CONSOLIDATED DIGEST OF CASE LAWS (JANUARY 2014 TO JULY 2014)

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Compiled by Research team of KSA Legal Chambers and AIFTP Journal Committee

S. 2(1A) : Agricultural Income – Assessee failed to explain source of agricultural income – Exemption denied.

Assessee was required to prove the agricultural income by documentary evidence and to produce the concerned owner of the land. Being not satisfied with the explanation provided by the assessee, Assessing Officer made addition by denying the exemption claimed by the assessee on agricultural income. CIT (Appeals) and Tribunal upheld the order passed by Assessing Officer. On appeal by the assessee to the High Court, held dismissing the appeal, that the Assessee failed to provide adequate material on the points raised by the Assessing Officer as well as the Commissioner (Appeals) and even before the Tribunal no material was placed except reiterating the facts pleaded before. When the assessee was not owner of the land and the agreements were full of discrepancies pointed out by the Assessing Officer, it was for the assessee to produce the owner to the satisfaction of the Assessing Officer for examining or by acceptable evidences or otherwise as also in meeting with the various defects/discrepancies pointed, which the assessee failed to do. (AY. 1994 - 95)

Bhairavnath Agrofin (P.) Ltd. .v. CIT (2014) 220 Taxman 1 (Mag.) / (2013) 259 CTR 51(2013) 354 ITR 276 (Raj) (HC)

S.2(1A):Agricultural income–Capital gains-Gains from sale of agricultural land is exempt even though purchaser intends to use the land for commercial purposes. [S.2(14),45]

The only reason the A.O. treated the land as non-agricultural land was that 'agreement of sale' read with 'Irrevocable GPA' does not indicate that land retained the character of agriculture at the time of transfer. This was also the ground raised by Revenue in the appeal that M/s. Ramky Estates and Farms P. Ltd., may put the property to commercial use, therefore, the land was meant for commercial exploitation and did not have the character of agricultural land at the time of his transfer. There is no dispute that assessee has purchased agricultural land and put to agricultural use as such earlier. The facts indicate that assessee has sold only agricultural land which was also used and put to agricultural use earlier and the purpose for which the purchaser utilized the land cannot be considered as an evidence of change of nature of land as was considered by Assessing Officer.The chargeability to tax under s. 45 arises only if on the date of sale, the land in question retained its character as a capital asset, which means, an asset, which does not answer the definition of a capital asset and which is an agricultural land would automatically be outside the scope of s. 45. It is no doubt true that the purpose for which the purchaser had purchased was totally different from what the transferor had intended to use the land in question but with the admitted finding that the lands in question were under agricultural operation on the date of sale for the purpose of considering the meaning of capital assets, it matters very little how the subsequent purchaser intended the land in question to be put to use. The Hon'ble Delhi High Court in the case of Hindustan Industrial Resources Ltd., vs. ACIT has taken a similar view. The CIT(A) in his order has followed the decision of Hon'ble Bombay High Court in the case of CIT vs. Debbi Almao and Joaqyam Almao reported in 339 ITR 59 (Bom.) (HC) which also considered similar facts and accepted the contention that no capital gains arises on the sale of agricultural land even though purchaser purchased the property with an intention of selling it for non-agricultural purposes. (ITA No. 729/Hyd/2013, 24.10.2014.) (AY.2008-09)

DCIT v. M. Kalyan Chakravarthy(Hyd.)(Trib.);www.itatonline.org

S.2(1A): Agricultural income-Agricultural land-Beyond municipal limit-Law laid down on when an isolated transaction can be regarded as an "adventure in the nature of trade" and the taxability of agricultural land situate beyond municipal limits. [S. 2(13),2(14)(iii)), 10(1),28(i), 45]

The assessee purchased the land with standing crops thereon and it was shown in the records as land cultivated throughout the period of holding by the assessee. No efforts have been taken by the assessee to change the nature of land. Income from standing crops was offered for rate purpose as agricultural income. The transaction of purchase and sale of agricultural land is not part of a regular business activity of the assessee. It was an isolated transaction of purchase of agricultural land and sale thereof within a period of 13 months. Though the land is situated in the National Capital Region and there was a plan to develop the area of Alwer district as a global city, the fact remains that the master plan was finalised in the year 2010 and as per the master plan the area will be developed by the year 2013. If the assessee's intention was to carry on an adventure in the nature of trade she has to wait at least till the master plan is finalised as otherwise she cannot expect substantial profit. On the contrary, the land was sold within a short span, seizing the opportunity of offer of better price which shows that the assessee intended to purchase the land as an investment only. Merely because a property was sold for a profit it cannot be assumed that it is an adventure in the nature of trade. Also, whether the land was sold out of free will or compulsion will not alter the character of the transaction. Every assessee would like to make profit on a transaction, given an opportunity. Taking a holistic view of the matter, the transaction was not an adventure in the nature of trade;

The land cannot be treated as capital asset since it is situated beyond eight kilometers from the municipal limits and it was purchased as agricultural land and sold accordingly without making any changes such as conversion in the land records, plotting of land, etc. The assessee earned agricultural income in the immediately preceding year on sale of standing crop and the same was offered as agricultural income and accepted by the AO for rate purposes. It is thus clear that it is a case of sale of agricultural land and the land being situated beyond eight kilometres from the municipal limit, it cannot be subjected to tax under the Income Tax Act either as business income or capital gains. The land situated outside the municipal limits stands excluded from the expression 'capital asset' from the inception and the sale proceeds have to be treated as revenue received from agricultural land. When two views are possible a view which is in favour of the assessee has to be taken. Consequently, the surplus arising on sale of the impugned agricultural land gives rise to agricultural income and not assessable to tax. (AY. 2007-08)

Supriya Kanwar (Smt.) .v. ITO(2014)104 DTR 166/163 TTJ 1/149 ITD 1(TM) (Jod.)(Trib.)

S.2(14): Capital asset-Agricultural land-Capital gains-land situated within limits of 8 Kms from any municipality would be a capital asset, sale of which would attract capital gain. [S.45]

The assessee owned a piece of land which was situated at Village Islampur, District Pathankot. The same was sold on 29.8.2005. She claimed that since the land is an agricultural land, therefore, it does not attract any capital gain. Before the Assessing Officer, a certificate issued by the Tehsildar, Pathankot was filed to the effect that the land is at a distance of 9 KMs from Pathankot and thus not a capital asset. The Assessing Officer took a note of the fact that Government of Punjab vide notification dated 31.11.2004 extended the Municipal Limits of Municipal Council, Sujanpur upto Malikpur and that the said Municipal Council has established Octroi post at Malikpur and the land sold was situated inside the Octroi post. Thus, it was said to be a capital asset. The CIT(A) and the Tribunal set aside the order passed by the Assessing Officer. On an appeal by the department, the High Court decided the issue in favour of the revenue by relying on the judgment of CIT v. Smt. Anjana Sehgal (ITA No. 276/2004) (P&H) and held that since the land is situated within the Municipal limits of Municipal Council, Sujanpur, it is a capital asset and hence subject to capital gains.

CIT .v. Neeru Aggarwal (Smt.) (2014) 220 Taxman 329 (P&H)(HC)

S.2(14): Capital asset-Agricultural land- Transfer of land on as it is and where it is basis to a developer- Neither assessable as capital gains nor business income. [S.10(1), 28(i), 45]

The assessee is engaged in agricultural operations on land classified as agricultural land in revenue records. The land was situated in rural area outside municipal limits. Assessee transferred the said land to developer on "as is and where is" basis to a developer. Tribunal held that profit earned on sale of land was agricultural income. Hence, it is exempt from tax. It is neither assessable as capital gains nor business income. (AY.2006-07)

Harniks Park (P.) Ltd .v. ITO (2014) 62 SOT 15(URO)/41 taxmann.com 109 (Hyd.)(Trib.)

S.2(14)(iii):Capital asset- Agricultural land-land was situated beyond 9kms from the municipal limit & the land is situated in the Revenue record of village Lasudia Parmar whose population was about 2,000 people -Capital gains on the sale of land were not chargeable to tax.[S.45]

Assessee declared income & claimed exemption from capital gains on sale of land by claiming the same to be agricultural land situated in the revenue record of village. The AO held that said agricultural land was situated within 8 kms from the limits of the municipal limits & refused to grant exemption being an agriculture land. CIT (A) allowed the appeal of the assessee by supporting the contention of the assessee that the land was situated more than 8 kms by road from the municipal limit by Straight Distance Method. Tribunal held against the assessee by holding that agricultural land was situated beyond 9 kms from the municipal limit of village & also relied on the judgment of the Gujrat High Court in the case of Balkrishna Harivllabhdas V. CIT (1982) 138 ITR 245 (Guj) & decision of Punjab & Haryana High Court in the case of CIT V. Satinder PalSingh (2010) 33 DTR (P& H) 281. On further appeal in HC , HC held in favour of assessee & said that certificate of Tehsildar & land Surveyor merely say that the impugned land was situated beyond 9kms from the municipal limit & the land is situated in the Revenue record of village Lasudia Parmar whose population was about 2,000 people . Therefore capital gains on the sale of land were not chargeable to tax. (AY.2008-09)

CIT .v. Ashok Shukla (2014) 99 DTR 250 (MP)(HC)

S.2(14)(iii)(b):Capital asset-Capital gains–Sale of agricultural land – Distance from municipal limits.[S.54B]

As the land in question was not situated within 8 kms from the municipal limit in terms of the approach by road, assessee was entitled to exemption u/s. 54B. (AY. 2007-08)

CIT .v. Shabir Hussain Pithawala (2014) 98 DTR 62(MP)(HC)

S.2(15): Charitable purpose - Construction of toilets-Carrying on an activity for consideration and not within ambit of definition of 'charitable purpose'-Rejection of registration u/s. 12A was justified. [S. 12A, 12AA]

Assessee-society constructed dry latrines in villages under contract awarded by DUDA, i.e., District Urban Development Authority. It applied for registration under section 12A which was rejected by Commissioner. Tribunal held that since the assessee had not constructed dry latrines (shushk shauchalya) as a part of a social service but it only executed contract awarded by DUDA, its case fell within ambit of carrying on an activity for consideration and not within ambit of definition of 'charitable purpose', therefore rejection of registration u/s. 12A was justified.

Bahara Shiksha Vikas Evam Sudhar Samiti .v. CIT(2014) 146 ITD 747 / (2013) 40 taxmann.com 2 /105 DTR 169/164 TTJ 586 (Delhi)(Trib.)

S.2(15): Charitable purpose-Proviso to S. 2(15) which denies exemption to a charitable institution carrying on commercial activities does not apply to institutions carrying out relief to the poor, education or medical relief but applies only to those carrying out "advancement of any other object of general public utility"-Eligible for exemption.[S.2(11)]

Though the assessee, carrying on activities in the field of education, was held eligible for exemption in earlier years, in AY 2009-10, the AO denied exemption on the ground that the case was hit by the Proviso to s. 2(15) inserted by the Finance Act, 2008 which provides that the 'advancement of any other object of general public utility' shall not be a charitable purpose if it involves the carrying on of (a) any activity in the nature of trade, commerce or business; or (b) any activity of rendering any service in relation to any trade, commerce or business for cess or fee or any other consideration, irrespective of the nature of use or application, or retention of the income from such activity. The

AO's stand was upheld by the CIT(A) though reversed by the Tribunal. On appeal by the department to the High Court HELD dismissing the appeal:

(i) On the issue as to whether the activities of the assessee are for "education" & "charitable" in nature, the sense in which the word 'education' has been used in s. 2(15) of the Act in the systematic instruction, schooling or training given to the young is preparation for the work of life. It also connotes the whole course of scholastic instruction which a person has received. Though the word "education" is not used in a loose sense so as to include acquisition of all sorts of knowledge, it should also not be interpreted in a narrow or pedantic sense. It encompass systematic dissemination of knowledge and training in specialized subjects. The changing times and the ever widening horizons of knowledge may bring in changes in the methodology of teaching and a shift of the better in the institutional setup. Advancement of knowledge brings within its fold suitable methods of its dissemination and though the primary method of sitting in a classroom may remain ideal for most of the initial education, it may become necessary to have a different outlook for further education. It is not necessary to nail down the concept of education to a particular formula or to flow it only through a defined channel. Its progress lies in the acceptance of new ideas and development of appropriate means to reach them to recipients. On facts, activities such as Continuing Education Diploma and Certificate Programme; Management Development Programme; Public Talks and Seminars and Workshops and Conferences etc constitute "education" so as to qualify as a "charitable purpose" u/s 2(15).

(ii) The mere existence of profit will not disqualify an institution for exemption u/s 10(22) if the sole purpose of its existence is not profit making but is educational activities;

(iii) On the issue of the Proviso to s. 2(15), the same has been explained in Circular No.11/2008 dated 19/12/2008. From the said Circular it appears that the newly inserted proviso to s. 2(15) of the Act will apply to entities whose purpose is advancement of any other object of general public utility i.e. fourth limb of definition of 'charitable purpose' contained in s. 2(15) and hence such entities will not be eligible for exemption u/s 11 or u/s 10(23C) of the Act if they carry on commercial activities. The Proviso will not apply in respect of the first three limbs of s. 2(15) i.e. relief to the poor; education or medical relief. Thus, where the purpose of a trust or institution is relief of the poor; education or medical relief, it will constitute 'charitable purpose' even if it incidentally involves the carrying on of the commercial activities.Eligible for exemption.(AY.2009-10)

DIT(E) .v. Ahmedabad Management association(2014) 366 ITR 85 (Guj.)(HC)

S. 2(15): Charitable purpose – Breeding of cattle – Incidental profit-Trust entitled to exemption. [S.11, 12]

The main objectives of the trust were to breed cattle and endeavour to improve the quality of the cows and oxen in view of the need for good oxen as India is prominently an agricultural country. All these were objects of general public utility and would squarely fall under section 2(15) of the Act. Profit making was neither the aim nor object of the trust. It was not the principal activity. Merely because while carrying out the activities for the purpose of achieving the object of the trust, certain incidental surpluses were generated, that would not render the activity in the nature of trade, commerce or business. The assessee was entitled to exemption under section 11.(AY.2009-10)

DIT (E) .v. Sabarmati Ashram Gaushala Trust (2014) 362 ITR 539 (Guj.)(HC)

S.2(22)(e):Deemed dividend-Loan to a share holder-Expenditure on repair and renovation by the company-No deemed dividend in shareholder's hands.

The assessee had let out the premises to the company. The company incurred expenses towards construction and improvement of the factory premises which it continued to use. The AO held that the amount was paid on behalf of the assessee and alternatively the amount spent was treated as perquisite.On appeal Tribunal held that the payment was not a deemed dividend and the amount was also not a perquisite. On appeal by revenue , dismissing the appeal held that no money had been paid to the assessee by way of advance or loan nor was any payment made for his individual benefit. It was a case where the asset of the assessee may have enhanced in value by virtue of repairs and renovation but this could not be brought within the definition of the advance or loan to the assesse,nor could it be treated as payment by the company on behalf of the assessee share holder or for the individual benefit of such shareholder. Appeal of revenue was dismissed.

CIT v. Vir Vikram Vaid (2014) 367 ITR 365 (Bom.)(HC)

S. 2(22)(e) : Deemed dividend-Does not apply to a non-shareholder.
The High Court rejected the contention of the revenue that the definition of deemed dividend u/s. 2(22)(e) does not contemplate or does not stipulate any requirement of assessee being a shareholder of the assessee like the one in the present case. The view taken in the present case that the recipient/assessee was not a shareholder, thus is in consonance with the legal position noted by us hereinabove. We are of the further view that this Court merely restated this principle and which remains unaltered throughout from the case of Rameshwarlal Sanwarmal v/s CIT(1980) 122 ITR 1 (SC). Followed CIT v.Universal Medicare Pvt Ltd (2010) 324 ITR 263 (Bom)(HC)
CIT .v. Impact Containers Pvt. Ltd(2014)367 ITR 346/48 taxmann.com/107 DTR 145/270 CTR 337/225 Taxman 322(Bom.) (HC)

S. 2(22)(e): Deemed dividend–Share application money cannot be treated as loan or deposit-Not assessable as deemed dividend.
When the Tribunal gave a finding that the amount received by the assessee-company was share application money, the sum could not be treated as loan or deposit. Furthermore, share application money was retained for some months and shares were allotted in following year. Therefore, sec. 2(22)(e) was not applicable. (AY. 2008-2009)
CIT .v. Alpex Exports P. Ltd. (2014) 361 ITR 297 (Delhi)(HC)

S.2(22)(e):Deemed dividend–Loan to shareholder–Not assessable in hands of person not a shareholder.
Since the assessee-company was neither a registered nor a beneficial holder of the shares in the company giving loan, the question of including the disputed amount as deemed dividend in terms of s. 2(22)(e) did not arise.
ACIT .v. Britto Amusement P. Ltd. (2014) 360 ITR 544/226 Taxman 45 (Mag.) (Bom.)(HC)

S.2(22)(e):Deemed dividend-Assessee was not beneficial owner-Deletion of addition was held to be justified.
During the search operation carried out by the department, it was noticed that the said company had given loans to various members including the assessee having shareholding & voting powers exceeding 10%. The assessee during the search operation, confronted with such shareholding pattern & the loans advanced. Assessee accepted certain sum u/s 2(22)(e) of the act . During the course of assessment proceedings, it was contended by family members that they had settled on aggregate of 5.12 lacs of equity shares of the said company held by them. It was the case of the assessee that he did not hold any beneficial voting power. AO rejected the contention of the assesse. CIT (A) dismissed the appeal. Tribunal allowed the appeal & held that trust deed was created nearly four years prior to the date of search & notarised. Tribunal also held that the companies' act would not permit transfer of shares in the name of trust & that there was no dividend declared by the company & that the trust did not receive any income so as either to open a bank account or to file a return. On appeal in HC, HC held that Tribunal having found as a fact that shares in question stood settled on genuinely created trust & assessee was no more beneficial owner of the shares, no interference was called for with the order of Tribunal holding that deemed dividend u/s 2(22)(e) was not chargeable in the hands of the assessee.(AY. 2006-07)
CIT .v. Krupeshbhai N. Patel (2014) 99 DTR 209 (Guj.)(HC)
Editorial: Krupeshbhai N. Patel .v.Dy.CIT(2013) 140 ITD 176(Ahd) (Trib) is affirmed.

S.2(22)(e): Deemed dividend–Accumulated profits-Depreciation to be considered as per Income–tax Act and not as Companies Act.
While assessing income, the assessing authority is required to take into consideration the depreciation as provided under the Income–tax Act and not as provided under the Companies Act.
CIT .v. Pushparthy Packs (P.) Ltd. (2014) 98 DTR 65 (Bom.)(HC)

S.2(22)(e): Deemed dividend–Not a share holder-Loans or advances from another company cannot be treated as deemed dividend merely on the ground that there was common shareholder in both the companies.

The assessee company had received loan from another company. The assessee was not a shareholder of the other company. However, there was a common shareholder (individual) who held more than 50% in both the companies. In view of the above facts the AO held that the amount received by the assessee from an another company was a deemed dividend u/s 2(22)(e) of the Act. The CIT(A) upheld the AO's order. On further appeal, the Tribunal deleted the addition made by AO following the decision of the jurisdictional High Court in CIT v. Ankitech (P.) Ltd. 340 ITR 14 (Delhi)where it has been held that deemed dividend provisions cannot be invoked merely because there are common shareholders between the two companies. The High Court followed the aforesaid judgment and dismissed revenue's appeal. (AY. 2006-07)

CIT .v. AR Magnetics (P.) Ltd. (2014) 220 Taxman 209 (Delhi)(HC)

S.2(22)(e): Deemed dividend–Not a share holder-Inter-corporate deposit-Where assessee had received a deposit from a company but did not own any share of that company it could not be treated as a deemed dividend.

The Assessee received a deposit of Rs. 25 lakhs from Amigo Brushes Pvt. Ltd. During the assessment, the Assessing Officer treated the deposits as a loan and consequently deemed to be a deemed dividend under Section 2(22)(e) of the Act from Amigo Brushes Pvt. Ltd. The assessee contended that it did not hold a share in other company from which it had received deposit and, accordingly, it could not be treated to be a deemed dividend under Section 2(22)(e) of the Act . The CIT(A) uphold the order of the AO. On appeal, the tribunal reversed the order of CIT(A). The High Court decided the issue in favour of the assessee, relying on the decision of the Division Bench of the High Court in *CIT* v. *Ankitech (P.) Ltd.* (2012) 340 ITR 14 (Del) wherein it was held that if the assessee-company does not hold a share in other company from which it had received deposit then it cannot be treated to be a deemed dividend under Section 2(22)(e) of the Act. (AY. 2000-01)

CIT .v. Daisy Packers (P.) Ltd. (2014) 220 Taxman 331 (Guj)(HC)

S.2(22)(e): Deemed dividend-Not a registered share holder-Where assessee-company received share application money from another company, the amount in question could not be taxed as deemed dividend in its hands as the assessee was not a registered shareholder of said company.

The assessee had derived income from trading in shares. During the course of assessment proceedings, it was revealed that the assessee had received a sum of Rs.23.00 lacs from M/s. Japanwala Jewellers (P.) Ltd., Jaipur as share application money. The assessing authority, after taking note of Section 2(22)(e) and available records, observed that the share application money received by the assessee company was in the nature of an unsecured loan and further treated it to be deemed dividend in the hands of the assessee company under the provisions of Section 2(22)(e). The High Court upholding the order of the CIT(A) and Tribunal hold that liability of tax as deemed dividend would be attracted in the hands of the individuals who were shareholders of the said company and not in the hands of the company.

CIT .v. Suram Holding (P.) Ltd. (2014) 220 Taxman 327 (Raj.)(HC)

S. 2(22)(e) : Deemed dividend- Not share holder-Provision is not applicable.

In the present case, the assessee company was engaged in the business of providing computer services. Its shares were held by a company 'V' and Three individuals by name 'K' 'R' and 'S' to the extent of 64% 32% 2% and 2% respectively. Further the entire shares of company 'V were held by 'R' & 'S'. During the previous year, the assessee had received a loan from company 'V'. The A.O. treated the amount of loan as deemed dividend under section 2(22) (e) of the Act. On appeal C.I.T. (A) held that to invoke the provisions of section 2(22) (e), the assessee must be shareholder in the company which gave loan. Since the assessee was not a shareholder the loan in question could not be treated as deemed dividend in the hands of the assesee under section 2(22) (e) of the Act. The Tribunal upheld the order of the C.I.T. (A) and dismissed the Departments appeal on the ground that since the intention of legislature behind the provisions of section 2(22)(e) is to tax dividend in hands

of shareholder and assesee company was not a shareholder in company 'V' deeming provisions of section 2(22) (e) of the Act were not applicable to the instant case. (AY. 2006 - 2007)
ACIT v. Source Hub India (P) Ltd. (2014) 61 SOT 111 (Bang.)(Trib.)

S.2(22)(e):Deemed dividend–Sister concern transactions of commercial nature-Provision of deemed dividend is not applicable.
The assessee was 100% EOU engaged in the business of conversion of rough granite blocks into polished granite slabs, granite tiles and monuments. During the assessment proceedings, the AO found that 2 individuals S and V held shares in the assessee with voting power of 75% and 25% respectively. S also held 66.8% of the voting rights of a sister concern which had accumulated profits and also had credit balance in the name of the assessee. Therefore, the AO held that there was a loan or advance within the meaning of section 2(22)(e) of the Act and treated the amount of accumulated profit as deemed dividend and disallowed the benefits of deduction u/s. 10B. The CIT(A) deleting the addition made by the AO held that the transactions of the assessee with its sister concern were commercial in nature and that the provisions of section 2(22)(e) of the Act were not applicable.

On appeal by the Department, the Tribunal observed that the assessee had filed additional details before the CIT(A) establishing that the transactions were regular business transactions. These evidences were also sent to the AO in the Remand Proceedings who had in his Remand Report conceded that the transactions were regular business transactions. Accordingly, the Tribunal dismissed the departmental appeal. (AY.2006-07)
Dy.CIT .v. Chariot International P. Ltd. (2014) 29 ITR 36 (Chennai)(Trib.)

S.2(24):Income-Transfer of development right (TDR)-Compensation paid to members-Amount cannot be taxed in the hands of society.[S.2(14), 2(47)]
Assessee was a hosing society consisting of 51 members. It had certain property. Developer has paid certain amount to the society for granting consent to consume TDR purchased by developer from 3rd party. Developer has also paid certain amount of compensation to individual members of society. AO held that compensation received by the society and members of the society also taxable in the hands of society. On appeal Tribunal held that amount of compensation paid by the developer to the members of the society cannot be taxed in the hands of society as individual members have offered the income to tax in their respective assessment. Society has received only Rs 2.51,000 for granting consent to consume TDR purchased by the developer from third party. The Society continued to be the owner of the land and no change in ownership of the land had taken place.Mere grant of consent would not amount to transfer of land or any rights therein. Tribunal deleted the addition. The revenue has filed an appeal to High Court which was dismissed by Bombay High Court (ITA NO 2292 of 2011 dt. 27-12-2013.Revenue has filed SLP before Supreme Court, which was also dismissed.(AY.1997-98)(S.L.P(C) No. 34415 of 2015 dt 28-10-2013)
CIT .v.RajRatan Palace Co-operative Housing Society Ltd (2014) 362 ITR 1(St.)(SC)
Editorial: Refer Raj Ratan Co-operative Housing Society Ltd. (2011)46 SOT 217 (URO)(Mum.)(Trib.)

S.2(24):Income-Capital or revenue-Carbon credit-Receipt on account of carbon credit is capital receipt hence not liable to tax. [S.4,28(iv),45]
The amount received for carbon credits has no element of profit or gain and it cannot be subjected to tax in any manner under any head of income. (AY. 2007-08 to 2009-10)
Shree Cement Ltd. v. ACIT(2014)100 DTR 33 (Jaipur)(Trib.)

S.2(24):Income-Capital or revenue-Carbon credit-Income on sale of Certified Emission Reduction/carbon credit -Chargeable to tax.[S.4, 28(i)]
The value of any benefit or perquisite arising from business or profession forms part of the profit and gains of the business. Therefore, the income on sale of the Certified Emission Reduption / carbon credit which is admittedly a benefit arising out of the business of the assessee, would fall within the

definition of "income" u/s. 2(24)(vd) of the Act. Therefore, income on sale of Certified emission reduction/carbon credit part of the chargeable as income. (AY. 2008-09)
Apollo Tyres Ltd. .v.ACIT (2014) 149 ITD 756 /31 ITR 477 /47 taxmann.com 416 (Cochin)(Trib.)

S.2(24):Income–Charitable trust–Donation towards building construction was held not taxable –Donations used for the benefit of trustees is held to be taxable -Matter was set aside. [S.2.(24)(iia),12]
Donations received by the assessee-society towards building construction cannot be brought to tax and the donations used for the benefit of trustees are taxable as income of the assessee. The matter was sent back to Assessing Officer to segregate the donations which have been diverted for personal benefit of the members of the society.
JB Educational Society .v. ACIT (2014) 159 TTJ 236 (Hyd.)(Trib.)
Joginapally B.R.Education Society .v. ACIT(2014)159 TTJ 236 (Hyd.)(Trib.)

S.2(29A): Long term capital asset-Capital gains- Period of holding- Letter of allotment- Period of holding of flat has to be reckoned from date of allotment letter for the purpose of computing capital gain. [S.45, 54F]
The Tribunal held that the assessee was allotted a flat in a building vide allotment letter dated 22-01-2005, by which the builders agreed to sell the flat to the assessee. After signing the said letter of allotment and paying the booking amount ,the assessee acquired the right in the flat. Thus, all the rights in the flat were duly acquired by the assessee on 22-1-2005, the period of holding is to be computed with respect to the date of allotment that is 22-01-2005. Thus when the assessee sold the flat on 5-03-2009, the holding period of the right in flat with the assessee was right in flat with the assesse was more than 36 months, therefore, the assessee was right in claiming exemption under section 54F of the Act.ITA no 448/Ind/2013 dt.19-12-2013) (AY. 2009-10)
ACIT .v. Sanjay Kumath (2014)63 SOT 90/ The Chamber's Journal –April P, 81 (Indore)(Trib.)

S.2(31)(1):Person-An individual-Association of persons-Land inherited by brothers by operation of law - Assessee to be assessed as individuals and not as an association of persons.[S. 28, 45(5)(b), Land Acquisition Act, 1894, S.28]
The assessee were brothers .Their father died leaving land to the assessee and two others who relinquished their rights in the assesee's favour. Bequeathed land was acquired by the State Government and compensation was paid to the assessee. AO brought to tax the compensation in the status of Association of persons and taxed the interest in the year of receipt.On appeal High Court held that assessee were to be assessed as individuals and not an association of persons and that the interest was to be spread over from the year of dispossession of land, that is, the assessment year 1987-88, till the year of actual payment, which was the assessment year 1999-2000. On appeal by the revenue the Court held that land inherited by the brothers by operation of law hence assessable as individuals and not association of persons.Interest is taxable in the year of receipt and not spread over.
CIT v. Govindbhai Mamaiya (2014) 367 ITR 498/271 CTR 31/109 DTR 65 (SC)
Editorial: Judgment of Gujarat High Court in ITA no 8103 of 2009 dt 16-11-2006 was partly affirmed and partly reversed.

S.2(31)(v):Association of persons-Linde and Samsung were independent of each other and were responsible for their own deliverables under the Contract, without reference to each other. Consequently, no AOP is formed-DTAA-India –Germany-Business connection-Matter remanded.[S.9(i),(i),9(1)(vii),90,197, Art 3, 4,5,7,12]
Before an association can be considered as a separate taxable entity (i.e an Association of Persons), the same must exhibit the following essential features: (i) must be constituted by two or more persons; (ii) the constituent members must have come together for a common purpose; (iii) the association must move by common action and there must be some scheme of common management; (iv) the cooperation and association amongst the constituent members must not be perfunctory and/or merely in form. The association amongst members must be real and substantial which is sufficient to treat the

association as a separate homogenous taxable entity. (b) On facts, as per the terms of the Contract, the scope of work to be executed by Linde and Samsung was separate and was accordingly specified in the annexures to the Contract. The payments to be made for separate items of work were also specified. The currency in which the payments were to be made was also separately indicated.

Linde and Samsung had joined together to (i) bid for the contract; (ii) present a façade of a consortium to OPAL for execution of the contract and accept joint and several liability towards OPAL for due performance of the contract and completion of the project; and (iii) put in place a management structure for inter se coordination and execution of the project. However, in all other respects, both Linde and Samsung were independent of each other and were responsible for their own deliverables under the Contract, without reference to each other. Consequently, no AOP is formed.

Linde AG.Linde Engineering Division.v. DDIT (2014) 268 CTR 274/103 DTR 137/365 ITR 1/224 Taxman 43 (Mag)(Delhi)(HC)

S.2(42A): Transfer-Letter of allotment-Period of holding-Booking rights-Capital asset of booking rights accrues to buyer only on signing of agreement and not on dare of allotment application. [S.2(14), 2(29A), 45]

The court held that for computing the period of holding of capital asset to be counted from the date of buyer's agreement and not from the date of booking or date of allotment application. On the facts the allotment or confirmation letter states clearly that no right to provisional or final allotment accrues untill the agreement is signed between the buyer and the builder. Thus , in such a case capital asset of booking rights accrues to buyer only on date of signing buyer's agreement and not on date of allotment application or confirmation letter.

Gulshan Malik .v. CIT (2014) 223 Taxman 243/102 DTR 354 **(Delhi)(HC)**

S.2(47): Transfer-Capital gains-Profit on sale of property used for residence-If an agreement to sell is entered into within the prescribed period, there is a transfer of some rights in favour of the vendee. Fact that sale deed could not be executed within the time limit owing to supervening problem is not a bar for s. 54 exemption. [S.45,54]

Consequences of execution of the agreement to sell are very clear and they are to the effect that the appellants could not have sold the property to someone else. In practical life, there are events when a person, even after executing an agreement to sell an immoveable property in favour of one person, tries to sell the property to another. In our opinion, such an act would not be in accordance with law because once an agreement to sell is executed in favour of one person, the said person gets a right to get the property transferred in his favour by filing a suit for specific performance and therefore, without hesitation we can say that some right, in respect of the said property, belonging to the appellants had been extinguished and some right had been created in favour of the vendee/transferee, when the agreement to sell had been executed. A right in respect of the capital asset, viz. the property in question had been transferred by the appellants in favour of the vendee/transferee on 27.12.2002. The sale deed could not be executed for the reason that the appellants had been prevented from dealing with the residential house by an order of a competent court, which they could not have violated. As held in Oxford University Press vs. CIT [(2001) 3 SCC 359] a purposive interpretation of the provisions of the Act should be given while considering a claim for exemption from tax and one can very well interpret the provisions of Section 54 read with Section 2(47) of the Act, i.e. definition of "transfer", which would enable the appellants to get the benefit under Section 54 of the Act.(AY. 2005-06)

SanjeevLal .v. CIT(2014) 105 DTR 305/365 ITR 389/269 CTR 1/225 Taxman 239(SC)

Shail Motilal (Smt).v. CIT(2014) 105 DTR 305/365 ITR 389(SC)

S.2(47): Transfer-Capital gains-Possession of property before date of sale deed - Transfer could not be treated as taking place before date of sale deed-Denial of exemption under section 54F was held to be justified. [S. 45, 54F]

The word "transfer" under s. 2(47) includes a situation where a transaction has been made allowing possession of any immovable property in part performance of the contract. But that should be made good on material placed on record and through cogent evidence. Held, the claim of the assessee that there was transfer of possession to her under the agreement dated September 15, 2004, had not been

made out on acceptable material facts before the three authorities. In view of the finding of fact, the order of the Tribunal could not be interfered with. Denial of exemption under section 54F was held to be justified.(AY.2008-09)

Latha Ramachandra Inamdar (Ms) .v. DCIT (2014) 360 ITR 367 /103 DTR 132(Karn.)(HC)

S.2(47)(v): Transfer-Capital gains-Transfer under a development agreement takes place on handing over possession-Capital gains are chargeable to tax even if no consideration is received by assessee. [S.45,Transfer of Property Act, 1882, S. 53A]

S. 53A of the Transfer of Property Act, 1882, which is engrafted in the definition of "transfer" in s. 2(47) of the Income-tax Act does not contemplate any payment of consideration. Payment of consideration on the date of agreement of sale is not required. It may be deferred for a future date. The element of factual possession and agreement are contemplated as transfer within the meaning of the aforesaid section. When the transfer is complete, automatically, consideration mentioned in the agreement for sale has to be taken into consideration for the purpose of assessment of income for the assessment year when the agreement was entered into and possession was given. Here, factually it was found that both the aforesaid aspects took place in the previous year relevant to the assessment year 2003-04. Hence, the Tribunal has rightly held that the appellant is liable to pay tax on the capital gain for the assessment year.(ITA No. 245 of 2014, dt. 09/04/2014.)(AY.2003-04)

Potla Nageswara Rao .v. DCIT(2014)365 ITR 249/269 CTR 325/106 DTR 96(AP)(HC)

S.2(47)(v):Transfer-Capital gains-Mere execution of a development agreement is not a "transfer" if possession as per s. 53A of the Transfer of Property Act is not given.[S.45, Transfer of Property Act , 53A]]

Though the development agreement was executed in AY 2003-04, the possession as contemplated in Section 53A of the Transfer of Property Act was in fact not handed over by the assessee to the developer. The agreement only permitted the development to be carried out by the said developer. The entire control over the property was in fact with the assessee inasmuch as the licence to construct the property was also in the name of the assessee and the occupancy certificate was also given to the assessee. Therefore, the execution of the agreement could not amount to transfer as contemplated under Section 53A of the Transfer of Property Act. The agreement was subsequently specifically modified and the assessee was liable to pay the capital gain as per the last agreement i.e. for assessment year 2008-09.(AY.2008-09)(Tax Appeal No. 11 & 12 of 2013, dt. 2/12/2013.)

CIT .v. Sadia Shaikh (Bom.)(HC),www.itatonline.org

S.2(47)(v): Transfer-Possession-Development agreement-Despite handing over possession & receiving advance, development agreement is not a "transfer" for capital gains purposes if developer has not performed his part of the contract-Capital gains are liable to be taxed only in the year in which the development area coming to the share of the assesse is handed over it.[S.45 Transfer of Property Act , 1882, S. 53A]

A transaction is deemed to be a "transfer" u/s 2(47)(v) of the Act if the conditions of s. 53A of the Transfer of Property Act are satisfied. For s. 53A, 'willingness to perform' of the transferee is something more than a statement of intent; it is the unqualified and unconditional willingness on the part of the vendee to perform its obligations. Unless the party has performed or is willing to perform its obligations under the contract, and in the same sequence in which these are to be performed, it cannot be said that the provisions of s. 53A of the TOP Act will come into play. On facts, a reading of the 'Development Agreement-cum-General Power of Attorney' indicates that what was handed over by the assessee to the developer is only 'permissive possession'. The agreement specifically provides that the assessee has permitted the developer to develop the land and that the consideration receivable by the assessee from the developer is '38% of the residential part of the developed area'. That being so, it is only upon receipt of such consideration in the form of developed area by the assessee in terms of the development agreement, the capital gains becomes assessable in the hands of the assessee. Further, the facts show that even as on date, there was no developmental activity on the land. The process of construction has not been even initiated and no approval for the construction of the building is obtained. This is due to lapse on the part of the transferee. While the assessee has fulfilled its part of the obligation under the development agreement, the developer has not done anything to

discharge the obligations cast on it under the develop agreement. Mere receipt of refundable deposit cannot be termed as receipt of consideration. Consequently, s. 53A does not apply. As a result, there is no "transfer" u/s 2(47)(v) of the Act.(ITA No. 157/Hyd/2011, dt. 04/04/2014.) (AY. 2006-2007)

Binjusaria Properties Pvt. Ltd. .v. ACIT(2014) 106 DTR 321/164 TTJ 417/149 ITD 169(Hyd.)(Trib.)

S. 4: Charge of income-tax–Lease rentals–Lease or finance-Agreement of lease-Entire lease rent assessable-Lessor was entitle to depreciation. [S.32]

The assessee was engaged in the business of bill discounting, hire purchase and leasing, mutual funds and insurance agency. In the returns, it offered the interest portion in the leasing transaction alone as its income. It stated that according to the amended Accounting Standards 19 dated April 1, 2001, only the income portion of the lease rental shall be offered as income and the lessor cannot claim depreciation. Accordingly, the assessee treated the lease transaction as a financial lease transaction. The Assessing Officer held that the entire lease rent was taxable as income of the lessor and the lessor was entitled to depreciation on the equipment.The Tribunal found on reading a sample lease agreement that in respect of lease of a car, the term of the lease was stated to be three years, with monthly rentals and total rentals payable. During the currency of the lease, the lessee shall insure the subject of lease and protect if from any risk. Clause 10 of the agreement stated that without the prior written consent of the lessor, the lessee shall not make any alterations, additions, or improvements to the equipment and all additions, replacements, attachments and improvements of whatever kind or nature made to the equipment shall be deemed to be parts of the property of the lessor and shall be subject to all the terms and conditions of the agreement. Clause 13 spoke about the surrender of the lease equipment upon the expiration or earlier termination of the lease agreement. It also gave the option for renewal on year to year basis on mutually agreed terms and conditions. Clause 15 dealt with payment by the lessor and clause 20 stipulated that on expiration of the lease term, if the lessee failed to deliver the equipment to the lessor in accordance with any direction given by the lessor, the lessee would be deemed to be the monthly tenant of the equipment and upon the same terms expressed in the agreement and the tenancy should be terminated by the lessor immediately upon default committed by the lessee by serving seven days' notice. Upon termination of the lease period the lessee had to immediately return the property to the lessor in as good condition as received less normal wear, tear and depreciation. The Tribunal confirmed the order of the Assessing Officer. On appeal to the High Court:

Held, dismissing the appeals that on examination of the terms of the agreement showed that it was a simple lease agreement. If in effect the agreement was a finance agreement, the question of returning the leased item to the assessee would not arise at all. Further, the question of again affixing the name of the assessee on the property also would not arise. The monthly payment of the rent and the number of months of the lease rent payment was also clearly stated in the agreement. The entire lease rent was assessable (A. Y. 2002-2003 - 2008-2009)

Simpson and General Finance Co. Ltd v. Dy. CIT (2014) 365 ITR 328 (Mad.)(HC)

S. 4:Charge of income-tax-Capital or revenue-Business income–Sale of carbon credits-No cost of acquisition-Capital receipt.[S.28(i)]

Carbon credits not being an offshoot of business but an offshoot of environmental concern, amount received on their transfer had no element of profit or gain. Since carbon credit was not even linked with power generation, which was the business of the assessee, Tribunal was justified in its decision. There was no cost of acquisition or cost of production to get entitlement for carbon credit. Income from sale of carbon credits was to be considered as capital receipts and not liable to tax under any head under the Income–tax Act. (AY. 2007-08)

CIT .v. My Home Power Ltd. (2014) 365 ITR 82 (AP.)(HC)

S. 4 :Charge of income-tax-Capital or revenue-Profit on repatriation of foreign exchange on account of variation in forex rate-Capital receipt.

The assesse had issued Euro Notes in 1997 for raising funds for capital expenditure programmes. The entire proceeds raised abroad were held in interest for a period of three years pending deployment and utilization. During the year ending 31 st March 2011, the funds were repatriated to India as per the requirement of Reserve Bank of India. As a result of fall in value of the Indian Rupee , a gain in

terms of the repatriation of funds has arisen. Assessee credited the said in to P&L account however for taxation the said gain was treated as capital in nature. The AO treated the said gain as revenue in nature. On appeal Tribunal decided the issue in favour of assesse. On appeal by revenue the Court held that the purpose for which the notes were raised was " capital" .The gain arose not in the course of trading activities but due to conversion of the currency of one country in to the currency of another country. The gain is therefore on account of capital and not in the nature of income. Further the gain has arisen at that point of time when the funds were repatriated to India. If the Notes were issued for meeting capital expenditure , and remained outside India, the taxability has to be determined at the point of time when the profit arose . The subsequent utlilisation was irrelevant.(ITA no 251 of 2012 dt 11-06-2014 (AY.2001-02)

CIT v. Tata Power Co. (Bom.)(HC)(Unreported)

S. 4 : Charge of income-tax–Capital or revenue-Grant of subsidy for facilitating business operations is a revenue receipt. [S. 28(i)]

Where power tariff concession was not contingent upon establishment of the unit but for the purpose of assisting the assessee in carrying out business operations same had to be treated as revenue receipt.(AY.1998-99)

Brakes India Ltd. .v.JCIT (2014) 363 ITR 13 / 222 Taxman 359 (Mad.)(HC)

S. 4 : Charge of income-tax–Tax Planning–Sale of shares to one of the group companies-Set off of loss against long term gains was allowed.

The assessee had purchased shares of Hindustan Development Corporation Ltd. from two sellers, one of them was a scam tainted company. The assessee sold the shares at a loss of Rs. 4,50,04,414 to one of its group companies. The aforesaid loss was sought to be set off against the long term capital gains. The AO disallowed the claim of setting off. On appeal, the CIT(A) held that the purchase of the shares was genuine, but the sale was a colourable transaction considering the fact that the assessee purchased the same scrip after sometime and the sale to the group company was financed by the assessee himself. He therefore upheld the order of the AO. On second appeal, the Tribunal had given the findings of fact that the transaction of purchase and sale was supported by contract notes and bills. Both the sale and purchase took place at the prevalent market rate and payments were made by account payee cheques. These transactions were duly confirmed not only by the brokers, but also by the Inspector appointed by the AO. Furthermore, the alleged financing by the seller for purchase of the shares was an insignificant part of the total purchase price. The total purchase price was Rs. 18.99 crore, whereas the financing was restricted to Rs. 2.60 crore on interest on commercial rates. The Tribunal held that both the sale and purchase of shares were genuine transactions. The High Court held that basis of suspicion, howsoever strong, it is not possible to record any finding of fact. As a matter of fact, suspicion can never take the place of proof. The finding arrived at by the Tribunal that both the sale and purchase were genuine transactions was not even alleged by the revenue to have not been based on evidence. Since the finding of the Tribunal was factually correct, the Tribunal had no option but to direct the AO to give the benefit of the losses suffered by the assessee, which he had disallowed. The appeal did not raise any question of law and was therefore not to be admitted. (AY. 1995-96)

CIT . .v. Lakshmangarh Estate & Trading Co. Ltd. (2014) 220 Taxman 122 (Mag.)(Cal.)(HC)

S. 4 :Charge of income-tax-Security deposit received by assessee for supply of cylinder–Not a trading receipt.

Assessee was a manufacturer and supplier of gas to customers in cylinders. It received security deposit from customers for supply of cylinders. Assessing Officer took a view that security deposit received by assessee from customers was part of trading receipt. Tribunal finding that money received as security was never part of sale price and that security money was refundable to customers, concluded that said amount could not be brought to tax as trading receipt. The High Court held that the security for gas cylinders received by the assessee could not be treated as trading receipt and consequently, the substantial question of law was answered against the Revenue and in favour of the assessee. (AY. 2006-07)

CIT .v. Munjal Gases. (2014) 220 Taxman 124(Mag.) (P&H)(HC.)

S. 4 : Charge of income-tax -Accrual–Charge of notional interest for free period was held to be not justified.

Assessee entered into MOU with its collecting agent not to charge interest on unremitted collections for a period of two months. It was held that AO was not justified in making addition towards notional interest relatable to such interest free period.

CIT .v. Sahara India Mutual Benefit Co. Ltd (2014) 101 DTR 265 / 220 Taxman 16 (All.)(HC)

S. 4 : Charge of income-tax-Deposit-Where assessee was merely a custodian of deposit and income arose from deposits in form of dividend, interest etc., the Tribunal was justified in holding that deposits themselves could not amount to income chargeable to tax.

The assessee-firm ran some financial schemes in which deposits were collected from the public. During assessment proceedings, the AO held that deposits received represented revenue receipts liable to tax. On appeal before Tribunal, it held that deposits in question amounted to capital receipt which could not be brought to tax. On appeal by the Revenue before High Court, the latter held that since the assessee was merely a custodian of deposit and income arose from deposits in form of dividend, interest etc., the Tribunal was justified in holding that deposits themselves could not amount to income chargeable to tax.(AY. 1983-84)

CIT .v. Sahara India Firms, Lucknow (2014) 221 Taxman 68 (All.)(HC)

S. 4:Charge of income-tax-Accrual-Excise credit- Credit of pro forma excise rebate-Though credited by assesse to P& Loss account but not received by assesse , is illusory receipt and not real income, hence not chargeable to tax.[S.5]

Credit of pro forma excise rebate taken into account was illusory and no real income had accrued. The assessee had communicated its reasons why it resorted to such an illusory entry which included that the company had sustained losses and in order to impress the bankers and to please the shareholders the entry was passed into the profit and loss account. The Tribunal on the facts was satisfied with the explanation. This was a finding of fact which had not been challenged by the Revenue as perverse nor was the finding of the Tribunal demonstrated to be erroneous either in fact or in law. When the Tribunal was satisfied that the entry did not represent any real income or any real receipt of money, there was no question of its being taxable.

CIT .v. Kusum Products Ltd. (2014) 361 ITR 632/106 DTR 372 (Cal.)(HC)

S.4:Charge of income-tax-Capital or revenue-Special capital incentive-Object of assistance under subsidy schem to enable assesse to set up unit-Capital receipt.

Character of a receipt in the hands of assesse has to be determined with respect to the purpose for which the subsidy is given.The purpose trst to be applied.The point of time subsidy is given is not relevant .The source is immaterial.The form of subsidy is immaterial .The main condition and with which the court should be concerned is the incentive must be utilised by the assesse to set up a new unit or for substntail expansion of the existing unit.If the object of the subsidy scheme is to enable the assesse to run the business more profitably the receipt is on revenue account.ON the other hand ,if the object of the assistance under the subsidy schem is to enable the assesse to set up a new unit the receipt of subsidy would be on capital account.On facts the subsidy given by the State of Maharastra through SICOM to set of new unit is capital receipt.Order of Tribunal is up held.(1997-98)

CIT .v. Kirloskar Oil Engines Ltd(2014) 364 ITR 88.(Bom.)(HC)

S.4:Charge of income-tax-Capital or revenue-Subsidy–Protection of capital investment of parent company.

Subsidy received by subsidiary of Government company from its holding company to protect capital investment of parent company is capital receipt. (AY.1985-86)

CIT .v. Handicrafts and Handlooms Export Corporation of India ltd. (2014) 360 ITR 130 /268 CTR 341/ 102 DTR 211**(Delhi)(HC)**

S.4 : Charge of income-tax-Capital or revenue-Non-compete fees–Capital receipt. [S.28va,45]

Non-compete fees received prior to insertion of s. 28(va) is capital receipt.(AY. 2001-02)

CIT .v. Wintac Ltd. (2014) 360 ITR 614 (Karn.)(HC)

S.4:Charge of income-tax-Capital or revenue-Forfeiture–Termination of agreement-Revenue receipt.

Assessee had entered in to agreement for sale of property to lessee. Sale agreement provided for forfeiture of thirty lakh rupees. Amount forfeited upon termination of agreement for sale of property to lessee is revenue receipt.(AY. 2001-02)

CIT .v. Wintac Ltd. (2014) 360 ITR 614 (Karn.)(HC)

S.4:Charge of income-tax-Capital or revenue-Setting up new unit or expanding existing unit-Sugar incentive scheme-Capital receipt.

Amount received under sugar incentive scheme for setting up new unit or expanding existing unit was capital receipt.(AY. 1998-99)

CIT .v. Dhampur Sugar Mills Ltd (2014) 360 ITR 82 (All)(HC)

S.4:Charge of income-tax-Capital or revenue-Subvention assistance from holding company-Capital receipt.[S.2(24)]

Subvention assistance from holding company to recoup anticipated losses of the assessee constituted capital receipt not chargeable to tax.

CIT .v. Deutsche Post Bank Home Finance Ltd. (2014) 98 DTR 144/265 CTR 525**(Delhi)(HC)**

S.4:Charge of income-tax-Capital or revenue- Subvention payment received from parent company-Revenue receipt chargeable to tax.[S.2(24)]

Subvention payment received by the assessee from parent company to make good the loss and to see that company is run more profitably constituted revenue receipt. (AY. 1999-2000 to 2001-02)

CIT .v. Siemens Public Communication Networks Ltd (2014) 98 DTR 151(Karn.)(HC)

S.4:Charge of income-tax -Public financial institutions-Interest on NPAs is not taxable-As there is a conflict on the point between two decisions, the view in favour of the assessee has to be followed. [S.43D]

Based on the prudential norms, the assessee herein did not admit the interest relatable to NPA advances in its total income. The Delhi High Court in Vasisth Chay Vyapar Ltd 330 ITR 440 (Del) has held that the interest on NPA assets cannot be said to have accrued to the assessee on the basis that "*What to talk of interest, even the principle amount itself had become doubtful to recover. In this scenario it was legitimate move to infer that interest income thereupon has not "accrued"*". However, the Madras High Court in the case of CIT vs. Sakthi Finance Ltd.**,** (2013) 31 taxmann.com 305 (Madras) has differed with the judgement of the Hon'ble Delhi High Court in the case of M/s Vasisth Chay Vyapar Ltd. (supra) on a similar issue, i.e. relating to interest income on NPAs. The Madras High Court followed the decision of the Supreme Court in the case of Southern Technologies Ltd**.** (supra) in holding that interest on NPAs was assessable to tax on accrual basis.

We have carefully considered the submissions put-forth by the learned Departmental Representative based on the judgement of the Madras High Court in the case of Sakthi Finance Ltd. (supra). The controversy before the Hon'ble Madras High Court related to non-recognition of interest income on NPAs by the assessee following the RBI guidelines. The Madras High Court took the view that the judgement of the Hon'ble Supreme Court in the case of Southern Technologies Ltd**.** also applied to the Income Recognition Norms provided by RBI and therefore it held the interest income on NPAs is liable to be taxed on accrual basis and not in terms of RBI's guidelines. But the Delhi High Court in M/s Vasisth Chay Vyapar Ltd. has taken a view that Southern Technologies Ltd. (supra) case did not apply to the Income Recognition Norms prescribed by RBI. Ostensibly, there is divergence of opinion between the Hon'ble Delhi High Court and the Madras High Court as noted by the Madras High Court in its order. As there is no judgment of the Jurisdictional High Court. We are faced with two contrary judgments of the non-jurisdictional High Court. In such a situation, we are inclined to prefer a view which is favourable of the assessee following the judgement of the Supreme Court in the

case of CIT vs. Vegetable Products Ltd. (1973) 88 ITR 192 (SC). (ACIT vs. The Omerga Janta Sahakari Bank Ltd**.** order in ITA No.350/PN/2013 dated 31.10.2013 followed)
ACIT .v. Solapur Siddheshwar Sahakari Bank Ltd. (Pune)(Trib.);www.itatonline.org

S.4:Charge of income-tax –Grant-Capital or revenue-Grant given to safeguard the interests of depositors, though used for meeting SLR requirements of RBI relatable to its banking activity, is still capital in nature. [Banking Regulation Act, S.35A]
The objective of the Government of Maharashtra to give grant to the assessee was to protect the interests of farmers and depositors from the Nanded district and for the said purpose the Government deemed it fit to provide financial assistance to the assessee-bank to enable it to regularize its functioning. Pertinently, the functioning of the bank was restrained by the RBI in the face of the restrictions imposed u/s 35A of the Banking Regulation Act, 1949. The objective and purpose of the Government was sought to be achieved by providing Rs.110 crores as a grant. The case made out by the Revenue is that the financial assistance given to the assessee-bank is for smooth running of its business and therefore it is to be regarded as a trading receipt. No doubt, the aforesaid sum has been used by the assessee for the purpose of maintain the Statutory Liquidity Ratio (SLR) as per the requirements of RBI, which enabled the assessee-bank to regularize its banking operations. So, however, the form or mechanism of subsidy is not important, as held by the Hon'ble Supreme Court in the case of Ponni Sugars and Chemicals Ltd. (supra). The nature of subsidy has to be determined by the object for which the subsidy is given. The underlying object of the Government was to safeguard the interest of farmers and small depositors, and this object was sought to be achieved by the mechanism of providing financial grant to the assessee-bank and regularizing its normal banking activity. In this manner, it has to be deduced that the subsidy/grant in question has not been received by the assessee-bank in the course of a trade but it is of capital nature. (ITA No. 33/PN/2014,dt. 14.10.2014) (AY.2010-2011)
The Nanded District Central Co-op Bank Ltd. v. DCIT (Pune)(Trib.);www.itatonline.org

S.4:Charge of income-tax-Lease rent- Principal component received cannot be treated as income.
The Tribunal held that the capital component included in the lease rent being return of capital investment cannot be treated as income. (AY. 1996-97)
Hathway Industries (P) Ltd. v. Addl. CIT (2014) 163 TTJ 141 (Mum.)(Trib.)

S.4:Charge of income-tax-Interest on NPAs, even if credited to the Profit & loss account, is not chargeable to tax.[S.145,Maharashtra Co-operative Societies Act, 1960]
While constructing its Profit & Loss Account to arrive at its net Profit or Loss, a Co-operative Society is required to show interest accrued/accruing on amounts of Overdue Loans separately. This is precisely what has been done by the assessee in the present case. The aforesaid requirement of the manner of construction of Profit & Loss Account, prescribed under the Rules of the Maharashtra Co-operative Societies Act, 1960, has prompted the assessee to draw up its Profit & Loss Account in the manner we have noted above qua the interest on NPAs. Therefore, it cannot be accepted that the manner or presentation of account which ostensibly is in compliance with the statutory provisions governing the assessee, can be a factor to evaluate assess ability or otherwise of an income. In our considered opinion, it would inappropriate to be merely guided by a presentation in the annual financial statements to infer assessee's perception that an income had accrued, without considering the entries made in the financial statements in toto. In the present case, it is quite clear that assessee has drawn up its annual financial statement in compliance with the requirements of the statutes under which it functions and/or is incorporated. Therefore, the issue with regard to non-recognition of income on NPAs is required to be adjudicated having regard to the relevant legal position and not on the basis of the presentation in the annual financial statements. At this stage, we may also refer to the judgement of the Hon'ble Supreme Court in the case of CIT vs. Shoorji Vallabhdas & Co**.,** (1962) 46 ITR 144 (SC) for the proposition that a mere book keeping entry cannot be assessed as income unless it can be shown that income has actually resulted. In the present case, the crediting of gross interest in the Profit & Loss Account, which includes interest on NPAs cannot be taken as a proof that such income has accrued to the assessee unless the statutory guidelines applicable on the said subject are

ignored. Obviously, when the banking institutions following mercantile system accounting are permitted to treat the income on NPAs as assessable on receipt basis, such a position cannot be ignored in the case of present assessee merely because of a presentation in the annual financial statements. Even otherwise, we notice that the RBI guidelines permit that interest income on NPAs be parked in a suspense account and it is not necessary that it has to be brought to the Profit & Loss Account by the assessee. However, in the present case, as seen earlier, assessee has credited the gross amount of interest on credit side of the Profit & Loss Account and simultaneously shown on the debit side of the Profit & Loss Account, the amount of interest on NPAs. In other words, instead of netting of the interest the two amounts have been shown separately one on the credit side and other on the debit side. The net effect of the said presentation is the same. Therefore, in our view, the lower authorities have misguided themselves in rejecting the claim of the assessee for non-recognition of interest income on NPAs. (ITA No. 495/PN/2012, Dt. 29.09.2014.)(AY.2008-09)

The Solapur District Central Co-op, Bank Ltd. v. ACIT (Pune)(Trib.);www.itatonline.org

S.4:Charge of income-tax-Capital or revenue- Forfeiture of warrants is capital receipt [S. 28(iv)]

While confirming the order of CIT(A) , the Tribunal held that amount received on account of forfeiture of amount due to non-payment towards warrants issue has to be treated as capital receipt and since the assessee has also transferred it to the capital reserve account in the balance sheet the amount cannot be taxed as income of relevant financial year. (AY.2006-07)

Dy. CIT .v. CNB Finwiz Ltd. (2014) 159 TTJ 146 / 65 SOT 134(Delhi)(Trib.)

S.4:Charge of income-tax-Capital or revenue-Termination of Agreement-Compensation so received was capital receipt and hence, not taxable. [S.28(i)]

Compensation was received by assessee for termination of agreement for providing back office support services to bank.Assessee had parted with personnel who were handling this activity of assessee company to give them on role of bank and bank handled such activity itself. Compensation so received was capital receipt and hence not taxable.(AYs. 2003-04 to 2006-07)

3i Infotech Ltd .v. Add. CIT (2014) 146 ITD 405 / (2013) 38 Taxmann.com 422/(2014) 162 TTJ 184/102 DTR 151 (Mum.)(Trib.)

S.5:Scope of total income-Accrual-Advance business receipts-No income could be said to have accrued to assessee on receipt of advance.[S.263]

Assessee which is engaged in the business of hotels, resorts, and clubs offered holiday schemes for its card members to utilize 'rooms nights' by payment of some advance . In case of non utilisation of said facility, assesse would refund back said some to card members along with surrender value. Assessee was required to refund advances more than 99 percent in cash. Assessee has the said advances as liability in the balance sheet. AO accepted the method of accounting followed by assessee. CIT revised the order and directed the AO to pass fresh order assessing the advance as income. Tribunal allowed the appeal of assessee. On appeal by revenue the dismissing the appeal the Court held that since the assessee was required to refund advance is more than 99 percent in cash, assessee incurred liability and no income could be said to have accrued to assessee on receipt of advance.(AY.2005-06)

CIT .v. Pancard Clubs Ltd. (2014) 206 Taxman 141 (Bom.)(HC)

S. 5 :Scope of total income– Accrual-Retention money under contract released on furnishing of bank guarantee – Retains it character as retention money and cannot be equated with the right to receive such amount the dominant control over the amount remained with the contractee'-Amount retained did not accrue to assesse. [S. 4,145]

Money retained under the contract for satisfactory completion of the work which was released only upon the satisfactory completion of the contract and would be adjusted against the amount due if it was found that execution of work was not satisfactory, did not accrued to the assessee, even though the amount was received by assessee by furnishing bank guarantee. (AY. 1992 – 93)

Amarshiv Construction (P) Ltd. v. Dy. CIT (2014) 367 ITR 659/ 102 DTR 33 / 223 Taxman 171 (Mag.)(Guj.)(HC)

S.5:Scope of total income-Accrual-Builder and developer –Advances received from different parties–Advance receipt could not be taken as trading receipt of the year under consideration.
The assessee company was a builder and developer and received certain amount as advance from different parties. The AO added the said amount in the total income. The Tribunal deleted the addition on the ground that assessee being the developer, the profit will arise on the transfer of the title of property and any advances received cannot be treated as trading receipt of the year under consideration and the same was accepted in the earlier years by the revenue. On appeal the High Court affirmed the view of the Tribunal
CIT .v. Shivalik Buildwell (P.) Ltd. (2014) 220 Taxman 3 (Mag.) (Guj.)(HC)

S.5:Scope of total income–Accrual –Method of accounting-Mercantile system of accounting-Profit and loss account credited with a sum representing estimated amount of difference on outstanding bills. [S.145]
The assessee, an exporter, credited to its profit and loss account a sum of Rs. 5,37,909 representing the estimated difference on account of fluctuation in foreign exchange rates. According to the assessee, the amount did not represent any income received or accrued as on the date of the balance-sheet and, therefore, should be excluded in the determination of income.
Held, the assessee had credited its own accounts with Rs. 5,37,909 being the difference arising on account of foreign exchange rate fluctuation. The assessee may have received the amount much later. But the time of receipt was relevant only when the accounts were being maintained on the basis of the receipt system. The fact that foreign exchange was received much later was completely irrelevant having regard to the system of accounting followed. In fact the finding was that the payments were received much later and this was not a case where the payments were not received. There may be difficulties in actual realisation of amounts. But that could not detract from the accrual of income.
CIT .v. Mahavir Plantations Pvt. Ltd. (2014) 360 ITR 22 (Ker.)(HC)

S.5: Scope of total income-Real income-Notional interest-Parties were agreed on not to charge interest as per the conditions laid down in MOU, than the AO cannot compel them to do so.
In terms of MOU, the assessee had not charged interest from its collection agent Sahara India, except when the delay in transmission of funds exceeded two months. The Assessing Officer treated the amount outstanding for less than two months as a loan to Sahara India in the form of working capital on which no interest was charged. Accordingly, the Assessing Officer had disallowed interest on the borrowings to the extent of interest not charged on the interest-free loan given to Sahara India. On appeal, the CIT(A) as well as the Tribunal deleted the addition made by the Assessing Officer. On appeal by the Revenue, the High Court held that the parties were agreed on not to charge interest as per the conditions laid down in MOU, than the AO cannot compel them to do so. It is only the assessee who knows the commercial and business relations and situation thereof and the department is not supposed to interfere. (AY. 1992-93 to 1994-95)
CIT .v. Sahara India Mutual Benefit Co. Ltd. (2014) 220 Taxman 16 (All.)(HC)

S. 5 : Scope of total income – Accrual-Real income-Development agreement - Consideration was not determinable with reasonable certainty, postponing recognition of income was held to be justified.[S.145]
AO treated development agreement as a transaction giving rise to accrued income of sale of future property. Tribunal held that neither possession of property had been given to ultimate buyer, nor assessee had received any substantial consideration. Agreement entered into by assessee herein was only for sale of piece of property and sale would take place only after completion of construction and after assessee's share of property was identified. when consideration was not determinable with reasonable certainty, assessee was justified in postponing recognition of income and it was appropriate to recognize income only when it was reasonably certain that ultimate realization was possible. (AY. 2008-09)
Dy.CIT .v. S.P. Real Estate Developers (P.) Ltd. (2014) 149 ITD 617 / 47 taxmann.com 281 (Hyd.)(Trib.)

S.5: Scope of total income-Accrual–Fees received from students for entire course in one year should be apportioned proportionately for each year-Matter remitted to AO for proper quantification .

The Tribunal sent the matter back to Assessing Officer for proper quantification of the income on accrual basis as the fees received for full course from a student in one assessment year should be appropriated proportionately for each year under consideration during the course period.

JB Educational Society .v. ACIT (2014) 159 TTJ 236 (Hyd.)(Trib.)

Joginapally B.R.Education Society.v. ACIT(2014) 159 TTJ 236 (Hyd.)(Trib.)

S.5:Scope of total income-Accrual–Interest receivable on advances-Waiver of interest-No evidence was produced-Income accrued.

Assessee brought nothing on record to show that interest chargeable by it on advance to C as per the agreement was actually waived in the year under consideration. Such interest income had accrued to assessee and was liable to tax. (AYs. 2002-03 to 2004-05)

ITO .v. Ricoh India Ltd (2014) 98 DTR 435(Mum.)(Trib.)

S.5:Scope of total income-Accrual– Service charges received in advanve from customers-Not taxable in the year of receipt.

Assessee is in the business of transmitting the bulk MS data.Assessee received advances from its customers and whenever services are provided by the assesse it adjusts the advances received from the customers and recognizes the income in the year in which the services are rendered.AO taxed the entire advances.Court held that assesse having maintined its books of account on accrual basis , service chrges received in advance for the services to be rendered in future years are not liable to be taxed in the year of receipt.Appeal of revenue was dismissed .(AY. 2009-10**)**

DCIT .v. Velti India (P.) Ltd. (2014) 43 taxmann.com 425/105 DTR 213/163 TTJ 691 (Chennai)(Trib.)

S. 6(1) : Residence in India – Individual – Stay less than 182 years in India-Employed prior to leaving India should not effect his residential status- Salary income of assessee accrued or arose during employment in China was not taxable in India. [5]

Assessee contended that he was working in Whirlpool, China and salaryaccrued and arose in China only and that he was non-resident during the relevant financial year.Therefore, he was not liable to be taxed in India. Tribunal held that the assessee was not resident during the relevant period as he has left India for the purpose of employment outside India. His stay during the relevant financial year was less than 182 days in India. Therefore, his status was non-resident during the relevant financial year. He was already employed in Whirlpool India prior to the leaving India for working with Whirlpool China shall not effect the residential status of the assessee. Held, all this fact clearly shows that salary income of the assessee accrued and arose during the employment in China is not taxable in India. Where status of assessee was a non-resident, fact that assessee was already employed before leaving India should not effect his residential status.(AY.2006-07)

ACIT .v. Raj Jain(2014) 146 ITD 651 / (2013) 38 taxmann.com 133 (Delhi)(Trib.)

S.6(1): Residence in India–Non-resident-Individual–Period of stay-Resident and receipts taxable.

Assessee, an Indian citizen, employed outside India returned to India in financial year 2010-11 after resigning employment. His total stay in India in preceding four years was more than 365 days and total stay in India for financial year 2010-11 was 119 days. Held, he is resident in FY 2010-11 and receipts taxable. (AY. 2011-12)

SmitaAnand (Mrs.) In re (2014) 362 ITR 38 /97 DTR 389 (AAR)

S.9(1)(i): Income deemed to accrue or arise in India-Business connection – Procurement fees-Deduction at source-Substantial question of law-Matter remanded back to High Court to decide the issue by taking in to consideration of section 26A. [S.9(1)(vii), 40(a)(ia), 260A]

The court observed that the High Court merely quoted the decision of the Tribunal in extensor in its judgment without deciding the substantial questions of law raised by the Revenue as to whether the Tribunal erred in holding that the procurement fees received by the assesse is taxable under section

9(1)(i) or 9(1)(vii) and deleting the disallowances under section 40(a) (i) . Apex Court set aside the matter to High Court and decide the questions of law keeping in to consideration of the provisions of section 260A.

DIT(IT) .v. Black & Veatch (I) (P) Ltd. (2014) 101 DTR 289/222 Taxman 1/267 CTR 183 (SC)

Editorial: Judgment of Bombay High Court in ITA no 927 of 2010 dt 17-01-2011 was set aside.

S.9(1)(i):Income deemed to accrue or arise in India - Business connection - In absence of any material on record amount received for performing activities outside India cannot be brought to taxed in India through PE-DTAA-India-Korea.[Art. 5, 7]

The assessee, a Korea based company, entered into a contract with O.N.G.C. and L&T as consortium partners.The assessee's received certain amount under said contract a part of which was attributable to activities carried out within India.The AO found that in addition to the sum of money shown to have been received, assessee had received some other amount under the contract which were in respect of outside India activities and held that 25% of the revenues so received allegedly for outside India activities would be taxed in India. The tribunal upheld the order of AO.

The High Court observed that the assessee has a tax identity in India and a tax identity outside India and, accordingly, its tax liability in India is required to be apportioned and in terms of Article 7(1), of DTAA,assessee will acquire its tax identity in India only when it carries on business in India through a permanent establishment situate in India. Accordingly, allowing the appeal of the assessee, the High Court held that neither the AO or the Tribunal had made any effort to bring on record any evidence to tax 25% of the gross receipt is attributable to the said business (AY. 2007-2008)

Samsung Heavy Industries Co. Ltd. v. DIT (IT) & Anr. (2014) 221 Taxman 315 / 265 CTR 109 (Uttarakhand)(HC)

S. 9(1)(i) : Income deemed to accrue or arise in India-Business connection-No question of law arose from Tribunal's order remitting matter back to AO to ascertain truth of assessee's assertion.

The assessee had only an assembly project in India for a period less than 9 months and claimed before the Tribunal that its income was not taxable in India. The Tribunal remitted the matter back to the AO for the purpose of ascertaining, whether, in fact, such assertion on the part of the assessee is true or not.

On appeal by the department, the High Court found that no question of law requiring determination of this Court arose, except for clarifying that, in the event, it is held that the assessee had a permanent establishment during the relevant assessment year in India, the Assessing Authority would be entitled to take such recourse to law as is permissible against such an assessee under the Act.

ADIT .v. GIL Mauritius Holdings Ltd. (2014) 221 Taxman 107 (Mag.) (Uttarakhand)(HC)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection -DTAA would apply when a recipient of interest does not have a PE in a country where he has received interest-DTAA-India –France [Art 12]

The assessee, a French company, having a PE in India, earned interest on refund of income tax in India. The issue that arose before the High Court was whether the same is covered by sub-articles (1) and (2) of article 12 of India-France DTAA. The High Court held that a plain reading of these provisions make it absolutely clear that Sub-Articles (1) & (2) apply *inter alia* when the recipient of interest does not have a PE in the country, where he has received interest. There is no dispute that the respondent assessee had a permanent place of business in India and, accordingly, the interest earned in India on the refund of income tax is not covered by Sub-Articles (1) & (2) of Article 12 of the said Treaty.

DIT .v. Pride Foramer SAS (2014) 221 Taxman 305 /103 DTR 275 **(Uttarakhand)(HC)**

S.9(1)(i):Income deemed to accrue or arise in India -AOP Business connection -Fees for technical services off-shore supply & services.[S.2(31)(v),(9(1)(vii)]

Merely because a project is a turnkey project would not necessarily imply that for the purposes of taxability, the entire contract be considered as an integrated one. Where the equipment and material is manufactured and procured outside India, the income attributable to the supply thereof could only be brought to tax if it is found that the said income therefrom arises through or from a business connection in India. It cannot be concluded that the Contract provides a "business connection" in India and accordingly, the Offshore Supplies cannot be brought to tax under the Act.

In order to fall outside the scope of Section 9(1)(vii) of the Act, the link between the supply of equipment and services must be so strong and interlinked that the services in question are not capable of being considered as services on a standalone basis and are therefore subsumed as a part of the supplies. In view of the Explanation to Section 9(2) as substituted by Finance Act 2010 with retrospective effect from 01.06.1976, the decision of the Supreme Court in Ishikawajima-Harima Heavy Industries, in so far as it holds that in order to tax fees for technical services under the Act the services must be rendered in India, is no longer applicable. Therefore, in the event the services in question are not considered as an integral and inextricable part of equipment and material supplied, it would be necessary to examine whether any relief in respect of such income would be available to the assessee by virtue of the DTAA between Germany and India;

(f) The AAR exercises judicial power and necessarily has to follow the principle of law already accepted by it. This is also a necessary facet of Article 14 of the Constitution of India. The equal protection clause in the Constitution would necessarily imply that the judicial authorities interpreting the law must also follow a consistent view. Thus, in the event the Authority was of the opinion that the earlier view was erroneous, it was incumbent upon the Authority to refer the matter to a larger bench. In the present case, the Authority has sought to distinguish its earlier decision in the case of Hyundai Rotem, without pointing out any material dissimilarity in facts which would render the earlier decision inapplicable. We are also unable to find any material dissimilarity in facts that would warrant such a conclusion.

Linde A. G. v. DDIT (Delhi)(HC).www.itatonline.org

S.9(1)(i): Income deemed to accrue or arise in India - Business connection-PermanentEstablishment-DTAA-India-USA.[S.90,Art.5]

Re. Whether a subsidiary can be a Permanent Establishment: While under Article 5(6), a holding or a subsidiary company by themselves would not become PE of each other, a subsidiary can become a PE of the holding company if it satisfies the requirements of Article 5. Accordingly, any premises belonging to the subsidiary that is at the disposal of the parent (the "right-to-use test") and that constitutes a fixed place of business (the "location test" and the "duration test") through which the parent carries on its own business (the "business activity test"), gives rise to a PE of the parent under Art. 5(1).

Re. Location or fixed place PE under Article 5(1) and (2) of DTAA: The word "permanent" refers to some degree of permanency and not a mere transitory nature of the business in the other State. The expression "fixed place of business" refers not only to physical location in the form of immovable property or premises but in certain instances can mean machinery and equipment. The word "fixed" refers to a distinct place with some or certain degree of permanence. The carrying on of "business" should be "through" the fixed place of business.

Re. What constitutes a "Service PE" under Article 5(2)(l) of the DTAA: Article 5(2)(l) and (k) defines what can be called service PE. Sub-clause (l) requires furnishing of services within the second contracting State by a foreign enterprise through its employees or other personnel. But a PE is created only if activities of that nature continue for a period or periods aggregating more than 90 days in 12 months period or under clause (ii) services are performed within that State for a related enterprise as defined in Article 9 paragraph 1.

Re. Impact of Article 5(3) and its over-riding effect and consequences: Article 5 (3) contains a list of negative activities which are deemed not to create PE. First and foremost, Article 5(1)/(2) should be applicable but then if the activities fall within parameters of paragraph 3, PE is not created for imposing tax in the second state. It does not follow that if activities are not covered in the negative or exclusions set out in paragraph 3, a PE is established or deemed to be established under paragraphs 1 or 2 of Article 5;

Re. What is "Agency PE" under Article 5(4) and (5) of DTAA: A dependent agency is one which is bound to follow instructions and is personally dependent on the enterprise he represents. Such dependency must not be isolated or once in a while transaction but should be of comprehensive nature.
The MAP procedure and agreement is no doubt relevant but cannot be determinative or the primary basis to decide whether the assessee had PE in India. (ITA No. 735/2011, dt. 5/02/2014.)(AY. 2000-01 to 2007-08)
CIT .v.eFunds IT Solution(2014) 99 DTR 257/266 CTR 1(Delhi)(HC)
DIT(IT) .v.eFunds Corporation & Ors. (2014) 99 DTR 257/266 CTR 1 (Delhi)(HC).

S. 9(1)(i):Income deemed to accrue or arise in India - Business connection -Expenses incurred in India attributable to business carried on in India through PE, had to be allowed subject to limitations provided in Act-DTAA –India-USA). [Art.7]
Expenses incurred by assessee in India Attributable to business carried on in India through Permanent establishment was held to be allowable, subject to limitations provided in the Act.(AY.1997-98)
Bank of America .v.Jt. CIT (2014) 149 ITD 145 / 41 taxmann.com 9 (Mum.)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India-Business connection-Interest paid to its Singapore branch–Held to be allowable-DTAA-India- USA.[Art.7]
Indian branch of assessee's bank borrowed funds from Head Office/overseas branches on which assessee paid interest to its Singapore branch and claimed same as deduction in computation of income. Interest paid to the overseas branch head office is an allowable deduction by virtue of provisions of DTAA and at the same time the said interest paid by the India PE is not chargeable to tax under the provisions of IT Act being income to self. Interest paid to overseas head office branch was to be allowed as deduction. (AY.1997 - 98)
Bank of America .v. Jt. CIT (2014) 149 ITD 145 / 41 taxmann.com 9 (Mum.)(Trib.)

S.9(1)(i):Income deemed to accrue or arise in India-Business connection-Royalty-Contract for supply of equipment which included hardware and software both, entire income from supply of equipment was to be assessed as business income arising from assessee's business connection/PE in India-DTAA-India-China. [S.9(1)(vii), Art. 5,7,12]
Assessee Company incorporated in China and was engaged in business of supplying telecommunications network equipment. Assessee had its branch office in India, In respect of supply of hardware, AO estimated operating profit and then attributed 20 per cent towards PE in India. In respect of software portion, he treated receipt from software as income from royalty and held that same was to be charged to tax at rate of 10 per cent. The ITAT held that if there was only one contract for supply of equipment which included hardware and software both, entire income from supply of equipment was to be assessed as business income arising from assessee's business connection/PE in India. (AYs. 2005-06 to 2008-09)
Huawei Technologies Co. Ltd. .v. ACIT (2014) 149 ITD 323 / 44 taxmann.com 296 (Delhi)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India-Shipping business-Amount received by shipping company for providing cargo tracking service to its customers would not be taxed as fees for technical services-DTAA-India-Denmark. [S.9(1)(vii),44B, 90, Art. 9]
Assessee was doing shipping business on global basis and to keep track of ships/vessels and its cargo, it provided tracking service to its customers, whose cargo assessee was handling.The payment received is nothing but a payment by way of reimbursement of the cost for providing a particular facility. the business of shipping and not in the business of providing any technical service. the

payment was for fee for technical services, there has been use of sophisticated equipments, due to improved technology does not mean that the Assessee is providing technical services. The Assessee as well as its agents are the beneficiaries of such improved technology. The Assessee is not the owner of any technology to provide them for a fee to prospective user. They are themselves consumers of the technology". such payments received from assessee's agents were not in nature of Fees for technical services, but reimbursements, not amounting to generation of income. (AYs. 2006-07 & 2007-08)
A.P. Moller Maersk v. Dy.DIT (2014) 149 ITD 434 / (2013) 38 taxmann.com 346 (Mum.)(Trib.)

S. 9(1)(i):Income deemed to accrue or arise in India-Business connection-As the work done by the branch in India required high technical and managerial skill, it is not preparatory and auxiliary work of a back office but constitutes a permanent establishment (ii) Attribution of profits under Rule 10B(2) on the basis of the H.O's profits in the absence of data on uncontrolled transactions is proper, (iii) As risks were shared by the H.O. and the PE, 50% of the profits determined as per rule 10 are attributable to operations carried out by the PE in India-DTAA-India-USA. [Art. 5(2), 7]
(i) The benefit of the ratio of first part of Morgan Stanley and Co. Inc. (2007) 292 ITR 416 (SC) is not available for the assessee as on careful examination of activities and modus operandi of the assessee, we have reached to a conclusion that the important work assigned to Indian branch office was preparation of drawing, designs and doing structural calculations which require high technical and managerial skill, therefore, this important facet of the Indian Brach cannot be said to be a preparatory and auxiliary work of a back office but at the same time, we note that the US office minimise their cost of services and other expenses by assigning and appointing highly technical and materially skilled professional to discharge main function of US Head office in India at low cost. The Apex Court in Morgan Stanley (supra) in 'para 15' held that even employees which are highly experienced in their specialized fields lends their expertise to Indian entity in that that sense there is a service PE under Article 5(2)(1) of Indo-US DTAA. Consequently, the assessee is a PE in India as per provisions of Article 5(2)(b) and (c) of Indo-US DTAA;
(ii) Coming to the issue of attribution of profits to PE in India, the transfer pricing analysis report shows that the assessee itself has adopted the mark up to the cost at 1.83% and at the same time, the AO found that the net profit earned by the Head Office of the assessee in US tax return was 8.5% which was based on sales. The revenue authorities have observed that the assessee has not submitted record of uncontrolled transactions and the record of analysis, how the uncontrolled transactions are comparable to the case of the assessee as per requirement of Rule 10B(2) of the Income Tax Rules, 1962. In this situation, the AO was right in adopting the profit of 8.5% for AY 2003-04 and 10.6% for AY 2004-05 to calculate attributable profit;
(iii) The AO has not brought out any fact or material into existence that the risk of marketing and quality control activity have taken place and all developmental activities have taken place in India. In this situation, it cannot be said that risk is involved exclusively either on the Head office or on the PE branch office in India. Obviously, from stage of discussion and obtaining the contract till its final marketing to the respective client have been undertaken by the US Head office but at the same time this fact cannot be ignored that the PE branch office in India contributed towards all development activities at the cheaper cost of service and human resources in comparison to USA, therefore, we are of the view that for earning higher profit in comparison to USA, comparable companies as adopted in transfer pricing study, the US Head office earned higher profit due to low cost of services and human input by Indian PE. At the same time, although we note that the risk factor was also borne by the Indian PE branch, we also note this fact that certain risk in regard to capital investment, bad debts and other legal obligations were borne by the US Head office, therefore, the AO rightly adopted the global profit of the US Head office for benchmarking the percentage of profit and the AO attributed 100% profit to the Indian PE. The CIT(A) has taken into account this very fact that the Indian branch takes some risk as the important drawing and designing calculations are carried out by the Indian company and impliedly other risks as stated above were taken by the US Head office and, therefore, in the totality of these facts and circumstances, the CIT(A) was justified in holding that 50% of the profits determined by the AO after applying rule 10 were to be attributable to the operations carried out by the PE in India. (ITA No. 1597/ Del/ 2009, A. Y. 2004-05, dt. 31.10.2014.)
Consulting Engineering Corporation v. JDIT (Delhi) (Trib.) ; www.itatonline.org

S. 9(1)(i) : Income Deemed to accrue or arise in India-Business connection-Commission foreign agent- Not liable to deduct tax at source.[S. 40 (a) (ia), 195].

In the present case assessee exporter claimed deduction on commission paid to agents abroad who were canvasing for assessee in overseas market. During the relevant assessment year when assessee had affected payments to foreign agents, such payments were not income of non-residents eligible for tax in India. The Tribunal held that subsequent circular allegedly withdrawing benefits given to assessee, nor addition of explanation to section 9(2) through Finance Act, w.e.f. from 1-6-1976 would have no effect on the taxability of such income earned by non-residents agents outside India during relevant year in course of his business or profession carried out outside India.(AY. 2008-2009)

ACIT v. Capricorn Food products India Ltd. (2014) 61 SOT 176 (Chennai)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection-Permanent Establishment-Commission is taxable in India- DTAA-India-Finland [Art.5]

Assessee Finland company executed a contract with Nhava Sheva Port Trust (NSPT) for supply of tractors and trailers. It engaged an Indian company Usha Sales for rendering certain specific services in India. Assessee paid an agreed commission to Usha Sales. Assessee had PE in India in form of Usha Sales and that certain percentage of sale of trailers was also taxable in India. Assessee had not been able to convince on fact that Usha Sales was not a PE of assessee and it was an independent branch by itself. Indian company should be treated as a PE, and not as an agent of independent status.(AY. 1989-90)

ADIT (IT). .v. Oy Sisu AB (2014) 146 ITD 572 / (2013) 38 taxmann.com 81 (Mum.)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection- Permanent Establishment-DTAA-India-USA. [S.90].

The Tribunal held that the agreement entered is an independent agreement on principal to principal basis and held that there is no PE of the assessee company in India as there is neither any office in India nor it has any business connection in India nor has carried out any business activities in India. Assessee company is a standalone legal independent entity. As there is no PE, the question of attribution of profits does not arise.

Addl. DIT . .v. Lucent Technologies GRL LLC (2014) 159 TTJ 589 / 29 ITR 132 (Mum.)(Trib.)
Dy. DIC . .v. Reliance Infocom Ltd. (2014) 159 TTJ 589 / 29 ITR 132 (Mum.)(Trib.)

S.9(1)(i):Income deemed to accrue or arise in India–Business connection–Liaison office of foreign company in India-Over and above the reimbursement of expenses-Taxable as income.[S.5(2)]

In the employment contract between the assesee, a US company and its employees at liaison office, there was a sales incentive plan whereby the employees were to be provided with the remuneration based upon the achievement of the target for sale of goods of the assessee company in India. The assessee company had also got itself registered with the ROC for carrying on business in India and filed its return declaring loss under the head "Profits and gains of business or profession". These clearly established that the liaison office was promoting sales of the assessee company in India. Therefore, the income attributable to the liaison office was taxable in India. Amount received by the liaison office from the head office over and above the reimbursement of expenses was rightly treated as income. (AY. 2003-04 to 2005-06)

Brown & Sharpe Inc .v. ACIT (2014) 98 DTR 405/64 SOT 126 (URO) **(Delhi)(Trib.)**

S.9(1)(i):Income deemed to accrue or arise in India - Business connection – Purchase of goods in India through liaison office for exports-No income was derived in India.

Assessee, a Hong Kong company acted as buying agent for group companies. It established a liaison office in India which acted as communication channel between the company and the manufacturers for sourcing apparels from India. Liaison office's activities were prior to purchase of goods by the company and, therefore, Expln. 1(b) to s. 9(1)(i) was clearly applicable and no income was derived in India. (AYs. 2003-04 to 2007-08)

Tesco International Sourcing Ltd .v. DDIT(IT) (2014) 98 DTR 33/62 SOT 41(Bang.)(Trib.)

S.9(1)(i): Income deemed to accrue or arise in India - Business connection-"composite" contracts for supply of offshore & onshore supply & services under Act & DTAA-DTAA-India-Korea.[S.5(2)90,Art 7,12]

It is wide off the mark to categorize the present contract agreement as a composite one since all its major four components are distinctly identifiable with separate consideration for each. There is a separate mention of consideration for supply of equipments and for rendition of services. Simply because the supply of equipment and the rendition of services is to one party and for a common purpose, we are unable to find any logic in treating the entire amount as one composite payment attributable commonly both to the supply of equipment and rendering of services, more so when there is a specific identifiable amount relatable to these segments;

Title to goods shall be considered to have passed outside India when delivery was made on high sea and the payment was also received outside India. Merely because the risk passed in India, it cannot be said that the sale took place in India. Therefore, no income can be said to have arisen in India;

In so far as the price for offshore supply of equipment simplicitor is concerned, profit from the same cannot be charged to tax as the assessee is a non-resident and there is absence of territorial nexus of such income with India.(AY.2008-09)

POSCO Engineering & Construction Co. Ltd. .v. ADIT(2014) 31 ITR 255/148 ITD 527/162 TTJ 689/102 DTR 257(Delhi)(Trib.)

S.9(1)(i): Income deemed to accrue or arise in India-Permanent establishment-Business profits-Force of Attraction (FOA)- Similar business activities carried on by an enterprise of contracting State-Marketing and management services were provided outside India-Income would not be taxable under Art 7.DTAA-India-USA DTAA. [Art.5,7]

Marketing and management services in question were rendered outside India and income of such services cannot be said to have accrued or arisen to the assessee or deemed to have accrued or arisen to assessee in India, the existence of service PE in India would not make it taxable under article 7 of Indo-US DTAA.(AY.2007-08)

ADIT .v. WNS North America Inc (2014) 146 ITD 435/38 taxmann.com 321/30 ITR 346(Mum.)(Trib.).

S. 9(1)(i) : Income deemed to accrue or arise in India –Business profits- Profit on services rendered by company - not taxable in India if non-resident company does not have PE in India-DTAA-India-Singapore. [Art.7].

The applicant is a resident company engaged in the business of producing and distributing television programmes. It mainly produces reality shows and has also ventured into soap operas. For one of its productions, for the purpose of shooting the show outside India, the applicant engaged NAPL, a Singapore based Company, to procure the services of one CPH as an executive producer for the show. As per the terms of the agreement, NAPL was responsible for the overall production and also for handling business issues. The agreement also provided that NAPL will provide specialized services to aid in the production of programmes for which NAPL agreed to commission its representative to CPH who was an executive producer. As per the agreement the applicant was to pay a total consideration of US Dollar 49,000 to NAPL for their services for the show. The applicant sought advance ruling on whether the payments made by the applicant to NAPL will be treated as business income, and since it does not have a Permanent Establishment (PE) in India, whether the payments made by the Applicant to NAPL would be chargeable to tax in India.

The Authority for Advance Ruling held that the Article 7 of the India-Singapore Tax Treaty provides that "the profits of an enterprise of a Contacting State shall be taxable only in the State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is directly or indirectly attributable to that permanent establishment.The Authority, on the facts of the case, further held that NAPL is a resident company of Singapore. The applicant is an Indian enterprise and for its business activities outside India the services of NAPL were utilized and payment for the services were also received outside

India. There was nothing on record to show that NAPL had PE in India. In the absence of any PE in India, the profits arising out of the transactions for services rendered by NAPL were not taxable in India.

Endemol India (P.) Ltd., In re (2014) 222 Taxman 59 (AAR)

S. 9(1)(vi) : Income deemed to accrue or arise in India – Royalty -Amount received under the license agreement for allowing the use of software is not royalty-DTAA-India-USA. [S.90, Art. 7, 12]

License Agreement was entered between India & USA. According to which the license was non-exclusive, non transferable and the software were to be used in accordance with the agreement. The revenue treated the amount received by the assessee under the license agreement for allowing the use of software as Royalty under DTAA between India & USA. On appeal, the court held in favour of assessee and held that right to use a copyright in a programme is totally different from the right to use a programme embedded in a cassette or a CD which may be a software and the payment made for the same cannot be said to be received as consideration for the use of or right to use of any copyright to bring it within the definition of royalty as given in the DTAA. Amount received under the license agreement for allowing the use of software is not Royalty under DTAA between India & USA. What was transferred was neither the copyright in the software nor the use of the copyright in the software, but what is transferred is the right to use the copyrighted material or article which is clearly district from the rights in a copyright. Right that is transferred is not a right to use the copyright but is only limited to the right to use the copyrighted material and the same did not give rise to any royalty income and would be business income.

DIT v. Infrasoft Ltd. (2014)254 CTR 329(Delhi)(HC)

S. 9(1)(vi) : Income deemed to accrue or arise in India– Royalty-Permanent establishment-Rights in television programmes, motion pictures and sports events and exhibiting same on its television channels from Sigapore-Not taxable in India-Not liable to deduct tax at source-DTAA-India-Singapore[S.195, Art 12]]

The assesse is a Singapore based company engaged in business of acquiring rights in television programmes motion pictures and sports events and exhibiting same on television channels from Sigapore .It entered in to an agreement with Global Cricket Corporation(GCC) also tax resident of Singpore , under which GCC granted telecast rights to assesse through out licence territory which included India . AO held that payment made by assesse to GCC for acquisition of telecast rights was royalty and was chargeable to tax in India. In appeal CIT(A) and Tribunal held that payment was not taxable in India in as much as liability for payment was incurred by assesse in connection with broadcasting operations in Singapore and that had no connection with marketing activities carried out though its alleged permanent establishment in India. On appeal by revenue , dismissing the appeal the Court observed that the alleged permanent establishment of assesse in India , the Tribunal's finding of fact is that the economic links entirely with the assessee's head office in Singapore .The payment to GCC cannot be said to have been incurred in connection with the appellant's permanent establishment in India. The Court affirmed the view of Tribunal and held that no substantial question of law arise out of order of Tribunal. Order of Tribunal was affirmed.

DIT(IT) v. Set Statellite (Singapore) Pte Ltd. (2014) 225 Taxman 1 (Bom.)(HC)

S. 9(1)(vi) : Income deemed to accrue or arise in India–Royalty- Consideration paid for transfer of right to use software/computer programme in respect of copyright is 'royalty'

The High Court following the decisions of the Karnataka High Court in the case of CIT .v. Samsung Electronics Co. Ltd. (2012) 345 ITR 494 and CIT .v. Synopsis International Old Ltd. (2012) 28 taxmann.com 162 held that consideration paid by the Indian customers or end users to the assessee, a foreign supplier, for transfer of the right to use the software/computer programme in respect of the copyrights falls within the meaning of 'royalty' as defined in section 9 (1) (vi) of the Act. (A.Y. 2002-2003)

CIT .v. Customer Asset India (P.) Ltd. (2014) 222 Taxman 37 (Mag.) (Karn.)(HC)

S.9(1)(vi):Income deemed to accrue or arise in India–Royalty-Use of equipment or use of process-Brand width services or Telecom services- Taxable as Royalty0-DTAA-India-Singapore. [Art. 12(3)(b), (4)]

Payment received by assessee for providing international private leased circuitamounts to use of equipment or use of process and was taxable as royalty. (AYs. 2002-2003, 2003-2004, 2007-2008, 2008-2009)

Verizon Communications Singapore Pte Ltd. .v. ITO (IT) (2014) 361 ITR 575 (Mad.)(HC)

S.9(1)(vi): Income deemed to accrue or arise in India–Royalty- Amount received by assessee, a non-resident company, for granting license to use its copyrighted software for licensee's own business purpose only, could not be brought to tax as 'royalty' under article 12(3) of India-US DTAA-In absence of any amendment in DTAA, there was no need to examine effect of subsequent amendment to section 9(1)(vi)-DTAA-India-USA. [S.90, Art 5, 12]

The assessee, an international software marketing and development company developed customized software which was licensed to an Indian customer and the branch office of the assessee in India. In the course of assessment, the AO taxed the receipts on licensing the software as 'royalty' as per article 12 of Indo-US DTAA. The CIT (A) upheld the order of AO. The Tribunal, however, held that the amount received by the assessee under the license agreement for allowing the use of the software was not royalty either under the Act or under the DTAA. On revenue's appeal, the High Court observed that in order to qualify as royalty payment, it is necessary to establish that there is transfer of all or any rights (including the granting of any license) in respect of copyright of a literary, artistic or scientific work. In order to treat the consideration paid by the Licensee as royalty, it is to be established that the licensee, by making such payment, obtains all or any of the copyright rights of such literary work. Distinction has to be made between the acquisition of a "copyright right" and a "copyrighted article". Copyright is distinct from the material object, copyrighted. Just because one has the copyrighted article, it does not follow that one has also the copyright in it. Viewed from this angle, a non-exclusive and non-transferable license enabling the use of a copyrighted product cannot be construed as an authority to enjoy any or all of the enumerated rights ingrained in Article 12 of DTAA. There is no transfer of any right in respect of copyright by the assessee and it is a case of mere transfer of a copyrighted article. The payment is for a copyrighted article and represents the purchase price of an article and cannot be considered as royalty either under the Act or under the DTAA. Further the High Court observed that it was not necessary to examine the effect of subsequent amendment to section 9(1)(vi) and also whether amount received for use of software would be royalty in terms thereof for the reason that the assessee was covered by the DTAA, the provisions of which are more beneficial. In view of the above the appeal was dismissed.

DIT .v. Infrasoft Ltd. (2014) 220 Taxman 273 (Delhi)(HC)

S. 9(1)(vi) : Income deemed to accrue or arise in India – Royalty - Fee received for "foreign exchange deal matching system services" constitutes "royalty"-DTAA-India-UK. [S.90,Art. 12,13]

The Tribunal had to consider whether the consideration for services offered by the assessee of "foreign exchange deal matching system" was assessable as "royalty" under Article 12(3) of the India-USA DTAA. The "foreign exchange deal matching system" facilitates the Indian subscribers i.e. Banks to deal in the foreign exchange with the other counterparts who are ready for the transaction of purchase and sale of foreign currency. The role of the deal matching system is to provide a platform where both purchaser and seller find the respective match for the intended transaction of purchase and sale. HELD by the Tribunal:

The assessee is facilitating its clients to use its system and application programming interface which is subscriber interface for use with the related services including Auto quote service. The assessee is also providing the equipment with pre-loaded software to its subscribers and network used for provision of the services. The assessee grants subscribers limited license of software to install and use at the site. The said license can be sub-licensed by the subscriber. The subscriber/user can also view, manipulate and create the derived data from information for their individual use. Further the subscriber can Store information, manipulate information for its use and also distribute or redistribute information and Drive Data to anyone to a limited extent so far as it is not done in a systematic

manner. The subscribers are allowed to use the information and even to manipulate and Drive the Data to anyone for their individual use. Thus it is clear that it is subscribers who are using the information and system of the assessee for their commercial/business purposes. The information is made available by the assessee through its system and other equipments installed at the site of the subscriber to facilitate the connectivity with the assessee's system / router located in Geneva. The platform of transacting the purchase and sale is commercial equipment allowed to be used by clients / subscribers for commercial purposes. The nature of service rendered by the assessee includes the information concerning commercial use by the subscriber. Further the entire system of the assessee including the equipments and connectivity facility is provided at the site of the subscriber. Therefore, the assessee is providing the service in the form of information and solution to the need of the subscribers by providing the matching party. Also, the Indian subscribers have been granted a license to use the software for their internal business, which can be sub-licensed by them. The Indian clients are paying for use and right to use of equipment (scientific, commercial) along with software for which license was granted by assessee. It is not a case of simplicitor payment for access to the portal by use of normal computer and internal facility but the access is given only by use of computer system and software system provided by the Assessee under license. Accordingly, by allowing the use of software and computer system to have access to the portal of the assessee for finding relevant information and matching their request for purchase and sale of foreign exchange amount to imparting of information concerning technical, industrial, commercial or scientific equipment work and payment made in this respect constitutes royalty.) (ITA No. 6947/Mum/2012,dt. 18.07.2014.)(AY.2008-09, 2009-10)

Reuters transaction Services Ltd.v. DDIT(2014) 108 DTR 1 (Mum.)(Trib.)

S.9(1)(vi):Income deemed to accrue or arise in India–Royalty-Reimbursement of expenses-DTAA-India-Netherland.[S.90,Art.7, 12]

The amount received by the assessee Dutch Company from an Indian company for providing marketing services outside India is not taxable as royalty u/art. 12(4) of the Indo-Netherlands DTAA. The said amount would be taxable in India u/s art. 7 if the assessee carries on business in India through a PE situated in India. Impugned order was set aside and the matter was restored to the AO for considering the facts in the light of art. 7 of the DTAA.

Marriott International Licensing Co. BV .v. DDIT(IT) (2014) 98 DTR 27 (Mum.)(Trib.)

S.9(1)(vi): Income deemed to accrue or arise in India – Royalty- non-exclusive user right of a software owned by said company - two subsidiaries in India-Taxable as royalty- DTAA-India-USA.[Art.7, 12]

The assessee was a company incorporated in USA. It entered in to an agreement with a software company , oracle and obtained nonexclusive user right of a software owned by said company. The assessee granted user right to its subsidiaries. The assessee treated the said income as business profits under Art 7 of the DTAA between India and USA and since it did not have PE in India income was claimed as exempt.AO held that the payment received were royalty covered under section 9(1)(vi). and the same is taxable in India. DRP confirmed the order of AO.On appeal to the Tribunal the tribunal held that the payment received by assessee from its two affiliates for granting right of software was royalty and rightly been brought to tax in India. (AY. 2004-05 & 2006-07)

Cummins Inc .v. DIT (2014) 146 ITD 460 / (2013) 38 taxmann.com 286 (Pune)(Trib.)

S.9(1)(vi):Income deemed to accrue or arise in India–Deduction at source-Production and distribution of television programmes–Shooting of film outside India-Services specially characterized as work under section 194C would not be taxable without a permanent establishment in India-Not liable to deduct tax at source under S. 195.[S. 194C,195]

The applicant was a resident company engaged in the business of producing and distributing television programs. For shooting a program outside India, the applicant engaged U, company incorporated in, and a tax resident of, Brazil, for providing line production services and for providing a line producer, local crew for providing stunt services, transport necessary for stunts for production of the show in Brazil. Under the agreement, U was responsible for arranging for crew and support personnel as may be requisitioned; props and other set production materials; safety, security and

transportation; and filming and other equipment as may be requisitioned. The anchor and the participants of the show were engaged and paid separately by the broadcaster and were not the responsibility of U. Held, the services were specifically characterised as work for the purpose of s. 194C by the Explanation to that section. Therefore, the payments made by the applicant to the non-resident company specifically fell under the definition of work u/s 194C of the Act and would not be taxable without a permanent establishment in India. Consequently, the payment would not suffer withholding of tax u/s 195 of the Act.(AAR Nos. 1081 /1082 of 2011 dt 19-02-2014)

Endemol India P. Ltd. In re (No.4) (2014) 361 ITR 658/99 DTR 397/222 Taxman 67/266 CTR 142 (AAR)

S. 9(1)(vii):Income deemed to accrue or arise in India-Fees for technical services–Agreements prior to 1-4-1976 and approved by Government-Payments received under contracts is in the nature of fees for technical services –Not taxable.[Art. 12, OECD Convention]

The assessee a non-resident company received in terms of various agreements from various public sector undertakings. The AO held that the payment received fell within the definition of "royalty" given in Explanation 2 to section 9(1)(vi).On appeal the CIT (A) accepted the claim of the assessee by holding the payment received by the assessee were in the nature of technical service fee covered under section 9(1)(vii) and ought to be excluded from taxation in view of the proviso there to which took away the applicability of section in respect of agreements entered in to prior to April 1, 1976 and approved by Government. Tribunal also confirmed the order of CIT(A).On reference by revenue the affirming the view of Tribunal held that as the agreements were entered in to prior to 1-4-1976 and approved by Government, payments received under contracts is in the nature of fees for technical services hence not taxable.(AY.1979-80)

CIT .v.Montedison of Italy (2014) 367 ITR 179/226 Taxman 128/109 DTR 105 (Bom.)(HC)

S.9(1)(vii): Income deemed to accrue or arise in India - Fees for technical services- Design & Engineering drawings are in the nature of "plant" and consideration thereof is not assessable as "fees for technical services" if delivered outside India.

The assessee company provided design and engineering services, manufacture, delivery, technical assistance through supervision of erection and commissioning etc., to establish compressor house-I for RINL. The payments were made by RINL separately for each of the services/equipments provided/supplied by the assessee. It, inter alia, included payment made towards supply of design and engineering drawings. The assessee company claimed the said payment is not taxable under the Income Tax Act as it was a transaction of sale of goods that has taken place outside India. In our view the decision of Delhi ITAT Bench in the case of Mannesman Demag Sack AG v.. Add. CIT reported in (2008), 119 TTJ 543 (Del), on which reliance was placed by Ld DR, is not applicable to the facts of the instant case. In the case of Mannesman Demag Sack, supra, the decision was rendered on the basis of the terms of the contract which provided that technical services shall include supply of design and drawings. Hence on the facts of the case, the Tribunal held that design and drawing charges are in the nature of fee for technical services. However, it may be pertinent to note that the Tribunal in that case, accepted the alternative contention of the assessee that the said fee cannot be assessed in India, unless it is shown that some part of work has emanated from Indian territories. Hence on a conspectus of the matter, we are of the view that the amount received by the assessee for supply of design and engineering drawings is in the nature of plant and since the preparation and delivery has taken place outside Indian territories, the same cannot be subjected to tax in India.(ITA No. 612 of 2013, dt. 4.2.2014.)

DIT .v. Nisso Lwai Corporation, Japan (AP)(HC),www.itatonline.org

S.9(1)(vii):Income deemed to accrue or arise in India-Fees for technical services -In view of the finding of the service-tax authorities that services were rendered, argument that amount paid is a reimbursement of actual cost without profit element is not acceptable and it is chargeable as "fee for included services"-DTAA-India- Canada. [S. 195, 201(1), Art.]

Having held that the amount in question was remitted by the assessee company to ATI Technologies, Canada for certain benefits received by it in the form of services procured by ATI Technologies, Canada from Soctronics India Private Limited and provided to the assessee company, and it was not a

case of either gratuitous payment made by the assessee or mere reimbursement of expenditure incurred by the ATI Technologies, Canada, the question that now arises for our consideration is what exactly is the nature of this payment. As already noted by us, almost similar view, as taken by us on this issue, has been taken by the Commissioner of Service Tax vide his order dated 23.7.2012. In their respective orders, the Assessing Officer as well as the learned CIT(A) have observed that if one were to go by the conclusion of the Commissioner of Service Tax, the amount in question paid by the assessee to ATI Technologies, Canada for services procured from Soctronics India Private Limited and made available to the assessee company will be in the nature of 'fee for included services' which is chargeable to tax in the hands of ATI Technologies, Canada as per the domestic law as well as India Canada DTAA. At the time of hearing before us, when this position was confronted to the learned counsel for the assessee, he has also agreed that if the case of the assessee for reimbursement of actual cost to ATI Technologies, Canada, without any profit element is not found acceptable by the Tribunal, the amount in question is liable to be treated as "fee for included services", which is chargeable to tax in India in the hands of ATI Technologies, Canada as per the domestic law and India Canada DTAA. It accordingly follows that the assessee company was liable to deduct tax at source from this amount as per the provisions of S.195, and having failed do so, it has to be treated as an assessee in default under S201(1) to the extent of tax payable by ATI Technologies, Canada in India on the mount in question which is in the nature of "fee for included services". We accordingly modify the order of the learned CIT(A) on this issue and sustain the order of the Assessing Officer in treating the assessee as in default under S. 201(1) to the extent of tax payable by ATI Technologies, Canada in India on the amount in question which is chargeable as 'fee for included services' alongwith interest payable thereon under S.201(1A). (ITA No. 692 to 695/Hyd/2014, Dt. 22.10.2014.) (AY. 2007-08 to 2010-11)

AMD Research & Development Center v. DCIT (Hyd.)(Trib.),www.itatonline.org

S.9(1)(vii):Income deemed to accrue or arise in India - Fees for technical services -Tests for distinguishing secondment contract with technical services agreement-Matter set aside.

No doubt even if we come to a conclusion that there indeed were no secondment agreements and the persons sent were all along the employees of the affiliates abroad, it would not necessarily means that such affiliates were rendering technical services to the assessee. In our opinion, three cases relied on by the learned DR namely IDS Software Solutions India (P) Ltd 21 DTR 240, Ariba Technologies India (P) Ltd and M/s Abbey Business India (P) Ltd all had different factual scenarios. In the case of IDS Software Solutions, there was an agreement between the U.S. Co which had sent the persons to India, with its Indian subsidiary. It was from such agreement that the Tribunal came to a conclusion that the concerned employees were employees of the assessee during the relevant time. There was also a minutes of the Board of Directors of the U.S Co which substantiated the contentions of the assessee that the deputed persons were working in India as employees of the assessee in India. Similarly in the case of Ariba Technologies India (P) Ltd also, there were agreements between M/s Ariba USA and its Indian subsidiary through which Ariba US had provided services of one of its employees to its Indian subsidiary. In the case of M/s Abbey Business India Services also, there was an outsourcing agreement between Abbey U.K. entered with its subsidiary in India. The Tribunal had verified the clauses of this agreement and came to a conclusion that there was a secondment of staff to the assessee. As against this, here, as mentioned by us above, there was no such agreement of secondment, produced by the assessee before us or before any of the lower authorities. We are, therefore, of the opinion that the issue requires a revisit by the AO. Whether the employees of the affiliates abroad were rendering services to the assessee company, as a part of any technical services agreed to be rendered by such affiliates to the assessee, has to be seen based on the verification of actual services rendered by them. Assessee should also be given an opportunity to show that the employees came to India only on a secondment and had not rendered any technical services on behalf of the affiliates abroad.(IT(TP) A No. 270/Bang/2014, Dt. 17/10/2014.) (AY. 2009-10),

Cisco system service B. E. .v. ADIT(IT)(Bang.)(Trib.) ;www.itatonline.org

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services-Subsidiary-Reimbursement of expenses-Matter remanded. [S.40(a)(i), 195]

In the present case, assessee company paid certain sum to its subsidiary, TAFE Inc. USA & others without deducting tax at source on the ground that such payment was purely reimbursement of expenses. A.O. however held, that nature and services, rendered by 'TAFE' fell within ambit of 'fees for technical services ' and he, accordingly, disallowed payment under section 40(a)(i). As the agreement between the assessee and 'TAFE' was not examined by the lower authority & also question whether services rendered by 'TAFE" fell within ambit of 'technical serves under DTAA was not verified, matter was remanded back.(AY. 2006-2007)

ACIT v. Tractor & Farm Equipment Ltd. (2014) 61 SOT 190 (Chennai)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services -Business profits-Design and Engineering-Since technical supervision was provided by assessee, it could not be said that assessee was doing construction work-Assessee was liable to be taxed at rate of 10% as per section 9(1)(vii), read with section 115A- DTAA-India-Russia. [S.90,115A, Art 7, 12]

Assessee a foreign company, was dealing in construction of pipelines. Assessee company was duly registered under laws of Russia. It entered into a consortium agreement with Kalpataru Power Transmission Limited (KPTL). Consortium made a bid for PDPL project of Gas authority of India Ltd (GAIL), and was finally awarded contract by GAIL. Assessee Company further entered into a co-operation agreement with KPTL. As per said agreement, substantial work for executing contract was to be undertaken by KPTL by deploying all required input resources and assessee-company would provide its technical guidance and consultancy for project management and specialized manpower was also to be supplied by assessee-company. Assessee-company would get 3 per cent of contract receipts as full consideration for its contribution in project and KPTL would be entitled to 96 per cent of contract value and remaining 1 per cent would be used to meet expenses of consortium. Assessee-company had offered income arising out of PDPL project at rate of 10 per cent, claiming it to be 'fees for technical services', as per Article 12. AO found that all mainline activities required to be performed for construction of said pipeline were to be carried out solely by assessee-company or jointly by it with KPTL, or by KPTL under guidance of assessee-company. He held that income from said project was taxable as business profits at rate of 40 per cent as per article 5(2)(i) read with article 7.CIT(A) following the earlier decision of Tribunal directed the AO to apply the provisions of Sub clause (BB) of clause (b) of sub section (1) of Section 115JA along with Section 9(1)(vii) of the Act. On appeal by revenue the Tribunal by following the earlier years identical facts, had treated income of assessee as FTS on grounds that assessee was required to provide design and engineering of various aspects and was also required for preparing welding procedure, review work procedure for pipeline laying and in addition to this, assessee was required to depute experts for site review and implementation by KPTL. It was held that, since technical supervision was provided by assessee, it could not be said that assessee was doing construction work. Income of assessee was liable to be taxed at rate of 10% as per section 9(1)(vii), read with section 115A and not at the rate of 40% as business profits. Matter was set aside to the AO only for verification that whether 96 percent receipts of contract has been disclosed by assesse in case of KPTL and tax had been paid on it .Order of CIT(A) was affirned.(AY. 2009 – 2010)

ACIT(IT) v. Joint Stock Company Zangas (2014) 149 ITD 9 / 44 taxmann.com 429 (Ahd.)(Trib.)

S.9(1)(vii): Income deemed to accrue or arise in India-Fees for technical services-DTAA-Deductionat source-Sales commission. [S.40(a)(i),) 195, art 12]

Assessee was engaged in business of import and export of electronic goods and components.AO held that as the assessee did not deduct TDS on payment of sales commission made to two foreign companies. According to the AO said payments were in nature of fee for technical service covered under section 9(1)(vii) and disallowed same under section 40(a)(i). CIT(A) held that as there was no element of income involved in said payment or not and held that there being no element of income involved in said commission payment, assessee was not liable to deduct tax at source . On appeal by revenue the Tribunal held that since CIT(A) had decided a question which was not emerging out from assessment order and further relevant question whether recipients had permanent establishment or not matter remanded for fresh adjudication to the AO. (AY. 2007-08)

ACIT .v. Sahasra Electronics (P.) Ltd. (2014) 146 ITD 565 / 41 taxmann.com 384 (Delhi)(Trib.)

S.9(1)(vii):Income deemed to accrue or arise in India-Fees for technical services –Providing software development services to its customers based in India-Liable to deduct at source-DTAA-India-USA. [S.195, Art.12]

The assessee company was engaged in providing software development services to its customers based in India. During relevant assessment year, assessee company claimed deduction of payment made to a US based company towards management services rendered by it. The Tribunal held that it was undisputed that assessee was making use of advice, input experience, experimentation and assistance rendered by USA based company in its decision making process of financial and risk management etc., Further apart from providing inputservice and advice, US based company was also providing training to employees of assessee-company. On facts services rendered by non-resident company were technical in nature as provided in clause 4(b) of article 12 of DTAA, and thus, assessee was liable to deduct tax at source while making payments in respect of said services.(AY. 2007-2008)

US Technology Resources(P)Ltd. .v. ACIT(2014)61SOT 19 (Cochin)(Trib.)

S.9(1)(vii): Income deemed to accrue or arise in India - Business connection -Fees for technical services- services rendered by assessee outside India could not be brought to tax in India-DTAA-India-USA. [Art 5, 12]

For the earlier assessment years 2003-04 to 2006-07 an identical issue has been considered and decided by the Tribunal in favour of the assessee. It is further noted that in the assessment years 2004-05 and 2005-06 the Hon'ble Jurisdictional High Court has confirmed the order of this Tribunal. The assessee in the instant case has not made available any technical knowledge, experience; skill etc. to WNS India, the same cannot be subjected to tax by considering the provisions of section 9(1)(vi) on stand-alone basis. It is, held that the marketing and management services rendered by the assessee to WNS India are not chargeable to tax as FIS under article 12 of the DTAA.(AY. 2007-08)

ADIT .v. WNS North America Inc (2014) 146 ITD 435 / 38 taxmann.com 321(Mum.)(Trib.)

S.9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services–Various services-No sufficient material to suggest–Not fees for technical services-DTAA-India-Netherland. [S.90, 195, Art. 7, 12]

Holding Company of the Applicant agreed to provide various services like (a) general management (b) international operations (c) Legal advisory (d) tax advisory (e) Controlling & accounting & reporting (f) Corporate communication (g) Human resources & (h) Corporate development ,mergers & acquisitions. The Revenue contended that services availed by the applicant were consultancy services & were covered by the definition of fees for technical services even as per Art.12 of the India- Netherland Tax treaty. Authority for Advance Rulings held in favour of the applicant and held that the transaction was for genuine business purpose for the benefit of both the parties. There was no sufficient materials on facts and circumstances made available which suggest that the transaction was an arrangement solely for the purpose of avoidance of Tax and therefore requirement of the "make available Clause" in the Art 12 (5) of India- Netherlands tax treaty was not satisfied and hence the payment for the services would not come under "Fees for technical services" under the Tax treaty.

Endemol India (P) Ltd. (2014) 264 CTR 117 / 223 Taxman 183 (Mag.) / 361 ITR 340 (AAR)

S. 9(1)(vii) : Income deemed to accrue or arise in India–Fees for technical services- Payment to a non-resident for production of programmes for broadcasting and telecasting not treated as 'fees for technical service'-DTAA-India-Singapore. [Art.12]

The applicant is a resident company engaged in the business of producing and distributing television programmes. It mainly produces reality shows and has also ventured into soap operas.For one of its productions, for the purpose of shooting the show outside India, the applicant engaged NAPL, a Singapore based Company, to procure the services of one CPH as an executive producer for the show. As per the terms of the agreement, NAPL was responsible for the overall production and also for handling business issues. The agreement also provided that NAPL will provide specialized services to aid in the production of programmes for which NAPL agreed to commission its representative to CPH who was an executive producer. As per the agreement the applicant was to pay a total consideration of US Dollar 49,000 to NAPL for their services for the show.The applicant sought advance ruling on

whether the payments made by the applicant to NAPL, for services rendered are chargeable to tax in India as 'fees for technical services'.
The Authority for Advance Rulings held that the services were rendered outside India and the non-resident company namely NAPL did not have any presence in India. There was no material to support that the technical knowledge, expertise, skill/ know-how or process was made available to the applicant by enabling it to apply the technology independently. Thus, none of the conditions of the Article 12.4 of the India-Singapore Treaty were fulfilled. Therefore, the consideration paid for services rendered by NAPL to the applicant was not covered by fees for technical services in terms of Article 12.4 of the India-Singapore Tax Treaty.
Endemol India (P.) Ltd., In re (2014) 222 Taxman 59 (AAR)

S. 9(1)(vii): Income deemed to accrue or arise in India-Fees for technical services–DTAA-India-Germany-Japan-USA-Netherland-Italy-Australia-China-France. [S.195,Art. 7]
Payments received or receivable by non-resident in connection with provision of services of technical and professional personnel to an Indian group company is taxable in India in view of Explanation 2 to sec. 9(1).
The incomes received by the applicants from the Indian company were taxable as business profits under article 7 of the Double Taxation Avoidance Agreement between India and the respective countries (except the applicant in the Cayman Islands with which there was no Agreement, and the applicant in Italy), whose income was to be taxed in accordance with the provisions of the Act. Applicants were subject to withholding of tax under section 195.
Booz and Company (Australia) P. Ltd. In re (2014) 362 ITR 134 (AAR)

S.9(1)(vii): Income deemed to accrue or arise in India- Fees for technical services-Sales promotion services-Not taxable-DTAA-India –Sri Lanka. [S.90,Art.14]
The applicant appointed an individual resident of Sri Lanka as resident executive for promotion of sale in Sri Lanka of books published by the applicant. The applicant has paid certain remuneration to the resident executive by remitting it to her bank account in Sri Lanka . The applicant approached AAR for its ruling on the taxability of such remuneration. AAR held that payments for sales promotion services rendered by a Sri Lanka resident were not FTS under the Act and were also not taxable in terms of Article 14. (Dt 30-04-2014)
Oxford University Press In re (2014) 45 taxmann.com 282/364 ITR 251/268 CTR 393/103 DTR 225 (AAR)

S.10(4)(ii):Exempt income- Non-resident (External) Account-Amount in non-resident (External) Account is exempt from tax.[S.5(2)(a), 6(5)]
Bank account is non-resident (External) Account therefore Amount in non-resident (External) Account is exempt from tax.
(AY. 2008-09, 2009-10)
Arvind Singh Chauhan .v. ITO (2014) 101 DTR 79/31 ITR 105/161 TTJ 791/147 ITD 509(Agra)(Trib.)

S. 10(14):Exempt income–Conveyance expenses-No relevance or bearing on actual expenditure-Taxable as salary-Tax is deductible at source.[S.15,17, 195, 201]
The conveyance allowance paid to defray expenses connected with journeys from residence to office and back could not be treated as an allowance paid for defraying expenses wholly, necessarily and exclusively in the performance of the duty. Held, that the conveyance allowance paid by the assessee without any relevance or bearing on the actual expenditure incurred by the employees, could not come within the purview of s. 10(14) and for that matter since the standard deduction granted u/s 16(1) was meant to take care of the expenses of an employee, incidental to his employment, including the journeys from residence to office and back, the conveyance allowance was clearly taxable under the head "Salary" and the assessee could not have excluded the conveyance allowance paid, while computing the tax deductible at source, from the salaries paid by it to its employees. (AY. 1995-96)
SriramRefregeration Industries.v. ITO (2014) 361 ITR 119 (AP)(HC)

S. 10(19A): Exempt income - Annual value of any one palace in occupation of ruler-Meaning of "in the occupation"-Not exclusively used not entitled to exemption.[S.2(2), 22, 23,Wealth–tax Act,1957, 5(1)(iii)]

Section 10(19A) of the Income-tax Act, 1961, postulates exemption from income-tax on "the annual value of any one palace in the occupation of a Ruler". There is substantial similarity in the language of section 5(1)(iii) of the Wealth-tax Act, 1957, and section 10(19A) of the 1961 Act on all relevant aspects except that word "building" has been substituted by "palace" in the latter. The occupation of the Ruler in the palace would, therefore, be a necessary pre-condition for claiming exemption. In a case where the Ruler has not been able to show that the palace declared as his official residence was exclusively in his occupation, he would not be entitled to any exemption.

CIT .v. Maharao Bhim Singh of Kota (2014) 365 ITR 485 (FB) (Raj.)(HC)

S. 10(20A) : Housing Boards–Conditions precedent–Authority constituted in India.

Assessee was a public company incorporated under the Companies Act 1956. It was set up for purpose of development, granting financial assistance and marketing products of small scale industries and also constructing and managing industrial estates. It was fully controlled by the State Government. It had filed NIL returns for A.Ys. 1998-99 to 2000-2001 claiming exemption under section 10(20A). During the course of assessment proceedings, the AO held that the assessee was not an authority constituted in India by or under any law but a Corporation incorporated under the Companies Act. He concluded that the assessee had not fulfilled the provisions contained under section 10(20A) to avail exemption and was not dealing in housing accommodations for the purpose of planning, development and improvement of cities, towns, villages or both. Both the CIT(A) and the ITAT upheld the order of the AO. On further appeal, the High Court upholding the orders held that to claim exemption, the person must be an authority and the said authority should be constituted in India by order under any law, such law should be enacted either for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of planning, development or improvement of cities, towns and villages or for both. The assessee was incorporated pursuant to the resolution of the Government of Karnataka, but not constituted under any law. It was incorporated for the purpose of achieving certain objects and cannot be equated with the authority constituted in India by or under any law enacted. From the object of the assessee, it cannot be treated as an authority under article 12 of the Constitution of India. Since the assessee is not discharging the functions of housing accommodation and for the purpose of planning and development of the Cities, towns and villages, the assessee does not fall under the purview of Section 10(20A) of the Act. (AY. 1998-99 to 2000-01)

Karnataka State Small Industries Development Corpn. Ltd. .v. ACIT (2014) 220 Taxman 4 (Mag.) / (2013) 40 taxmann.com 212 (Karn.)(HC)

S.10(21): Scientific research association–Royalty and service charges-Factors to be considered-Matter remanded. [S.35(1)(ii), R.5D]

The fact that the association was receiving payments towards royalty and service charges was not by itself ground to hold that the association is not a scientific research association. Whether and, if so, to what extent any activity constitutes scientific research, is a question which the Board is required to refer to the Central Government and the decision of the Central Government would be final. According to the petitioner, the Board in its case had not made any such reference to the Central Government and the Central Government had also not taken a definitive decision as to why the petitioner did not fall within the category of "scientific research association". Therefore, matter was directed to be decided afresh The Court also observed that the Central Government will examine the observations made as also requirement of rule 5D of the Income tax Rules , 1962 and directed the Central Government to decide the issue within three months.

Centre for Development of Telematics v. UOI (2014) 360 ITR 184 (Delhi)(HC)

S.10(23AAA):Employee welfare fund–Approval by Commissioner- Contravention of s.11(5)-Exemption cannot be denied.[S.11(5)]

Once the fund is approved by the CIT in accordance with the rules, the contributions made by the employees to the said fund do not from part of the total income and consequently it does not attract

tax, notwithstanding the fact that amount was deposited with two financial institutions not falling under purview of section 11(5). (AYs. 2000-01 & 2001-02)

CIT.v. KSRTC Employees Death-cum-Retirement Benefit Fund (2014) 98 DTR133/225 Taxman 113 (Karn.)(HC)

S. 10(23C):Exempt income–Approval after 1-12-2006 continues to remain in force until withdrawn. (R.2CA, IT Rules 1962)

Where assessee was granted approval after 1-12-2006 by Chief Commissioner under section 10(23C), same would be a one-time affair and continues to remain in force till it is withdrawn; hence, assessee's application for extention of approval would be redundant. (AY. 2008-09 to 2010-11).

Sunbeam Academy Educational Society .v. CCIT (2014) 365 ITR 378 (All.)(HC)

S.10(23C):Exempt income–Educational institution-Property purchased in name of director of educational institution but transferred subsequently to educational institution-Entitled to exemption.[S. 11]

Property was purchased in the name of director of educational institution but was transferred subsequently to the educational institution. Held, there was no violation of provisions of s. 10(23C)(vi) or s. 11, and Assesseewas entitled to exemption.(AY.2004-05)

CIT .v. Sunbeam English School (2014) 361 ITR 325 / 100 DTR 123 / 217 Taxman 331(All.)(HC)

S. 10(23C): Exempt income-Maternity hospital–Medical attention-Entitled to exemption-Matter remanded to AO.

The expression "medical attention" cannot be read to be confined to medical treatment of persons suffering from an illness or a mental disability alone. If that were the intent of the Legislature, the sub-clause would have been framed differently stipulating that the subsequent provisions for the reception and treatment of persons during convalescence, rehabilitation or in regard to providing medical attention would be of those suffering from an illness or mental disability. Prevalence of mental disability is not governing requirement of entirety of sub-clause (iiiae).Assessee being a maternity hospital was entitled to exemption. (AY. 2009-10)

Nehru PrasutikaAspatalSamiti.v. CIT (2014) 361 ITR 68 / 100 DTR 172/221 Taxman 300 (All.)(HC)

Editorial: Order of Tribunal in CIT v. Nehru PrasutikaAspatalSamiti (2013) 26 ITR 376 (Agra)(Trib.) is reversed.

S. 10(23C): Exempt income-Educational institution–Conducting examinations-Matter remanded.

One of the activities undertaken by the assessee was to conduct examinations and several candidates participated in the examinations. The results secured helped colleges select students for further studies. Course material, syllabus, contents of papers, question papers, etc., were part and parcel of the education system. Therefore, the assessee could not be denied the character of "other education institution" because it conducted examination or tests. In depth and proper verification or examination was required to be made before it was held or observed that the activities of the assessee were not genuinely charitable or were not being undertaken in accordance with the provisions of section 10(23C)(vi). This necessarily entailed and required the assessee's co-operation and furnishing of full details. General observations should not and cannot become the basis of invoking the thirteenth proviso to section 10(23C)(vi).No finding that assesse was carrying on activities which were not solely educational-Matter remanded.(AYs. 2005-2006, 2006-2007, 2007-2008)

All India Management Association .v. DGIT (E) (2014) 362 ITR 451 (Delhi)(HC)

S.10(23C): Exempt income-Educational institution–Not conducting classes but affiliating schools, prescribing syllabus and conducting examination is eligible exemption.

It is not mandatory to hold classes for an institution to qualify and to be treated as an educational institution. If the activity undertaken and engaged is educational, it is sufficient. Held, that the assessee did not conduct classes nor was it directly engaged in teaching students. The assessee affiliated schools, prescribed syllabus and conducted examination for students. The assessee was

authorised and permitted to conduct the examinations and the results enabled students to get admission at the graduate level. It was not disputed that the exams conducted by the assessee were recognised. The assessee was an educational institution within the meaning of section. 10(23C)(vi). (AYs. 2008-2009, 2009-2010, 2010-2011)

Council for the Indian School Certificate Examinations .v. DGIT(E) (2014) 362 ITR 436 /224 Taxman 210/ 269 CTR 228(Delhi)(HC)

S.10(23C): Educational institution –Imparting education to girls-The object clause of the trust deed were read in a holistic manner- Refusal to grant registration was not justified. [S. 10(22)

The main object of the assessee-trust was to impart education to girls. Two factors weighed with the Chief Commissioner while rejecting the claim of the trust. Firstly, a view was taken that all the objectives of the trust were not solely for carrying out educational activities. The second factor was that educational activity of the trust was limited to only a particular district in the State of Assam. Both the factors and the decision of the Chief Commissioner based thereon were fallacious. The trust deed had to be read as a whole. If the object clause of the trust deed were read in a holistic manner, it would show beyond any reasonable doubt that the principal objective of the trust was to establish and maintain educational institution in the country. The order refusing approval was not valid and was liable to be quashed.

Sree Kanya Pathsala Trust .v. UOI (2014) 360 ITR 60/101 DTR 361 /267 CTR 283(Gauhati)(HC)

S.10(23C):Exempt income-Educational institution-An institution which regularly makes more than 10% – 15% surplus is existing for profit & is not eligible for exemption-University was not a "State" with in the meaning of article 289(1) of the Constitution of India . .[S.4, Constitution of India , Art, 12, 131, 289]

As long as "surplus" is "reasonable surplus", there should not be any difficulty in giving exemption u/s 10(23C) (iiiab) of the Act. "Surplus" cannot be more than 10% – 15% so as to meet contingencies or unforeseen expenditure. If University or an educational institution under the guise of "surplus" start making huge profit, in our opinion, it would cease to exist for net making profit and in that event would not be entitled for exemption under this provision. (AY. 2004-05 to 2009-10)

Visvesvaraya technological University .v. ACIT(2014) 362 ITR 279/224 Taxman 89 / 100 DTR 89 /224 Taxman 89 / 267 CTR 40(Karn.)(HC)

S. 10(23C): Exempt income-One-time approval where approval granted after 13-7-2006-No necessity to accord subsequent approval unless approval withdrawn by competent authority - Denial of renewal of approval for 2012-13 - No opportunity of hearing afforded to assessee-Not justified.

Circular No. 7 of 2010, dated October 27, 2010(2010) 328 ITR 43(St), clarified that once the approval has been granted under sub-clause (iv) of clause (23C) of section 10, there is no necessity to accord subsequent approval unless the approval is withdrawn by the competent authority and further the assessee had not been afforded opportunity of hearing and the order was violative of the principles of natural justice. Petition was allowed. (A.Y. 2012-13)

State Innovations in Family Planning Services Project Agency .v. UOI (2014) 365 ITR 359 (All.)(HC)

S.10(23C):Exempt income-Educational institution-Approval of prescribed authority is necessary for claiming exemption only u/s. 10(23C)(vi) and not u/s. 10(23C)(iiiad).[S.12A]

Assessee trust was registered u/s. 12A, running educational activities for school students through its institution. Assessee claimed exemption u/s. 10(23C)(iiiad). AO rejected said claim taking a view that assessee had not obtained approval from prescribed authority. Approval of prescribed authority is necessary for claiming exemption only under section 10(23C)(vi) and not under section 10(23C)(iiiad). Assessee existed solely for educational purpose and annual receipts of its institution, namely, ASK BV was less than Rs. one crore, assessee's claim for exemption was sustainable as per the provisions of the section 10(23C). Claim of assessee was allowed.(AY. 2009 – 2010)

A.S. Kupparaju & Brothers Charitable Foundation Trust v. Dy. DIT (E)(2014) 149 ITD 531/47 taxmann.com 165 (Bang)(Trib.)

S.10(23C):Exempt income-Educational institution-Provisions of section 10(23C)(vi) as it existed for A.Y. 2004-05 contemplated specific approval of prescribed authority as a condition precedent for grant of exemption-Denial of exemption was held to be justified.[S.12A]

Assessee-trust Educational institution was running an educational institution namely AIT for engineering students. claim for exemption u/s. 10(23C)(vi) in respect of said institution was rejected for not taking approval from prescribed authority. Assessee had applied for grant of approval and failure of prescribed authority to act upon said application resulted in automatic grant of approval. The provisions of s. 10(23C)(vi) as it existed for A.Y. 2004-05 contemplated specific approval of prescribed authority as a condition precedent for grant of exemption. Therefore, in absence of such an approval, assessee's claim for exemption could not be allowed. (AY.2004-05)

A.S. Kupparaju & Brothers Charitable Foundation Trust .v. Dy.DIT(E)(2014) 149 ITD 531/47 taxmann.com 165 (Bang.)(Trib.)

S.10(23C):Hospital-Exemption is automatic for entities which are wholly or substantially funded by Government of India or State Government.[S.11,12AA]

The assessee, an association of persons, was established by the Government of Karntaka for charitable purposes. The assessee had received grant of a sum from State Government. At end of the relevant year the assessee had an unutilized fund which was claimed by the assessee as exempt under section 11. The Assessing officer found that the assessee was not registered under section 12AA, held that the assessee was not entitled for exemption under section 11. The CIT(A) affirmed order of the Assessing Officer. On appeal by the assessee before the tribunal, the tribunal held that the assessee has been recognized as a Government established, exemption under section 10(23C) *(iiiac)* is automatic for entities which were wholly or substantially funded by the Government of India or State Government as the case may be. Therefore the assessee is entitled for exemption under section 10(23C) *(iiiac).*(AYs.2008-09,2009-10)

District Health & Family Welfare Society .v. DCIT (2014) 61 SOT 41(URO)/(2013) 24 ITR 604(Bang.)(Trib.)

S. 10(23C)(iiiac) : Hospital-Maternity hospital – No treatment of illness-Not eligible for exemption.

Tribunal held that a maternity hospital is not hospital for treatment of illness, etc. Hence, not eligible for exemption under section 10(23)(iiiac). (AY. 2009-10)

Dy. CIT .v. Nehru Prasutika Asptal Samiti (2014) 159 TTJ 813 / (2013) 26 ITR 376 / 145 ITD 8 (Agra)(Trib.)

S. 10(23C)(iiiad) : Educational institution-Others objects-Merely having the other objects – Exemption cannot be denied.

It was held that when save and except educational activity the assessee did not carry on any other activity, merely because there exists object which is not related to educational activities, is not sufficient to deny the benefit of s. 10(23C)(iiad).(AYs. 2006-07, 2007-08)

Geetanjali Education Society .v. ADIT(E) (2014) 101 DTR 337 / 223 Taxman 167 / 267 CTR 369 (Karn.)(HC)

S.10(23C)(vi): Educational institution–Approval of Chief CIT-Diversion of funds for personal use and therefore application for exemption was correctly rejected

Application for approval for A.Y. 2007-08 made on 26.12.2008 was barred by limitation in terms of fourteenth proviso to s. 10(23C). Chief CIT found that the assessee institution was existing for profit motive and there was diversion of funds for personal use and therefore application for exemption u/s. 10(23C)(vi) was correctly rejected. (AY. 2007-08 to 2009-10)

Bal Bharti Nursery School .v. CCIT (2014) 98 DTR 366/221 Taxman 77 (All.)(HC)

S. 10(23G) : Infrastructure facility-Bonds-Exemption-Notification-Pre-condition of notification in Official Gazette is not applicable to bonds purchased by assesse during financial year 1997-98.

The Court held that once the bonds which had been issued, in respect of which exemption was claimed by assesse were issued on February 18, 1998, the requirement of notification in the Official Gazette as a condition precedent for exemption under section 10(23G) of the Act was inapplicable. Therefore the Tribunal was correct in holding that the pre-condition of notification in the Official Gazette , introduced by the Finance, Act ,1997 ,with effect from April 1, 1988 was not applicable to the bonds purchased by the assesse during the financial year 1997-98 relevant assessment year 1998-99. Appeal of revenue was dismissed .(AY.1998-99)

CIT v. Lord Krishna Bank Ltd. (2014) 366 ITR 416 / 107 DTR 138 (Bom.)(HC)

S. 10(23G) : Infrastructure undertakings-Amalgamation-Benefit which has accrued to investor / assessee cannot be taken away just because investee company which had originally been approved u/s.10(23G) by Government has amalgamated into another company. [R. 2E]

Assessee, engaged in business of investment, had claimed exemption u/s. 10(23G) in respect of long term capital gain which arose on account of sale of equity shares of a company named RSPCL. On date of acquisition of shares, RSPCL had been exempted u/s. 10(23G) and also on date of sale of shares, RSPCL had enjoyed the said exemption. AO disallowed the exemption on the ground that RSPCL had cesed to exit from 1-04-2003 due to amalgamation with other company and exemption was not available to the assesse unless the new company was eligible enterprises approved by the competent authority. On appeal the Tribunal held that benefit which has accrued to investor/assessee cannot be taken away just because investee company which had originally been approved u/s. 10(23G) by Government has amalgamated into another company. Approval given u/s. 10(23G) had not been withdrawn as provided in rule 2E. Hence, exemption u/s. 10(23G) was admissible to assessee. (AY.2004-05)

Goa Trading (P.) Ltd. .v. ITO (2014) 146 ITD 737 / (2013) 40 taxmann.com 379 (Mum.)(Trib.)

S.10(38):Long term capital gains-Securities-Shares sold after two years from their conversion (stock in trade to investment) did not mean the conversion was illegal and done with an intention to claim exemption u/s. 10(38)-Income is taxable under the head 'capital gain' and eligible for exemption u/s.10(38). [S. 45]

The assessee filed its return of income declaring long-term capital gains arising from sale of shares which was claimed as exempt income u/s. 10(38). The AO took a view that the business of the assessee was not to invest in shares but to deal them as a stockbroker and trader and, consequently, held the income to be business income and not capital gains. Further, he observed that conversion of stock-in-trade into investment was done with the intention not to pay tax. The Tribunal, after considering the facts, held the income to be taxable under the head "capital gains". The High Court observed that the Assessee had converted and transferred the shares in question under the head "investment" on 1 April 2004 and sold them after two years from the date of conversion, and this was disclosed in the financials. The AO never disputed when the conversion took place. Mere fact that the income is now exempt from tax after the introduction of Section 10(38) w.e.f. April 01, 2005, does not mean that the conversion was illegal. Further, the shares had been sold a considerable amount of time after the conversion. The High Court finally, accepted the assessee's position of treating the income from sale of shares, taxable as "Capital gain". (AY. 2006-07)

CIT .v. Express Securities (P.) Ltd. (2014) 220 taxman 365/105 DTR 86/364 ITR 488(Delhi)(HC)

S.10A: Free trade zone–Conversion of firm into company–Splitting up or reconstruction-Entitled to exemption.

All partners of erstwhile firm became shareholders of company and no outsiders were inducted. Also, all assets and liabilities were transferred to the company. Held, there was no transfer of business upon conversion of firm into company. Since the assessee fulfilled all conditions enumerated in s. 10A, deduction was to be allowed. (AYs. 2002-03 to 2004-05)

CIT .v. Foresee Information Systems P. Ltd. (2014) 365 ITR 335 (Karn.)(HC)

S. 10A : Free trade zone -Initiated production in 1999 – Prior to its registration as STPI in 2002–Benefit cannot be denied.

High Court held that in order to claim deduction, under section 10A, twin conditions are that an undertaking in hardware technology park or software technology park must be in existence commencing its production on or after 1-4-1994 and it should not have been formed by splitting up or reconstruction of an existing business. Assessee was in software technology park and registered as STPI in 2002 and further assessee was not formed by splitting up or reconstruction of business already in existence, mere fact that assessee was in existence since 1999, i.e., prior to date of registration on 27-3-2002, would not disentitle assessee from claiming benefit under section 10A (AYs. 2003-04 to AY 2005-06)

Nagesh Chundur .v. CIT (2014) 220 Taxman 47 / (2013) 358 ITR 521 / 39 taxmann.com 190 (Mad.)(HC)

S. 10A: Free trade zone–Set off of losses–Export processing zone unit-Brought forward losses of non export processing zone unit is not to be deduced or reduced from profit /income of export processing unit.[S.10B, 80A]

Brought forward losses of non-export processing zone unit cannot be deducted or reduced from profit/income of export processing zone unit. (AYs.2002-2003, 2003-2004)

CIT .v. TEI Technologies Pvt. Ltd. (2014) 361 ITR 36 (Delhi)(HC)

S. 10A: Free trade zone–Manufacture–Making of jewellery-Entitled to exemption.

Process of making jewellery amounts to manufacture and assessee is entitled to exemption under section 10A. (AYs.2003-2004, 2005-2006)

CIT .v. Jayshree Gems and Jewellery (2014) 362 ITR 272 (Delhi)(HC)

S.10A: Free trade zone – Donation for charitable purposes – Benefit can be claimed both under sections 10a and 80G. [S. 80G]

New industrial undertaking in free trade zone which gave donation for charitable purposes is eligible for benefit can be claimed both under sections 10A and 80G. S. 10A is an exemption s. whereas s. 80G is a deduction s. and, therefore, there would be no double deduction in respect of the same item, even if a benefit under both sections has been claimed. (ITA no 1192 of 2006 dt 22-4-2013).(AY. 1998-99)

CIT .v. Infosys Technologies Ltd. (2014) 360 ITR 714/104 DTR 282/ 270 CTR 523 (Karn.)(HC)

S.10A: Free trade zone-Interest income out of surplus funds in Banks and sister concerns & EEFC account is eligible for exemption.[S.10B]

The question is whether the interest received and the consideration received by sale of import entitlement is to be construed as income of the business of the undertaking. There is a direct nexus between this income and the income of the business of the undertaking. Though it does not partake the character of a profit and gains from the sale of an article, it is the income which is derived from the consideration realized by export of articles. In view of the definition of 'Income from Profits and Gains' incorporated in Subsection (4), the assessee is entitled to the benefit of exemption of the said amount as contemplated under Section 10B of the Act. (AYs. 1998-99 & 2001-02)

CIT .v. Motorola India Electronics (P) Ltd. . (2014) 98 DTR 81/265 CTR 94(Karn.)(HC)

S. 10A : Free trade zone-Opting out of provisions of s. 10A in terms of sub-section (8) will not extend period of benefit beyond 10 years from previous year relevant to assessment year in which assessee begins to manufacture or produce articles or things.[S.10A(3),10A(8)]

The assessee began to manufacture or produce articles or things in the previous year relevant to AY 95-96. Assessee claimed benefit of section 10A for first time in year 1998-99. By virtue of amendment to section 10A(3) effective from A.Y. 1999-2000, benefit of exemption was granted for ten consecutive years started from assessment year in which assessee began to manufacture article or thing.Since assessee started its manufacturing activities from A.Y. 1995-96, band of 10 years as per amended law would be from A.Y.1995-96 to A.Y. 2004-05 only.Therefore the assessment year from

which the begin to get deduction u/s.10A will be consecutive years commencing from A.Y. 95-96. The law as it existed prior to Substitution of Sec.10A of the Act w.e.f. 1-4-2001 was deduction was to be allowed for 5 consecutive assessment years falling within a period of 8 years from the Assessment year in which the industrial undertaking begins to manufacture or produce articles or things. From AY 01-02 instead of 5 consecutive assessment years out of 8 assessment years from the Assessment year in which the industrial undertaking begins to manufacture or produce articles or things, deduction u/s.10A of the Act was allowed for a period of 10 consecutive years from the Assessment year in which the industrial undertaking begins to manufacture or produce articles or things. The Assessee for AY 95-96 to 97-98 the could not get the benefit of deduction u/s.10A of the Act, may be due to absence of profits or by exercise of its option to choose the following 5 years to claim deduction u/s.10A as per the law as it existed then. According to the law as it existed upto AY 00-01 the Assessee could have claimed deduction only upto AY 02-03 the end of the 8 year period from 95-96. The Assessee claimed deduction u/s.10A for AY 98-99 to 01-02. The Assessee opted out of the provisions of Sec.10A of the Act by virtue of the provisions of Sec.10A(8) of the Act which gives such opting out to an Assessee for AY 02-03 to 04-05. The band of 10 years as per the amended law would be from 1995-96 to 04-05 only. Out of the provisions of Sec.10A will not have the effect of extending the band period of 10 years. The Assessee could thus get the benefit of the amended law applicable from AY 01-02 only for 2 more years viz., A.Y. 03-04 & 04-05. The provision for opting out of the provisions of Sec.10A of the Act is intended to facilitate an Assessee who can get more benefit under any other provisions of the deduction under Chapter VIA of the Act. That provision cannot extend the period of benefit beyond 10 years from the previous year relevant to Assessment year in which the Assessee begins to manufacture or produce articles or things. Claim of assesse was rejected.(AY. 2008-09)

Aditi Technologies (P.) Ltd. .v.ITO(2014)149 ITD 515 / 47 taxmann.com 166 (Bang.)(Trib.)

S.10A:Free trade zone–Claim can be made before CIT(A)- Though approval of Director of STPI to EOU is sufficient for s. 10A, it is not so for s. 10B. For s. 10B, the approval of the Board appointed under I(D&R) Act is necessary. Claim for s. 10A can be made before CIT(A)[S.10B]

(1) The fact that the assessee is a 100% EOU approved by the Director, STPI does not mean entitle the assessee to deduction u/s 10B if the undertaking is not been approved by the Board appointed in this behalf by the Central Government in exercise of powers conferred by section 14 of the Industries (Development and Regulation) Act, 1951, which is an express requirement for claiming deduction u/s 10B of the Act because of Explanation 2(iv) below section 10B of the Act as held in Regency Creations 27 taxmann.com 322 (Del). The plea of the assessee that the High Court has not considered the argument that a conjoint reading of the Exim Policy/Foreign Trade Policy entitles the assessee to the benefits of section 10B of the Act, once the unit is approved as per the Exim Policy is not acceptable because, having regard to judicial discipline, the Tribunal cannot disregard the judgement of the High Court in the manner sought to be canvassed. In Technovate E Solutions P. Ltd 354 ITR 110 (Del) the Delhi High Court held that the approval granted by the Director of STPI is sufficient approval so as to satisfy the condition stipulated in section 10A(2)(i)(b) of the Act in view of the Instruction and communication of the CBDT and it was held that the approval granted by the Director of STPI would be deemed valid for the purposes of compliance with the conditions stipulated u/s 10A(2) of the Act. However, as the aforesaid judgement in Technovate E Solutions P. Ltd deals with section 10A of the Act and not with section 10B, it does not help the assessee in the present case.

(ii) However, the Revenue's contention that the assessee cannot be allowed the benefits of section 10A of the Act merely because the prescribed Audit Report in Form No.56F was not filed in the return of income, is quite erroneous because after denial of deduction u/s 10B of the Act in the assessment order, the earliest opportunity for the assessee to stake claim for deduction u/s 10A of the Act was before the CIT(A); and, the assessee made the claim before the CIT(A) along with the prescribed Audit Report in Form No.56F. The Delhi High Court in Valiant Communications (supra) in similar circumstances held that the claim of the assessee for deduction u/s 10A of the Act is required to be examined in accordance with law. (ITA No. 2554/PN/2012,Dt. 30/10/2014.) (AY.2009-10)

Clarion Technologies Pvt. Ltd. .v. DCIT(Pune)(Trib.) ;www.itatonline.org

S.10A : Free trade zone –Export turn over-Total turnover.
AO had reduced telecommunication and travelling expenses from export turnover. Tribunal held same was also to be excluded from total turnover for computing deduction under section 10A.Followed CIT v. Tata Elxsi Ltd (2012) 349 ITR 98 (Karn)(HC)(2007-08)
Witness Systems Software India (P) Ltd. v. Dy. CIT (2014) 61 SOT 64 (URO) / (2013) 34 taxmann.com 183 (Bang.)(Trib.)

S. 10A : Free trade zone-Export turnover-Total turnover-Where any expenditure is to be reduced from export turnover, same is to be excluded from total turnover also.
AOreduced the communication expenses from the export turnover for computation of deduction u/s. 10A. CIT(Appeals) without appreciating the fact that the communication expenses were consisting of telephone charges, and internet charges which were incurred in normal course of business and not specifically for the purpose of delivery of software outside India, should have directed to be excluded from the export turnover for computing the deduction under section 10A.Tribunal held that if these communication expenses are to be excluded from the export turnover, then the same should also be excluded from the total turnover for computing the deduction u/s. 10A. (AY. 2005-06)
Intoto Software India (P.) Ltd. .v. ACIT(2014) 146 ITD 360 / (2013) 35 taxmann.com 421/30 ITR 504 (Hyd.)(Trib.)

S. 10B : Export oriented undertakings-In absence of specific definition of term 'manufacture', it includes every process which ultimately results in production of new article having a different character.[S.2(29B)]
The assessee was engaged in the business of manufacture and export of cut and polished granite building slabs was a 100 per cent Export Oriented Unit. It claimed exemption u/s. 10B.The AO rejected the assessee's claim on the ground that cutting and polishing of granite slabs did not amount to manufacture or production of an article or thing. He further contented that with the deletion of the definition 'manufacture' contained in section 10B from the year 2001, the expression 'manufacture' had to be understood in the normal sense and hence polishing of rough granite was not a manufacture or production of an article or thing. The CIT(A) and Tribunal allowed the appeal filed by the assessee.

On appeal by the department, the High Court observed that even though the definition of 'manufacture' was omitted from section 10B w.e.f. the year 2001, yet u/s. 2(29BA) inserted w.e.f. the year 2009 under the Finance (No. 2) Act, 2009, the term 'manufacture' was defined. However, during the year under consideration, there was no definition of manufacture existing and hence, in the absence of any specific definition, as per common man’s understanding the expression 'manufacture' would include every process, which would ultimately result in the production of new article having a different character in view. Accordingly the appeal filed by the department was dismissed. (AY. 2003-2004 to 2005-2006)
CIT .v. Pallava Granite Industries (I) (P.) Ltd. (2014) 221 Taxman 107(Mag.) (Mad.)(HC)
Super Auto Forge Ltd v. ACIT (2014) 365 ITR 318 (Mad.)(HC)

S.10B : Export oriented undertakings -Training fees-Not profits and gains derived from export oriented undertaking-Deduction is not allowable.
The assessee being 100% export oriented unit claimed exemption u/s.10B of the Act on the income received by them as by way of training fees. The AO disallowed the claim on the view that the relationship between the assessee and the trainees was not that of the employer and employees and training was given to the outsiders. On appeal CIT (A) allowed the appeal as training being recognized as part of software development in the EOU, the receipt from training the programme was exempt u/s 10B of the IT Act. On appeal in Tribunal dismissed assesses appeal and held that as income falling under 10B was earned as fee received by the assesse for imparting training to outsiders by using some infrastructure which might be lying idle as the assesse had not exported any article or goods or software during the period relevant to the assessment year under consideration. On an appeal the Court held that on admitted facts, the receipt was related to a fee charged by it, on the training of Professionals who are admittedly not its employees and that the profits and gains not being one rising on account of manufacture or production of an article or thing, the benefit u/s 10B has no relevance.

Further the court held that the assessee shows that the receipts come clearly within the language of the section, it is not possible for the court to give an elastic interpretation to the clear words based on tax treatment under different enactments or the schemes formulated for setting up of industries in a particular area or zone. (AYs. 1996-97, 1997-98, 1999-2000)
Penta Medi Graphica Ltd. .v. CIT (2014) 264 CTR 543 (Mad.)(HC)

S. 10B : Export oriented undertakings-Mistake in mentioning the section in the return for claiming the exemption–Exemption cannot be denied. [S.80IB, 251]
Assessee was eligible for exemption under section 10B and it had been found to be in order except that instead of mentioning exemption under section 10B, while e-filing return, it was wrongly on account of typographical error mentioned section 80-IB, it could not be said to be such a mistake by which exemption could be disallowed out rightly. (AY.2008-09)
CIT .v.Rajasthan Fasteners (P.) Ltd. (2014) 363 ITR 271 / 222 Taxman 100 (Mag.) / 266 CTR 401 (Raj.)(HC)

S. 10B : Export oriented undertakings-Manufacturing-Food items- Outsourcing-Only some follow up action was done by assessee-Not entitled to exemption.
A part of manufacturing activity of the assessee was outsourced. Raw material for preparation of snack items was not procured and supplied by assessee. Only some follow up action taken by assessee for packing and storing snacks was done by the assessee. Held, this did not amount to manufacture or producing an article or thing. Hence, assesseewas not entitled to exemption.(AY.2008-09)
Deepkiran Foods P. Ltd. .v. ACIT (2014) 361 ITR 437 /269 CTR 281/ 224 Taxman 135 / 105 DTR 29 /(Guj.)(HC) (Mag)(Guj.)(HC)

S.10B:Export–oriented undertakings-Manufacture–Processing of flowers amounted to manufacture-Three directors of Pvt. company being partners of the firm can be said that the firm was set up by reconstruction-Entitled exemption.
In the absence of a definition, the word "manufacture" has to be given a meaning as is understood in common parlance. It is to be understood as meaning the production of articles for use from raw or prepared materials by giving such materials new forms, qualities or combinations whether by hand labour or machines. If the change made in the article results in a new and different article then it would amount to manufacturing activity. Thus, if the commodity can no longer be regarded as the original commodity but instead is recognised as a new and distinct article, then the activity of manufacture can be said to have taken place.

Held, apart from cleaning and grading, the assessee had taken further processing; that what was purchased as raw material and what was exported as a product for export were totally different items i.e. handicraft items of dried flowers and parts of plants. The process that the assessee had undertaken clearly pointed out the irreversible nature of the final end product from the raw material purchased. Given the admitted fact that what was purchased by the assessee as raw material and exported goods were totally different items and commercially known as different products going by the definition "manufacture".

The Tribunal had also pointed out that the firm was constituted with the capital contribution by the partners from their personal funds. Neither the presence of the partners nor the products dealt with would be of any guidance to decide the issue raised by the assessee. So too the workmen working in the assessee's business and in the company. In the absence of any material to substantiate the contention of the Revenue that the firm was constituted by splitting up of the company, the firm was not formed by splitting up of the company. The assessee-firm was entitled to exemption under s. 10B.(AYs. 2004-05, 2005-06 , 2006-07 2008-09)
CIT .v. Deco De Trend (2014) 360 ITR 1/264 CTR 78 (Mad.)(HC)

S.10B:Export–oriented undertakings–Manufacture-Mix cable scrap , mix metal scrap-Old used transformers-All process amounted to manufacturer-Entitled to exemption.[S.2(29BA)]

The word "manufacture" implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinct name, character or use. The assessees would put the imported material to series of manual and mechanical processes and through such exercise so undertaken, bring into existence entirely new, distinct and different commodities which are marketable. Thus, the Tribunal, in our opinion, correctly came to the conclusion that this process amounted to manufacturing.(AY. 2003-04

CIT .v. MiteshImpex(2014)367 ITR 85/ 104 DTR 169/270 CTR 66/225 Taxman 168(Mag.)(Guj.)(HC).

S.10B : Export oriented undertakings-Trading-Granite monumental slabs-Eligible for deduction.

The assessee is a manufacturer and exporter of granite monumental slabs. During the course of the assessment proceedings the Assessing Officer noticed that the assessee company has purchased granites to the extent of Rs.42,62,996/- and the same was exported. The only question before us is whether the assessee is eligible for the deduction under section 10B in respect of trading profits or not. The Tribunal held that in the case of T. Two International (P) Ltd. v. ITO (26 SOT 583) (Mum) has observed that to allow deduction u/s 10A the material consideration is export of eligible goods and not whether those goods are manufactured or purchased by the assessee. Profits from both, the self-manufactured as well as trading in goods have been made eligible for deduction u/s 10A of the Act. However, this court is of the opinion that section 10A and section 10B are similar. The Tribunal followed its own order in the case of T. Two International (P) Ltd. (supra) and allowed assessee's Appeal.(AY. 2005-06)

GTP Granites Ltd. v. ACIT (2014) 61 SOT 36(URO.) / (2013) 26 ITR 369 (Chennai)(Trib.)

S. 10B : Export oriented undertakings-Trading-Granite monumental slabs-Held to be eligible deduction.[S.10B]

The assessee is a manufacturer and exporter of granite monumental slabs. During the course of the assessment proceedings the Assessing Officer noticed that the assessee company has purchased granites to the extent of Rs.42,62,996/- and the same was exported. The only question before us is whether the assessee is eligible for the deduction under section 10B in respect of trading profits or not. The Tribunal held that in the case of T. Two International (P) Ltd. .v. ITO (26 SOT 583) (Mum) has observed that to allow deduction u/s 10A the material consideration is export of eligible goods and not whether those goods are manufactured or purchased by the assessee. Profits from both, the self-manufactured as well as trading in goods have been made eligible for deduction u/s 10A of the Act. However, this court is of the opinion that section 10A and section 10B are similar. The Tribunal followed its own order in the case of T. Two International (P) Ltd. (supra) and allowed assessee's Appeal. (AY. 2005-06)

GTP Granites Ltd. .v. ACIT (2014) 61 SOT 36 (URO) / (2013) 26 ITR369 (Chennai)(Trib.)

S. 11: Property held for charitable purposes – Denial of exemption - Denial of exemption only to extent provision violated and not total denial of exemption. [S. 13(1)(d)]

The assessee-trust provided employment to poor women, assisted weaker sections of society for personal development, maintained destitute homes and rehabilitated victim of national calamities. It invested a sum of Rs. 20,000 in the shares in MIOT Hospitals Ltd. Since section 13(1)(d) of the Income-tax Act, 1961, recognises investment only in specified assets, failure to invest in such specified business would disentitle the assessee for exemption. Consequently, the Assessing Officer denied the exemption under sections 11 and 12. Held, denial of exemption should only be to the extent of the income which was violative of section 13(1)(d) and not the total denial of exemption under section 11. (A. Y. 2001-2002, 2002-2003, 2003-2004)

CIT v. Working Women's Forum (2014) 365 ITR 353 (Mad.)(HC)

S. 11 : Property held for charitable purposes – Grants received from State Government is not income.

The assessee was an agency incorporated to regulate blood transfusion in the State of Gujarat. During the year, the assessee received grants from the State Government which was distributed by it to

various blood banks in the State of Gujarat in the succeeding month of April, 2009. During the course of the assessment proceeding, the AO noticed that assessee had exercised the option of Explanation 2 to section 11(1) of Rs. 7,68,96,000 and claimed the same in return of income. The AO held that the assessee was not entitled to claim exemption as deemed application and added the amount of grants received to the assessee's income. The CIT (A) confirmed the action of the AO. However, the ITAT allowed the appeal of the assessee.

On appeal by the department, the High Court observed that the fact that during the relevant year, the assessee received the amount of Rs. 534.06 lakh as grant from the State Government on the last date of the relevant accounting year, i.e., 31-3-2009 and the grant amounted to Rs. 534.06 lakh was distributed to various blood banks in the State of Gujarat in the succeeding month of April, 2009 and the fact that the aforesaid amount was received by the assessee by way of grant from the State Government is not seriously disputed. Accordingly, following its own decision in the case of CIT v. Gujarat State Disaster Management Authority ITA No. 80 of 2010 it held that the amount received by the assessee by way of grant from the Government of Gujarat could not be said to be an income and dismissed the appeal of the department.

DIT (E) v. Gujarat State Council for Blood Tranfusion (2014) 221 Taxman 126 (Guj.)(HC)

S. 11 : Property held for charitable purposes - Depreciation – Not allowable in respect of assets – The cost of which was already been allowed as application of income. [S.32]

Depreciation was not allowable in respect of assets, the cost of which has already been allowed as application of income. (AY. 2006–07, 2007 – 08)

DIT (E) v. Charanjiv Charitable Trust (2014) 102 DTR 1 / 267 CTR 305 (Delhi)(HC)

S. 11 : Property held for charitable purposes –Once certificate of registration is granted-Exemption cannot be denied. [S. 12A]

Once certificate of registration is issued to a Trust, the requirements of provision 12A stands fulfilled. Hence, exemption u/s 11 cannot be denied.(AY. 2003 – 2004, 2006 – 2007)

CIT v. Lucknow Development Authority (2014) 265 CTR 433 / (2013) 219 Taxman 162 (All.)(HC)

S.11: Property held for charitable purposes-Activity not in accordance with objects–Major portion of income was spent towards construction of commercial complex-Not entitled to exemption.[S.2(15)]

Assessee-trust was held not entitled to exemption as major portion of income of trust was spent towards construction of commercial complex. The Object clause of bye-laws of trust did not show construction of commercial complex as object of trust. Also, commercial complex was not used for any of the objects of trust and donations received were considered as normal donation and not as donations towards corpus fund. (AY. 2001-02)

KammaSangham .v. DIT(E) (2014) 362 ITR 30 (AP)(HC)

S. 11:Property held for charitable purposes–On denial of exemption only net income to be taxed.[S.12A,57(iii)]

The exemption was denied for the relevant years on the ground that the assessee did not get registered under section12A.The assessee claimed before the CIT (A) that the entire expenditure should be allowed as deduction as the expenditure incurred by the assessee was only for the purpose of promoting sports events. The claim was accepted by the CIT(A) which was confirmed by Tribunal. On appeal by revenue the Tribunal held that if such expenditure was not allowed, it may amount to taxing the gross receipts of the assessee and not the income, which is not permissible under the Act. Moreover, up to the AY 2002-03 the assessee was exempt from tax under section 10(23C) ; from the AY 2006-07 it had been granted registration as a charitable institution under section 12A making it eligible for the exemption under section 11. There was no infirmity or error of law in the decision of the Tribunal. (AYs. 2003-2004, 2004-2005, 2005-2006)

DDIT(E) .v. Petroleum Sports Promotion Board (2014) 362 ITR 235 (Delhi)(HC)

S.11: Property held for charitable purposes-Notice for accumulation-Exemption must be allowed.[Form No 10]

A request by letter complying with the requirement and furnishing all the information as required in Form 10 was made and there was sufficient proof before the AO that the amount was not only kept apart but was also spent in the next year, the adherence to the form and not substance, was not valid .The AO should allow exemption.(AY. 2008-09)

CIT .v. Moti Ram Gopi Chand Charitable Trust (2014) 98 DTR 68/360 ITR 598 (All.)(HC)

S.11: Property held for charitable purposes- Application of income–Set-off of expenses in subsequent year is allowed.

Expenditure incurred in the earlier year, repaid out of income of the current year amounts to application of income. (AY. 2005-06)

CIT .v. Punjab Mandi Board (2014) 98 DTR 267(P&H)(HC)

S. 11 : Property held for charitable purposes-Entire cost was held to be application of income-Depreciation was held to be allowable.[S.32]

The Tribunal held that the CIT(A) was justified in directing the Assessing Officer to allow depreciation to the assessee on the assets whose entire cost has been treated as application of income for the purpose of allowing exemption under section 11. (AY. 2010-11)

ACIT .v. Saraswati Gyan Mandir Shiksha Sansthan (2014) 163 TTJ 29(UO) (Luck.) (Trib.)

S. 11 : Property held for charitable purposes - Application of income - Purchase of land - Conditions complied. [S.12]

Assessee was running a school and declared nil total income. The Assessing officer held that Assessee spent less than 85 percent of total income and for claiming deduction u/s 11 & 12. Assessee had to apply 85 percent of its income for charities as per section 11(1)(a), Further Assessee had not filed form No. 10 intimating intention of accumulation over and above 15 percent of its income. Therefore deduction u/s 11(2) cannot be allowed. AO made addition of shortfall of application of income. The CIT (A) reversed action of AO by applying the judgment of CIT v. Mayur Foundation reported in 274 ITR 562. The Tribunal upheld the order of CIT (A) holding that the genuineness of the trust was not in doubt; that the trust had set apart the amount of donation for the purpose of purchasing land and constructing an orphanage thereupon; that the funds received by way of donations had been kept apart in fixed deposits of nationalized banks; and that the trustees or the settlers had not benefited by the failure or delay on the part of the trust to give notice of such accumulation. Accordingly, the Tribunal held that the assessee-trust had complied with all the requirements stipulated by the provisions of section 11(2). (AY. 2006-07)

Jt. CIT v. Sewa Education Trust (2014) 61 SOT 4 (URO.)(Agra) (Trib.)

S. 11 : Property held for charitable purposes-Publishing activity - Running its business on commercial lines with an object to establish a large publishing house, order denying exemption of income was upheld [S.2(15),12A].

Assessee-trust was registered with Director (E) under section 12A. Activity being carried out by trust was publishing of a daily newspaper. Assessee claimed that its publishing activity was in national interest and, therefore, must be considered as towards a charitable object. Revenue authorities, however, opined that assessee was engaged only in publication activity, undertaken on commercial lines in an organized and systematic manner, so that it constituted a business activity. Accordingly, assessee's claim for exemption of income under section 11 was rejected. On appeal Tribunal held that the income to be applied for charitable purposes is that derived from property held under trust. The property held under trust being not specifically defined would, therefore, have to be read as without limitation. The only limitation stipulated is per sub-sections (4) and (4A) of section 11, and is in respect of a business undertaking. The same stipulates that only where the business is incidental to the attainment of the objective/s of the trust, that, separate books of account being maintained in its respect, could a business undertaking be considered as a property held under trust. Section 11(1) is to be read in conjunction and harmony with sections 11(4) and 11(4A). It is, thus, only the business undertaking which qualifies as a property held under trust whose income would be eligible for

exemption under section 11(1). Given the orders by the Tribunal in the assessee's own case for some of the years under appeal, which have become final, as well as reliance thereon for other years, all that the assessee was required to exhibit in the set aside (or otherwise) assessment proceedings was of the publication business as being incidental to the attainment of its other objects, *i.e.*, as a fact, toward satisfaction of the requirement of the law under sections 11(4) and 11(4A), for the said business to be considered as property held under trust. That the said business does not by itself constitute a charitable object or purpose is no longer res integra in view of the findings by the Tribunal in its own case as well as the law as explained in Ideal Publications Trust v. CIT [2008] 305 ITR 143/172 Taxman 199 (Ker.). Certainly, there would be no surplus from the business as the profits generated would be required to meet the funding requirements of its capital expenditure as well as concomitant financial obligations, including servicing of debt. The focus of the management is clear, *i.e.*, to set up a large, if not a grandiose publishing house. No wonder the assessee has not been able to generate a 'surplus' (for charitable purposes) in the two decades of its functioning, and despite being run on commercial lines. The plea of no surplus, which is even otherwise not maintainable, is false.(AY.1998-99, 2000-01, 2003-04, 2007-08,2008-09)

Prabodhan Prakashan v. ITO (2014) 61 SOT 167/(2013) 38 taxmann.com 125. (Mum.)(Trib.)

S. 11 : Property held for charitable purposes - Interest on FDR.

The Tribunal held that the interest earned by assessee charitable trust on investment of surplus funds in FDR's is directly incidental to main activities hence eligible for exemption under section 11. (AY. 2009-10)

Dy. CIT .v. Nehru Prasutika Asptal Samiti (2014) 159 TTJ 813 / (2013) 26 ITR 376 / 145 ITD 8 (Agra)(Trib.)

S.11:Property held for charitable purposes–Application of income-Advance to purchase of land –Project grant neither income nor corpus-Interest on fixed deposit-Interest could not be treated as income.[S.13].

The Assessee-society was formed at the instance of Government of India with the object to create world class automotive testing, validation etc. It had given advance for purchase of land and upgradation of existing facilities. The Assessing officer held that said advance given was not according to section 11(5) and therefore violated provisions of section 13(1)(d). The CIT (A) allowed the assessee's appeal, inter alia observing that:

(a) project grant was neither income nor corpus of the assessee.

(b) Interest received on fixed deposit receipts made out of unutilized project grant received by the assessee was not an income of society. On appeal by the department before the tribunal, the tribunal confirmed the findings of the CIT (A) and held that the grant received was on capital account and not a recurring grant towards revenue expenses. Hence it could not be taken to income and expenditure account as per Accounting Standards 12 issued by the Institute of Chartered Accountants of India.(AY.2006-2007)

ADIT(E) .v. Natrip Implementation Society (2014) 61 SOT 43(URO) / (2013) 26 ITR 333(Delhi)(Trib.)

S.11:Property held for charitable purposes–Voluntary contributions-Exemption cannot be denied on the ground that trust is not registered under a state act or sums received are used for a different scheme as far as prior approval is received from donors.[S.12]

The assessee, a charitable trust registered u/s. 12A was engaged in helping dalits, women empowerment, upliftment of street children etc. The AO disallowed expenditure incurred on foreign travel for international conference as not being for charitable purpose. The AO also disallowed expenditure in view of that fact that assessee had incurred expense towards a different scheme and had not taken appropriate registrations under the state act. The CIT(A) however deleted the disallowances holding that the grants received for specific purpose do not form part of corpus of the assessee and can be utilized towards its objects as per the memorandum of association which in this case had the requisite prior approval of the donors. Also the international conference was attended for furtherance of objects of the trust which was an allowable expenditure. Not being registered under a state act does not render the assessee as non-charitable and hence it can claim deduction u/s. 11.

On appeal by the department, the Tribunal agreed with the findings of the CIT(A) and dismissed the revenue's appeal. (AY. 2007-08)

DDIT(E) .v. Society for Integrated Development in Urban and Rural Areas (2014) 29 ITR 506 (Hyd.)(Trib.)

S. 12A : Registration - Trust or institution – Registration cannot be cancelled once the CIT has satisfied himself about genuineness of objects of assessee and has granted registration u/s. 12AA.[S.12AA]

The assessee was a cricket association registered under the Tamil Nadu Societies Registration Act. The CIT after satisfying himself about the genuineness of the activities/objects of the assessee granted registration to it u/s. 12AA. Subsequently, the CIT noticed that the assessee was deriving income from holding cricket matches which was in the nature of trade or commerce or business. The CIT thereby cancelled the registration on the grounds that the activities of the association were not charitable in nature. The Tribunal confirmed the findings and the order of the CIT.

The High Court observed that the Supreme Court in the case of CIT v. Andhra Chamber of Commerce (1965) 55 ITR 722 had held that if the primary or dominant purpose of a trust or institution is charitable, another object which by itself may not be charitable but which is merely ancillary or incidental to the primary or dominant purpose would not prevent the trust or institution from being a valid charity. The High Court further observed that if a particular activity of the institution appeared to be commercial in character but was not dominant, then it was for the AO to consider the effect of section 11 in the matter of granting exemption on particular head of receipt and that the mere fact that the said income did not fit in with section 11 would not by itself lead to the conclusion that the registration granted u/s. 12AA was incorrect and hence had to be cancelled. The High Court held that the cancellation of registration in a given case could be done only under the stated circumstances u/s. 12AA(3) and in the background of the definition of charitable purpose relevant to the particular year of registration and since the CIT had satisfied himself about the objects of trust and genuineness of the activities, the CIT was wrong in cancelling the registration of the assessee without triggering the circumstances stated u/s. 12AA(3).

Tamil Nadu Cricket Association .v. DIT (2014) 221 Taxman 275 (Mad.)(HC)

S.12A:Registration-Trusts or institution-Cancellation of registration was held to be not justified-Direction to grant registration and 80G exemption was held to be valid. [S.12AA, 80G(5)]

The respondent was granted registration u/s 12A/12AA .Application for approval of renewal of exemption u/s 80G was filed by the petitioner. CIT cancelled the order for registration already granted to the respondent u/s 12AAA (1b) vide its order dt.19/5/2010 by exercising powers u/s 12AA (3) by observing that para 5.10 of the trust deed of the assessee states that the Board of Trustee can do all such works, as deemed fit by them & they have a discretion to do all such works which may or may not be in accordance with the object of the trust . On appeal in Tribunal, Tribunal passed common order wherein Tribunal granted registration & set aside the order passed by CIT. On further appeal in HC , the court held that CIT having not pointed out that any part of the income of the assessee trust was open or any activity other than objects of the trust was carried out, he was not justified in cancelling the registration u/s 12A already granted to the assessee merely on the ground that a clause in the Trust deed of the assessee empowers the board of trustee to do all such works as deemed fit by them and they have discretion to do all such works which may not be in accordance with the object of the trust. (AY.2006-07)

CIT .v. Krishna Chandra Ghandhi Janshika Nyas (2014) 99 DTR 433/222 Taxman 108/267 CTR 85 (Jharkhand)(HC)

S. 12A : Registration - Trusts or institution-Seized material-Dumb documents-Entitled registration.[S. 132]

The Tribunal held that the seized material being excel sheets are dumb documents do not form the reason to cancel the registration granted to the assessee the Tribunal also held that reopening of

assessment was invalid as it was based simply on suspicion. The addition was also deleted by the Tribunal as the assessee was entitled to the registration under section 12A.
ACIT .v. B. Srinivasa Rao (2014) 159 TTJ 483 (Hyd.)(Trib.)
ACIT.v. Prathima Educational Society (2014) 159 TTJ 483 (Hyd.)(Trib.)

S.12A: Registration - Trusts or institution- Charitable purpose-Main object of assessee was to protect investors- Object being of general public utility-Entitled to get registration. [S.2(15),10(23EA),12AA].
The object of the assessee was to protect investors by way of creating a fund ,which could provide compensation to the investors in case of loss on account of default by any member of a participating recognized Stock exchange. Fund created by is a public charitable fund having been set up to advance an object of general public utility assessee was entitled to get registration.
Inter-connected Stock Exchange Investor Protection Fund (ISE IPF) .v. DIT (2014) 146 ITD 443/(2013) 38 taxmann.com 329/162 TTJ 218/102 DTR 330 (Mum.)(Trib).

S.12A: Registration - Trusts or institution- Club-Cancellation of registration by treating the Trust as non genuine was held to be not justifiable.[S.2(15), 12AA]
The assessee is a club registered under section 12A as a charitable trust.AO held that the assessee was carrying on activities in the nature of trade commerce or business and its gross receipts there from during the year were excess of Rs 10 lakhs the limit then prescribed under the second proviso to section 2(15).According to AO, the provisions of section 12AA(3) was attracted, he accordingly cancelled the registration w.e.f assessment year 2009-10. On appeal, Tribunal held that cancellation of registration of the Trust was not correct. The only effect will be that the assessee will not be entitled for exemption or tax benefits which otherwise would have been available to it being registered as charitable institution, for the relevant year during which its income has crossed the limit of Rs 10 lakhs.Subject to the same ,the Tribunal ordered the restoration of the registration granted to the Trust.(AY.2009-10)
Ghatkopar Jolly Gymkhana .v.DIT(E) (2014)147 ITD 112/160 TTJ 620/99 DTR 41(Mum.)(Trib.)
Editorial: By the Finance Act ,2011 the limit prescribed under second proviso to section 2(15) has been increased to Rs 25 lakhs w.e.f 01-04-2012

S. 12AA: Procedure for registration- Trust or institution- Dominant objective for benefit of particular community – Failure to discharge burden-Denial of registration.
Held, the Commissioner held that the dominant nature of underlying the setting up of the assessee-trust was to benefit only the Agrawal community relying on the material as produced by the assessee. The assessee failed to discharge the burden to prove otherwise. Therefore, the denial of registration was justified. Also held that this would not affect the liberty granted to the society to file a fresh application for registration.
Agrawal Sabha (Regd.) .v. CIT (2014) 365 ITR 244 (All.)(HC)

S. 12AA : Procedure for registration-Trusts or institution-Tribunal examined the aims and the objects of the assessee trust directed the commissioner to grant registration-Upheld by the High Court. [S. 2(15), 80G]
Assessee trust was an educational institution registered under Societies Act. It had approval from All India Council for Technical Education to run engineering and other courses. Commissioner rejected the application for registration on the ground that assessee was not engaged in any charitable activities. Tribunal, after examining the aims objects and other activities finally observed that the registration and approval should be allowed to the assessee and accordingly directed the commissioner. High Court refused to interfere in the order passed by the Tribunal.
CIT .v. Rajarshi Rananjai Singh Shiksha Sansthan, Amethi (2014) 220 Taxman 2 (Mag.) (All.)(HC)

S. 12AA : Procedure for registration - Trust or institution – Merely because exemption is denied to a society under section 10(23C)(vi), registration under section 12AA cannot be denied. [S.10(23C)(vi), 11, 12]

The assessee was granted registration under Section 12A for being a charitable institution. The assessee claimed exemption u/s 10(23C)(vi) on the ground that the income earned is relating to educational institution solely for educational purpose. The AO held that in the objects of the institution certain other objects were there which proves that the institution has not solely been established for educational purpose and derecognised the registration granted under u/s 12A merely because the exemption u/s 10(23C)(iv) was denied. The Tribunal held that the proceeding u/s 10(23C)(vi) of the Act is an independent proceeding and cannot be made the sole ground for cancellation of the registration granted under Section 12A of the Act. It further held that the deduction under Section 11 of the Act has been allowed to the assessee in the previous years and set aside the order of the CIT and restored the registration. The High Court affirmed the view of the Tribunal.

CIT .v. School of Management Sciences (2014) 220 Taxman 114(Mag.) (All.)(HC)

S.12AA :Procedure for registration-Trust or institution-Charitable purpose–Both charitable and religious objects. Not commenced its activities cannot be the ground to deny the registration.[S.2(15), 11]

Even if the trust was created with both objects–charitable & religious, law does not make any disqualification for the trust to make an application for registration. Although on the date of the application under section 12AA, it was yet to commence its operation the genuineness of the objects of the trust were not questioned by the Commissioner. Considering the fact that the continuance of registration is further a subject matter of scrutiny by the Commissioner as contemplated under section 12AA(3), the Revenue would not be justified in refusing the registration at the threshold.

DIT(E) .v. SeerviSamajTambaram Trust (2014) 362 ITR 199 (Mad.)(HC)

S. 12AA:Procedure for registration-Trust or institution–Charitable purpose-Registration cannot be refused on the ground that trust has not commenced its activities.[S.2(15), 11, 12]

Commissioner cannot refuse to register trust on the ground that trust has not commenced its activities.

CIT v. KutchiDasaOswal Moto PariwarAmbamaTrut (2014) 362 ITR 194 (Guj.)(HC)

S.12AA: Procedure for registration– Trust or institution- Cancellation–Activity being genuine and there being no dispute about genuineness of Trust, cancellation was not justified. [2(15), 11]

Cancellation of registration of a charitable trust in a given case is permissible only under the circumstances stated under s. 12AA(3) and in the background of the definition of "charitable purpose" relevant to the particular year of registration. The question whether or not the particular income qualifies under s. 11 is not the same as whether or not the activity is genuine. The mere fact that the income does not fit in with section 11 would not by itself, lead to the conclusion that registration granted under section 12AA was bad and had to be cancelled. Therefore section 12AA(1) must not be read along with section 12AA(3) before considering the cancellation. Activity being genuine and there being no dispute about genuineness of Trust, cancellation was not justified. Oder of Tribunal was set aside.

Tamil Nadu Cricket Association .v. DDIT(E) (2014) 360 ITR 633/98 DTR 299 (Mad.)(HC)

S.12AA: Procedure for registration-Trust or institution-benefits for a particular community-Denial of registration was held to be valid. [S.2(15)]

Assessee society governed by a scheme decree framed by District Court with the object of providing accommodation and facilities for the purpose of marriages and other auspicious functions of the members of a particular community was rightly declined registration u/s. 12AA.

Gowri Ashram .v. DIT(E) (2014) 98 DTR 294(Mad.)(HC)

S.12AA: Procedure for registration-Trust or institution-Statutory authorities-No motive to earn profit-Eligible to exemption.[S.2(15, 11]

A trust carrying on its activities for fulfilment of its aims and objectives which are charitable in nature with no motive to earn profit, and in the process earns some profit would not be hit by the proviso to

s. 2(15). Assessee was a statutory authority established with the objective to provide shelter to homeless people. Its aims and objects are charitable in nature. For the applicability of proviso to s. 2(15), the activities of the trust should be carried on commercial lines with the intention to make profit. No such material / evidence was on record. Therefore, the assessee was entitled to exemption u/s. 11. (AYs. 2003-04 to 2006-07)

CIT .v. Lucknow Development Authority (2014) 98 DTR183 (All.)(HC)
CIT .v.U.P. Housing & Development Board(2014) 98 DTR183 /265 CTR 433 (All.)(HC)
CIT.v.Ayodhya Faizabad Development Authority(2014) 98 DTR 183 (All.)(HC)

S.12AA: Procedure for registration-Trust or institution-Bonafide belief - Delay in registration u/s 12A was condoned.[S.12A]

Assessee a Mandi Samiti was established as a statutory body with the object to regulate sale and purchase of agricultural produce and also to develop facilities for the farmers. The assessee was enjoying the benefit u/s. 10(20) and 10(29) of the Act. Thereafter, the assessee was required to get registration u/s. 12A after the amendment in section 10(20). Officers of the assessee were under bonafide belief that status quo was continuing and there was no need to obtain registration. The assessee filed an application for registration belatedly when the requirement was known to the assessee. The CIT refused to condone the delay. The Tribunal condoned the delay. On an appeal by the department, the High Court accepted the contention of the assessee that it was under a bonafide belief that status quo was continuing and there was no need to obtain registration and condoned the delay.

CIT .v.Krishi Utpadan Mandi Samiti (2014) 220 Taxman 211/363 ITR 290 (All.)(HC)

S.12AA: Procedure for registration–Trust or institution– Reconsideration-Order of Tribunal remitting the matter to Commissioner was held to be proper. [S.254(1), 260A]

The assessee-society made an application for registration as a charitable or religious trust. The Commissioner rejected the application. On appeal, the Tribunal set aside the order passed by the Commissioner and remitted the matter to him for a fresh decision in the light of the directions issued by it. On appeal to the High Court, the assessee submitted that the Tribunal, instead of remitting the matter to the Commissioner, should have allowed registration to go ahead. The High Court held that, although the assessee was aggrieved by remand of the matter to the Commissioner, the jurisdiction to allow or reject an application filed under Section 12A rested with the Commissioner. Although the Commissioner had ignored relevant facts and considered factors that were not germane to the controversy, the order of the Tribunal declining to impose its own opinion on merits and remitting the matter to the Commissioner to decide afresh was proper. In view of this, the appeal filed by the assessee was dismissed.

Ganeshi Lal Education Society .v.CIT (2014) 220 Taxman 29 (P&H)(HC)

S.12AA:Procedure for registration- Trust or institution- -Charitable status cannot be denied by fact of surplus. Mere levy of fees is neither reflective of business aptitude nor indicative of profit oriented intent- Withdrawal of approval was held to be not valid.[S.2(15,11, 293C]

The appellant is a government agency and engaged in the coordinate and planned development of Jaipur region and which is predominant object of it. The learned CIT also erred in applying the provisions of Section 293(c) of the Act, in this case, which applied withdrawal of approval granted under any provision of this Act, notwithstanding that a provision to withdraw such approval has not been specifically provided for in such provision. For cancellation of registration, the specific provision U/s 12AA is provided. Withdrawal of approval was held to be not valid. (ITA No. 182/JP/2012, Dt. 30/09/2014.)

Jaipur Development Authority .v. CIT(Jaipur)(Trib.); www.itatonline.org

S. 12AA : Procedure for registration - Trust or institution-No finding was given by the Commissioner that the activities of the Trust is not genuine-Cancellation of registration was not justified-Award of cost not warranted.[S.11, 12A, 13]

The assesse was granted registration under section 12A of the Act. Commissioner cancelled the registration on the ground that the asessee was running the hospital on commercial basis with profit

motive hence violated the provisions of sections 13(1)(c) and 11(5) of the Act. On appeal the Tribunal held that accordance with the provisions of section 12AA(3) of the Act , the Commissioner could cancel the registration if he was satisfied that the activities of such trust or institution were not genuine or were not being carried out in accordance with the objects of the trust or the institutions .There was no such findings given by the Commissioner that the activities of the assesse trust were not genuine or were not being carried out in accordance with the objects of the Trust. Accordingly the cancellation of registration was held to be not valid. Tribunal also observed that the Commissioner discharged quasi judicial duty and there was no mala fide intention hence no award of cost is warranted.

Parkar Medical Foundation .v. DCIT(2014)34 ITR 286(Pune)(Trib.)

S.12AA: Procedure for registration-Trust or institution-Most of the objects of the society were meant for the benefit of Agrawal Community only-Registration was not eligible. [S.2(15); 11]

The assessee society was registered way back in January, 1991. Most of the objects of the society were meant for the benefit of AgrawalCommunity only. There were certain other objects like establishment of hospital, dharmshala, library etc. It applied for grant of registration u/s. 12AA in January, 2013. It submitted that it had already established a dharamshala, which was used for general public and was in the process of building another dharamshala. Rest of the objects had not been carried out by the assessee since its inception in the year 1991. The Tribunal therefore held that on the peculiar facts of the case, it was clear that the objects of the assesee were meant for the benefit of a particular community only i.e. the Agrawal community, hence registration under section 12AA of the Act was not granted to the assessee.

Shri Agrawal Sabha .v. CIT (2014)61 SOT 127(Agra)(Trib.)

S.12AA: Procedure for registration - Trust or institution - Denial of Registration- No infirmity was found in activities carried out by assessee, Director (Exemption) could not deny registration to assessee.[S.2(15) 11,12 13]

Just because some profit has been earned by an assessee, trust registration u/s. 12AA cannot be denied so long as provisions of sections 11, 12 and 12AA are complied with. So long as it is established that income of the assessee society has been applied for the purpose of charitable activities in terms of section 11(2) and there is no violation of section 13, the assessee would be entitled to enjoy the benefit of registration u/s. 12AA of the Act.

Institute & Electronics Engineers Inc. v. DIT(E) (2014) 146 ITD 263 / (2013) 38 taxmann.com 211 (Hyd.)(Trib.)

S.13:Denial of exemption-Trust or institution-Investment restrictions- A charitable and religious trust which does not benefit any specific religious community is not hit by s.13(1)(b) & is eligible to claim exemption u/s.11.[S.2(15),11, 12A, 12AA]

On facts, the objects of the assessee are not indicative of a wholly religious purpose but are collectively indicative of both charitable and religious purposes. The fact that the said objects trace their source to the Holy Quran and resolve to abide by the path of godliness shown by Allah would not be sufficient to conclude that the entire purpose and activities of the trust would be purely religious in color. The objects reflect the intent of the trust as observance of the tenets of Islam, but do not restrict the activities of the trust to religious obligations only and for the benefit of the members of the community. In judging whether a certain purpose is of public benefit or not, the Courts must in general apply the standards of customary law and common opinion amongst the community to which the parties interested belong to. Customary law does not restrict the charitable disposition of the intended activities in the objects. Neither the religious tenets nor the objects as expressed limit the service of food on religious occasions only to the members of the specific community. The activity of Nyaz performed by the assessee does not delineate a separate class but extends the benefit of free service of food to public at large irrespective of their religion, caste or sect and thereby qualifies as a charitable purpose which would entail general public utility. Even the establishment of Madarsa or institutions to impart religious education to the masses would qualify as a charitable purpose qualifying under the head of education u/s 2(15). The institutions established to spread religious awareness by means of education though established to promote and further religious thought could

not be restricted to religious purposes. The assessee is consequently a public charitable and religious trust eligible for claiming exemption u/s 11;
On facts, though the objects of the assessee-trust are based on religious tenets under Quran according to religious faith of Islam, the perusal of the objects and purposes of the assessee would clearly demonstrate that the activities of the trust are both charitable and religious and are not exclusively meant for a particular religious community. The objects do not channel the benefits to any community if not the Dawoodi Bohra Community and thus, would not fall under the provisions of s. 13(1)(b).
CIT .v. Dawoodi Bohara Jamat(2014)364 ITR 31/102DTR 361/222 Taxman 228(Mag)(SC)

S. 13 : Denial of exemption - Trust or institution - Investment restrictions - Loans given in violations of section 13 not entitled to exemption- Entire income of trust cannot be denied exemption. [S.11, 263]
In case of a charitable trust, it is only income from investment or deposit which has been made in violation of section 11(5) that is liable to be taxed and that violation under section 13(1)(d) does not tantamount to denial of exemption under section 11 on total income of assessee-trust. Revisional order was held to be not valid. (AY.2000-01, 2001-02)
CIT .v.Fr. Mullers Charitable Institutions (2014) 363 ITR 230 / (Karn.)(HC)

S.14A:Disallowance of expenditure-Exempt income-Judgment of Calcutta High Court was set aside and matter remitted to for deno consideration.[S. 260A, 261]
The Court observed that issue involved being interpretation of section 14A which was not considered by the High Court in the impugned judgment. matter is remanded to High Court for de novo consideration.(From the judgement ITA no 389 of 2007 dt. 21-06-2007)
CIT v. RK BK Fiscal Services (P) Ltd (2014) 270 CTR 555(SC)

S.14A:Disallowance of expenditure-Exempt income-Disallowance cannot be made if there is no exempt income or if there is a possibility of the gains on transfer of the shares being taxable.[R.8D]
(i) On the issue whether the assessee could have earned dividend income and even if no dividend income was earned, yet Section 14A can be invoked and disallowance of expenditure can be made, there are three decisions of the different High Courts directly on the issue and against the Revenue. No contrary decision of a High Court has been shown to us. The Punjab and Haryana High Court in CIT vs. M/s. Lakhani Marketing Inc made reference to two earlier decisions of the same Court in CIT Vs. Hero Cycles Limited, 323 ITR 518 and CIT Vs. Winsome Textile Industries Ltd 319 ITR 204 to hold that Section 14A cannot be invoked when no exempt income was earned. The second decision is of the Gujarat High Court in CIT vs. Corrtech Energy (P.) Ltd. [2014] 223 Taxmann 130 (Guj). The third decision is of the Allahabad High Court in CIT vs. Shivam Motors (P) Ltd;
(ii) Income exempt under Section 10 in a particular assessment year, may not have been exempt earlier and can become taxable in future years. Further, whether income earned in a subsequent year would or would not be taxable, may depend upon the nature of transaction entered into in the subsequent assessment year. For example, long term capital gain on sale of shares is presently not taxable where security transaction tax has been paid, but a private sale of shares in an off market transaction attracts capital gains tax. It is an undisputed position that assessee is an investment company and had invested by purchasing a substantial number of shares and thereby securing right to management. Possibility of sale of shares by private placement etc. cannot be ruled out and is not an improbability. Dividend may or may not be declared. Dividend is declared by the company and strictly in legal sense, a shareholder has no control and cannot insist on payment of dividend. When declared, it is subjected to dividend distribution tax;
(iii) What is also noticeable is that the entire or whole expenditure has been disallowed as if there was no expenditure incurred by the assessee for conducting business. The CIT(A) has positively held that the business was set up and had commenced. The said finding is accepted. The assessee, therefore, had to incur expenditure for the business in the form of investment in shares of cement companies and to further expand and consolidate their business. Expenditure had to be also incurred to protect the investment made. The genuineness of the said expenditure and the fact that it was incurred for

business activities was not doubted by the Assessing Officer and has also not been doubted by the CIT(A).(ITA No. 486/2014 and ITA No. 299/2014, dt. 05/09/2014)
CIT .v. Holcim India P.Ltd. (Delhi) (HC);www.itatonline.org

S. 14A : Disallowance of expenditure-Exempt income–No disallowance can be made when interest free funds available with the assessee are much higher than investments made to earn exempt income.
The assessee received dividend on the units of the Unit Trust of India and the shares of the domestic companies and claimed full deduction for interest expenditure on the ground that investments were made in the previous year out of its abundant interest free funds and no new investments had been made in the current year. The AO disallowed the interest expenditure on the ground that the expenditure in terms of investment which pertained to the exempt income from interest bearing funds was not allowable. The CIT(A) and the Tribunal deleted the addition made by the AO.

The High Court confirmed the Orders of the CIT(A) and the Tribunal and observed that the interest free funds available was much larger as compared to the investment and also that there was no new investment made in the current year. The High Court following its own decision in the case of CIT v. Gujarat State Fertilizers & Chemicals Ltd. (2013) 358 ITR 323 held that since the assessee's own funds were higher than the investment made by it and with nothing to indicate that borrowed funds were utilized for the purpose of investment in shares and for earning dividends, no disallowance u/s. 14A could be made. (AYs. 2001-2002 and 2002-2003)
CIT .v. Gujarat Narmada Valley Fertilizers Co. Ltd. (2014) 221 Taxman 479 (Guj.)(HC)

S. 14A : Disallowance of expenditure-Exempt income- Prospective in nature and not applicable for assessment years prior to A.Y. 2008–09. [R.8D]
Sub – Sections (2) and (3) of section 14 A of the Act inserted with effect from 01.04.2007 and Rule 8 D of the Income tax Rules, 1962 inserted in the Rules on 24.03.2008 are not procedural and apply prospectively from assessment year 2008 – 09 onwards. (AYs. 2001 – 02, 2004 – 05, 2005 – 06)
Birla Corporation Ltd. v. CIT (2014) 102 DTR 264 / 267 CTR 540 / 43 taxmann.com 267 (Cal.)(HC)

S. 14A : Disallowance of expenditure-Exempt income-No disallowance of interest paid on borrowings if assessee's own funds and non-interest bearing funds exceeds investment in tax-free securities.
For AY 2001-02 to 2005-06, the Tribunal deleted the disallowance made u/s 14A on the ground that as the assessee's own funds were more than its borrowed funds, the investments in tax-free securities had to be regarded as being made out of the own funds and no disallowance u/s 14A for the interest on the borrowed funds could be made. On appeal by the department to the High Court HELD dismissing the appeal:
In principle, if there are funds available, both interest-free and over draft and/or loans taken, then a presumption would arise that investments would be out of the interest-free funds generated or available with the company if the interest-free funds were sufficient to meet the investment. On facts, the assessee's own funds and other non-interest bearing funds were more than the investment in the tax free securities. Consequently, the ITAT rightly held that there was no basis for deeming that the assessee had used borrowed funds for investment in tax free securities. (ITA No. 330 of 2012, dt. 23/07/2014.) (AYs. 2001-02,2002-03, 2003-04, 2004-05 and 2005-06
CIT .v. HDFC Bank Ltd.(2014) 366 ITR 505/107 DTR 140/226 Taxman 132 (Mag.)Bom.) (HC)

S. 14A : Disallowance of expenditure-Exempt income-Interest and administrative expenses.
Where the assessee had sufficient funds available with it, which were more than the amount it invested for earning the dividend income, it was held that both the CIT(A) and Tribunal correctly approached the issue by setting aside the order for disallowance under s. 14A in respect of interest expenditure. As regards administrative expenses disallowance of Rs 5 lakhs on estimate basis was found to be reasonable.

CIT .v. Gujarat State Fertilizers & Chemicals Ltd. (2014) 101 DTR 175 / (2013) 217 Taxman 229 / 358 ITR 323 (Guj.)(HC)

S. 14A : Disallowance of expenditure-Exempt income-Interest–No disallowance if assessee has sufficient funds and it has not used any borrowed funds for making investments.

The assessee declared tax free interest on bonds as well as exempt dividend income. The AO observed that interest expenses to earn tax free income was not allowable and thereby made a disallowance of 1% of the interest expenditure u/s. 14A. The Tribunal deleted the disallowance.

On appeal by the department, the High Court observed that it was noted from records that the assessee was having shareholding funds to the extent of 2607.18 crores and the investment made by it was to the extent of Rs.195.10 crores. In other words, the assessee had sufficient funds for making the investments and it had not used the borrowed funds for such purpose. This aspect of huge surplus funds is not disputed by the revenue which earned it the interest on bonds and dividend income. The High Court further noted that with regard to disallowance of 1% of administrative expenses averred to have incurred on account of the earning of interest, there is nothing on record to indicate that there has been in fact any actual expenditure incurred by the assessee for earning tax free income of Rs.14 crores. It also noted that out of the total amount of exempt income of Rs. 14 crores, the assessee could point out that 6.12 crores was earned by it from 'S' project which was under construction and for which no expenditure had been claimed and for the remaining income of Rs.7.88 crores which consists of dividend and tax free interest, no part of expenditure appears to have been made towards the investment activity as emerging from the material. The total investment from the huge surplus is comparatively small and investment made was effortless, without any burden of administrative expenses. Accordingly, the High Court dismissing the departmental appeal held that in view of fact that no expenditure was incurred for earning exempted income and that being the question of fact, disallowance of 1% of interest expenditure artificially or on the basis of assumption rightly has not been sustained by the Tribunal. (AY. 2006-07)

CIT .v. Torrent Power Ltd. (2014) 363 TTR 474 / 222 Taxman 367 (Guj.)(HC)

S. 14A : Disallowance of expenditure-Exempt income-Where the assessee's interest free funds exceeded investment made for earning dividend income, disallowance under section 14A was not justified. [R.8D]

The AO made a disallowance u/s. 14A on the ground that the assessee had made an investment from interest bearing funds to earn exempt dividend income. The CIT (A) favoured the assessee's claim that its interest free funds were much larger than the investment yielding exempted income. The Tribunal concurred with CIT(A). On an appeal by the department, the High Court held that since the assessee's interest free funds exceeded investment made for earning dividend income, disallowance under section 14A was not justified. (AY.1999-00)

CIT .v.Hitachi Home & Life Solutions (I.) Ltd. (2014) 221 Taxman 109 (Guj.)(HC)

S.14A: Disallowance of expenditure-Exempt income-Disallowance cannot be made if the assessee has no tax-free income in the year.

From the reading of s. 14A of the Act, it is clear that before making any disallowance the following conditions are to exist:- a) That there must be income taxable under the Act, and b) That this income must not form part of the total income under the Act, and c) That there must be an expenditure incurred by the assessee, and d) That the expenditure must have a relation to the income which does not form part of the total income under the Act. Therefore, unless and until, there is receipt of exempted income for the concerned assessment years (dividend from shares), s. 14A of the Act cannot be invoked.(ITA No. 970 of 2008.,dated 02.04.2014.(AY.2001-02)

CIT .v. Lakhani Marketing Inc.(2014) 226 Taxman 45 (Mag.) (P & H) (HC)

S.14A: Disallowance of expenditure-Exempt income -No disallowance u/s 14A & Rule 8D can be made if the assessee does not have tax-free income & no claim for exemption is made. [R.8D]

In the present case, the Tribunal has recorded the finding of fact that the assessee did not make any claim for exemption of any income from payment of tax. It was on this basis that the Tribunal held that disallowance u/s 14A of the Act could not be made. Held, no question of law arose. (TA No. 239 of 2014.dt. 24/03/2014(AY. 2009-10.)

CIT .v. Cortech Energy Pvt. Ltd. (Guj.)(HC), www.itatonline.org

S.14A: Disallowance of expenditure-Exempt income - The assessee had not earned any tax free income, hence, in the absence of any tax free income, the corresponding expenditure could not be worked out for disallowance. [R.8D].

For the year in question, the finding of fact is that the assessee had not earned any tax free income. Hence, in the absence of any tax free income, the corresponding expenditure could not be worked out for disallowance. The view of the CIT(A) & Tribunal does not give rise to any substantial question of law. (ITA No. 88 of 2014, dt. 12.11.2013.) (AY.2008-09)

CIT .v. Shivam Motors (P.) Ltd. (All.)(HC), www.itatonline.org

S.14A: Disallowance of expenditure–Exempt income–Recording of satisfaction is mandatory disallowance can be made only after recording satisfaction. [R.8D]

In order to invoke rule 8D, the AO has to first record a finding that he was not satisfied with the correctness of the claim for expenditure made by the assessee in relation to income, which did not form part of the total income. (AY. 2007-08)

CIT .v. Hero Management Service Ltd. (2014) 360 ITR 68 /220 Taxman 107 (Mag.)(Delhi.)(HC)

S.14A: Disallowance of expenditure - Exempt income-Book profit-Disallowance has to be applied while computing book profits under clause (f) of Explanation to s.115JA.[S.115JA]

The assessee's contention that in view of the Proviso to s. 14A, the said provision could not have been invoked for AY 2000-01 in a revision u/s 263 is not acceptable because the assessment order was passed after section 14A was enacted (Honda Siel Power Products 340 ITR 53 (Del) (approved by SC) followed). The failure of the AO to invoke s. 14A had resulted in the order being erroneous and prejudicial to the interests of the Revenue. (ITA No. 1179/2010, dt.9/12/2013)(AY. 2000-01)

CIT .v. Goetze (India) Ltd.(2014) 361 ITR 505/97 DTR 169(Delhi)(HC)

CIT v. Federal Mogul Goetage (India) Ltd (2014) 97 DTR 169 (Delhi)(HC)

S.14A:Disallowance of expenditure - Exempt income-Rule 8D disallowance cannot be made without showing how assessee's claim/ computation is wrong.[R.8D]

In AY 2009-10 the assessee earned dividend income of Rs.1.65 lakhs which was claimed exempt u/s 10(34) of the Act. The assessee claimed that no disallowance u/s 14A could be made because no expenditure had been incurred to earn the said dividend. It was claimed that no new investment was made during the year. It was also claimed that no loans were taken for making the investments for earning the dividend income. The AO was not convinced with the reply of the assessee and computed the disallowance at Rs. 32.43 lakhs u/s 14A by making calculation under Rule 8D. This was deleted by the CIT(A). The department filed an appeal before the Tribunal which was dismissed. The Tribunal relied on J. K. Investors (Bombay) Ltd (ITAT Mum) and noted that the AO had not examined the accounts of the assessee and had not recorded satisfaction about the correctness of the claim of the assessee before invoking Rule 8D. It held that while rejecting the claim of the assessee with regard to expenditure or no expenditure, as the case may be, in relation to exempted income, the AO had to indicate cogent reasons for the same and was not entitled to disregard the assessee's claim and straightaway embark upon computing disallowance under Rule 8D. On appeal by the department to the High Court HELD dismissing the appeal.

The AO disallowed the expenditure u/s.14A without first recording that he was not satisfied with the correctness of the claim as regards the claim that "no expenditure" was made by the assessee. The disallowance u/s 14A of the Income-tax Act, 1961 is plainly contrary to the provisions of the statute. The CIT allowed the appeal of the assessee and the Tribunal did not interfere. Challenging the order of the tribunal, the present appeal has been filed. We are of the opinion that no point of law has been raised. Therefore, this appeal is dismissed. (ITA No. 161 of 2013,dt. 23/12/2013.) (AY.2009-10)

CIT .v. REI Agro Ltd.(Cal.)(HC),www.itatonline.org

S. 14A : Disallowance of expenditure - Exempt income –Suo motu disallowance of Rs 1.20 lakh-Disallowance under rule 8D amounting to Rs 88.85 was held to be not justified.[R.8D]

The assessee had suo motu disallowed expenses of Rs 1.20 lakhs under section 14A of the Act.AO disallowed an amount of Rs 88.85 lakhs by applying rule 8D. On appeal Tribunal held that the assessee was able to show demonstrate that it had enough interest free funds at its disposal for making investment, therefore there was no basis for deeming that the assessee had used the borrowed funds for investments. Relying on the ratio in Reliance Utilities and Power Ltd and HDFC Bank Ltd (ITA no 330 of 2012), the addition was deleted.(ITA no 5861 /Mum/2011 dt 20-8-2014). (AY. 2008-09)
Sharekhan Financial Services (P.) Ltd..v.ACIT(2014) The Chamber's Journal-September–P. 84 (Mum.)(Trib.)

S.14A:Disallowance of expenditure-Exempt income-Not recording of satisfaction-Disallowance of expenditure-Exempt income–Stock in trade-Surplus funds-Book profit. [S.115JA, 115JB, Rule 8D]

(i) When it is said that rule 8D is mandatory (i.e., AY. 2008-09 onwards), all that is meant is where the said expenditure cannot be reasonably ascertained with reference to the assessee's accounts, toward which the AO is to issue his satisfaction or, as the case may be, dissatisfaction, he has no discretion in case of the latter in formulating a method of his own, nor indeed has the assessee, and is bound to adopt the prescription of rule 8D. The sole premise of law, it needs to be appreciated, including that mandated per rule 8D, is to arrive at as fair and just an estimation of the sum expended by the assessee in relation to income that is not subject to tax, as the facts and circumstances admit, without at the same time allowing it to degenerate into an arbitrary or subjective exercise.

(ii) Rule 8D is statutorily prescribed [refer section 14A(2)] only to remove the estimation exercise from the realm of arbitrariness or any subjectivity. Arbitrariness at the end of the assessing authority cannot be substituted by that at the assessee's end, which is equally proscribed by law. The assessee speaks of the bulk, nay, almost the whole of its' investment being in shares in subsidiary companies, which it claims is for strategic reason/s and not for income generation.

(iii) Toward this, the assessee's argument is of the AO being precluded from proceeding to invoke rule 8D, otherwise mandatory for the current year, in view of his having not expressed his dissatisfaction with the assessee's suo motu disallowance. No specific format has been prescribed for communication of his dissatisfaction by the AO, which is immanent in the assessment order in the present case. The assessee's accounts are admittedly not maintained activity-wise, and its claim is de hors its accounts. We have already noted that the assessee's accounts do not in any manner support its claim of the organizational resources being dedicated to the extent of 10% toward the investment activity.

(iv) We may, however, discuss the assessee's claim on surplus funds, made with reference to the decision in Reliance Utilities & Power Ltd. (supra), so that there was, in its view, no need to apply the proportionate method advocated by rule 8D. The disallowance u/s.14A, it needs to be appreciated, is a statutory disallowance, constituting a complete code in itself. The said decision was cited before, and stands discussed by the Hon'ble jurisdictional high court in Godrej & Boyce Mfg. Co. Ltd. (supra). The relevant discussion appears at paras 85 & 86 (pgs. 135-137) of the reports, and considers the decision by it in Reliance Utilities & Power Ltd. (supra). It stands explained that section 14A has widen the theory of apportionment, which only seeks to effectuate the principle of only the net (i.e., net of all expenses) income, whether positive or negative, being liable to, or not so, to tax, i.e., as the case may be. Where therefore the assessee is able to show, with reference to its accounts, of the borrowed capital having financed a particular asset, the interest cost relatable thereto would necessarily have to be consider as expended toward the same. None of the decisions by the tribunal cited before us consider the decision by the Hon'ble jurisdictional high court in Godrej & Boyce Mfg. Co. Ltd.

(v) The assessee has also earned interest income at Rs.2962.63 lacs. The said income is on long term investments and on loans forming part of current assets. The entire interest income is offered as, and admittedly, business income. As such, the fact of earning of interest income would in our view be by itself of little consequence. There is no claim, which would, where so, though need to be established, of the interest being on borrowings which stood relent on interest. Rather, all business expenses have been claimed and allowed there-against, i.e., in computing the net assessable income. In fact, our restoration, seen in perspective, is only with the view and toward the assessee being able to establish its case on the lines of dedicated funding, so that the matter gets decided on the basis of

the facts, on which it rests, rather than on presumptions. The decision by the tribunal in Karnavati Petro Pvt. Ltd. (in ITA No. 2228/Ahd.(D)/2012 dated 05.07.2013) (to which no specific reliance though was made before us) would have no bearing in the matter;

(vi) The second issue raised by the assessee is for the adjustment of the amount disallowed u/s.14A in computing the book profit u/s.115JB. While the assessee's stand is that the disallowance u/s.14A is toward computing the income under the regular provisions of the Act, no corresponding addition could be made while computing the book profit, the Revenue argues with reference to the specific provision of Explanation 1(f) to section 115JB(2). We have also gone through the case law, being decisions by the tribunal relied upon by the assessee (pgs. 83-121 of the compilation of case law). The same is on the premise that the provision of section 14A cannot be imported into Explanation 1(f) to section 115JA or, as the case may be, section 115JB, so that there could be no adjustment in computing the book profit there-under for the disallowance made u/s.14A. Our decision, which is in line with the several by the tribunal, is however not on the incorporation of the provision of section 14A (or any other provision for that matter) in Explanation 1(f) to section 115JB, nor is the decision based on the principle of incorporation. The expenditure disallowed u/s.14A is only that incurred and claimed by the assessee in respect of dividend income, exempt u/s.10. It is only on this basis, and this basis alone, that we have found Explanation 1(f) to section 115JB (s.115JA) to be providing a clear legal basis to the adjustment qua expenditure relatable to dividend income. That the amount disallowed u/s.14A provides a ready basis for determining the amount of such expenditure is another matter. It would be a complete fallacy and a travesty of facts, being without basis and wholly presumptuous to state or consider that the disallowance (u/s.14A) is qua notional expenditure and not against that actually claimed by the assessee and, further, per its books of account. Or does it mean to suggest that the expenditure claimed is outside the books of account? We say so as without doubt the adjustment under Explanation 1 could only be qua sums debited or credited and thus reflected in the accounts. In fact, in this regard, we have also clarified that where and to the extent there is a difference between the expenditure, i.e., as per the assessee's books and that as claimed per its return of income, only the sum debited in books (to the profit and loss account) would hold. Further, the decision by the tribunal in Goetze (India) Ltd. vs. CIT [2009] 32 SOT 101 (Del), followed, inter alia, by the tribunal in Ovira Logistics Ltd. (in ITA Nos. 2439 & 3230/Mum(C)/2012 dated 30.08.2013), stands since reversed by the Hon'ble high court in CIT vs. Goetze India Ltd. [2014] 361 ITR 505 (Del);(ITA no. 3485/Mum/2012,Dt. 17.10.2014.) (AY.2008-09)

HSBC Invest Direct (India) Ltd. .v. DCIT (Mum.)(Trib.); www.itatonline.org

S.14A: Disallowance of expenditure-Exempt income–Disallowance is not automatic AO has to examine the books –Interest disallowance worked by CIT (A) as per working given by assessee was held to be correct.[R.8D]

It is now settled principle that the assessing officer has to examine the disallowance made by the assessee by having regard to the accounts of the assessee and only thereafter the AO, if he is not satisfied with the correctness of the claim, shall determine the disallowance to be made u/s 14A of the Act in accordance Rule 8D. In this regard, a gainful reference may be made to the decision rendered by the Hon'ble jurisdictional High Court in the case of Godrej & Boyce Mfg. Co. Ltd (328 ITR 81). It is also pertinent to note the decision rendered by Hon'ble Delhi High Court in the case of Maxopp Investment Ltd Vs. CIT (347 ITR 272), wherein the Hon'ble Delhi High Court has expressed the view that the assessing officer has to first reject the claim of the assessee with regard to the extent of expenditure by having regard to the accounts of the assessee and such rejection must be for disclosed cogent reasons. It is only then that the question of determination of expenditure u/s 14A by the assessing officer would arise. In the instant case, we notice that the workings furnished by the assessee for interest disallowance was not examined at all by the AO, whereas he is required to reject the workings furnished by the assessee after having regard to the accounts of the assessee.

Further we notice that the revenue could not controvert the finding given by the Ld. CIT(A) that the assessee was able to establish the nexus between the borrowings and the investments. We have also noticed that the finding so given by the first appellate authority was correct as per the workings furnished by the assessee in the table extracted above. It is also pertinent to note that the revenue did not find fault with the said workings. Under these circumstances, we are of the view that the ld CIT(A) was justified in holding that the interest disallowance was required to be made under Rule

8D(2)(i) of the I.T Rules and also in confirming the disallowance of interest to the extent of Rs.29,91,393/-, as worked out by the assessee.(ITA No. 274/Mum/2013, dt. 22.10.2014.) (AY. 2008-09)

ITO v. Reliance Share and Stock Brokers(P.) Ltd.(Mum.)(Trib.); www.itatonline.org

S.14A: Disallowance of expenditure - Exempt income –Stock in trade-Rule 8D(ii) & 8D(iii) do not apply to shares held as stock-in-trade. Loss arising out of derivatives from the income arising out of buying and selling of shares.[S.43(5),73, R.8D]

(i) Both trading of shares and derivative transactions are not coming under the purview of Section 43(5) of the Act which provides definition of "speculative transaction" exclusively for purposes of section 28 to 41 of the Act. Again, the fact that both delivery based transaction in shares and derivative transactions are non-speculative as far as section 43(5) is concerned goes to confirm that both will have same treatment as regards application of the Explanation to Section 73 is concerned, which creates a deeming fiction. Now, before application of the said Explanation, aggregation of the business profit/loss is to be worked out irrespective of the fact, whether it is from share delivery transaction or derivative transaction. Now, this view has been confirmed by the Hon'ble jurisdictional High Court in assessee's own case in GA No.3481 of 2013 and ITAT No. 215 of 2013 dated 12th March, 2014, has held as under:-

It would, thus, appear that where an assessee, being the company, besides dealing in other things also deals in purchase and sale of shares of other companies, the assessee shall be deemed to be carrying on a speculation business. The assessee, in the present case, principally is a share broker, as already indicated. The assessee is also in the business of buying and selling of shares for self where actual delivery is taken and given and also in buying and selling of shares where actual delivery was not intended to be taken or given. Therefore, the entire transaction carried out by the assessee, indicated above, was within the umbrella of speculative transaction. There was, as such, no bar in setting off the loss arising out of derivatives from the income arising out of buying and selling of shares. This is what the learned Tribunal has done."

(ii) Admitted facts are that the assessee is engaged in composite business of purchase and sale of shares and is a registered stock broker. The main intention of dealing in shares and securities is to earn business profits. During the relevant year under consideration assessee earned dividend income to the tune of Rs.28,77,678/-, although the dividends were received by assessee on the shares held as stock in trade. Earning of dividend was merely incidental to the holding of shares for a particular period within which dividend was declared. The CIT(A) as well as we have noticed that the balance sheet of the assessee does not show any investment and all the shares are being held as stock in trade only. The AO has calculated the disallowance on the stock in trade/inventories held by the assessee. A plain reading of Rule 8D(2)(ii) and (iii) can only be applied, in the situations, wherever share are held as an investment and this rule will not have any application when the shares are held as stock in trade.(ITAT 1183/Kol/2012, Dt. 21.10.2014.) (AY. 2009-10)

DCIT .v. Baljit Securities Private limited (Kol.)(Trib.); www.itatonline.org

S.14A: Disallowance of expenditure - Exempt income -Disallowance cannot be made if there is no exempt income. Cheminvest Ltd. vs. ITO 121 ITD 318 (Ahd.)(SB) is not good law.[R.6D]

There is no dispute that the assessee had no exempt income during both the years involved. No doubt as mentioned by the DR, the Special Bench of this Tribunal in the case of Cheminvest Ltd. vs. ITO 121 ITD 318, had held that disallowance under section 14A could be made even in an year in which no exempt income was earned or received by the assessee. This decision of Special Bench of the Tribunal has been, in our opinion, impliedly overruled by various decisions of different High Courts, namely, CIT vs. Shivam Motors P. Ltd. (All HC), CIT vs. Corrtech Energy Pvt. Ltd (Guj.)(HC), CIT vs. Winsome Textile Industries Ltd 319 1TR 204 (P&H), CIT vs.Delite Enterprises (Bom.)(HC) & CIT vs. Lakhani Marketing (P&H HC). Therefore, unless and until there is receipt of exempted income for the concerned assessment years, s. 14A of the Act cannot be invoked.(ITA No. 220 & 1034 (Bng) 2013. dt. 12.09.2014.) (AY.2009-10, 2010-2011)

Alliancce Infrastructure Projects Pvt. Ltd. v. DCIT (Bang.)(Trib.);www.itatonline.org

S.14A: Disallowance of expenditure - Exempt income – Non recording of satisfaction-Addition was deleted.

The Tribunal held that the Assessing Officer has no where commented about working being unsatisfactory or questionable on disallowance of expenses. The addition has been made by applying Rule 8 which is not applicable in this year. The CIT has also made some adhoc estimate of administration expenses and other heads. The Tribunal deleted the addition on both counts i.e. non-recording of satisfaction and alsoon merits. (AY. 2006-07)

ACIT .v. Bharti Teletech Ltd. (2014) 163 TTJ 36(UO)(Delhi) (Trib.)

S.14A:Disallowance of expenditure - Exempt income-Interest expenses-In applying Rule 8D(2)(ii) interest expenses directly attributable to tax exempt income as also directly attributable to taxable income, are required to be excluded from computation of common interest expenses to be allocated.[R.8D]

Tribunal held that in our opinion, it is only the interest on borrowed funds that would be apportioned and the amount of expenditure by way of interest that will be taken (as 'A' in the formula) will exclude any expenditure by way of interest which is directly attributable to any particular income or receipt. Therefore, it is not only the interest directly attributable to tax exempt income, i.e. under rule 8D(2)(i), but also interest directly relatable to taxable income, which is to be excluded from the definition of variable 'A' in formula as per rule 8D(2)(ii), and rightly so, because it is only then that common interest expenses, which are to be allocated as indirectly relatable to taxable income and tax exempt income, can be computed.Interest expenses directly attributable to tax exempt income as also directly attributable to taxable income, are required to be excluded from computation of common interest expenses to be allocated under rule 8D(2)(ii). (ITA No. 261/Coch/2014. AY 2008-09. Dt. 28.08.2014.) (AY.2008-09)

Geojit Investment Service Ltd. .v. ACIT (Cochin)(Trib.);www.itatonline.org

S.14A:Disallowance of expenditure - Exempt income -No disallowancecan be made towards exempt income earned on strategic investments.[R.8D]

The assessee had made significant investments in the shares of subsidiary companies which are definitely not for the purpose of earning exempt income. Strategic investment has to be excluded for the purpose of arriving at disallowance under Rule 8D(iii). The disallowance under Rule 8D(iii) has to be computed by excluding the value of strategic investments. No disallowance under Rule 8D(i) and 8D(ii) is also warranted (REI Agro (ITAT Kol) followed) (ITA No. 1362 7 1032/Del/2013, Dt. 3.4.2014.) (AY. 2008-09 & 2009-10)

Interglobe Enterprises Ltd. .v. DCIT (Delhi)(Trib.);www.itatonline.org

S. 14A : Disallowance of expenditure - Exempt income - For Rule 8D(2)(i) only expenditure relating to investments resulting in tax-free income can be considered. For Rule 8D(2)(iii) all investments, whether yielding tax-free income or not, have to be considered. [R.8D]

The Tribunal had to consider whether in computing the figure of disallowance under Rule 8D(2)(i) and 8D(2)(iii), it was necessary that the investments had to have yielded income which was not chargeable to tax. HELD by the Tribunal:

Rule 8D(2)(i) speaks of expenditure directly relating to income which does not form part of "total income". In the context of s. 2(45) & s. 5, the expression 'total income' in Rule 8D(2)(i) must relate to an income which is sought to be assessed. Therefore, only expenditure directly relating to income which is earned either on receipt basis or on accrual basis and which does not form part of total income of a particular assessment year can be disallowed under clause (i) of Rule 8D(2). However, while computing disallowance under Rule 8D(2)(iii), the average of the total investment of the assessee as appearing in the balance sheet on the first day and last day of the year irrespective of the fact whether it has yielded income or not can be considered for the purpose of disallowance. (ITA No. 1743/Hyd/2013, Dt. 28.04.2014.) (AY.2009-10)

Bellwether Microfinance fund Pvt. Ltd. v. ITO (2014) 165 TTJ 261 (Hyd.)(Trib.) www.itatonline.org.

S. 14A : Disallowance of expenditure-Exempt income-Apportionment of expenditure.
Tribunal held that assessee's own funds are far in excess of the investments made by it which yielded exempt income.Therefore, disallowance under section 14A made by the AO in respect of interest cannot be sustained. (AY. 2002-03)
Reliance Industries .v. Addl. ACIT (2014) 159 TTJ 349 / (2013) 55 SOT 8 (Mum.)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income –Disallowance cannot exceed expenditure claimed as deduction- Section 14A and Rule 8D cannot be applied in a mechanical manner-Disallowance cannot exceed expenditure claimed as a deduction. [R.8D]
The assesses, investment transactions were managed by investment advisers and the assessee paid portfolio management services (PMS) fees which were debited to his capital account. The demat expenses and security transaction tax (STT) was also debited to the capital account. The assessee claimed that the expenses relating to salary, telephone and other administrative expenses were incurred by him for his professional income and not for earning tax-free income. However, the AO rejected the claim and made a disallowance of Rs. 16.35 lakhs, being 0.5% of the average investments under Rule 8D(2)(iii). The CIT(A) deleted the disallowance on the ground that it was without establishing any nexus. On appeal by the department to the Tribunal HELD dismissing the appeal:
The assessee had debited direct expenses on account of dematerialization and STT in the capital account and not in the Profit and loss account. The AO had presumed that the assessee had must have incurred some expenditure under the heads salary, telephone and other administrative charges for earning the exempt income. It is further found that the total expenditure claimed by the assessee for the year is about 13 lakhs and the AO had made a disallowance of about Rs.16 lakhs. He has just adopted the formula of estimating expenditure on the basis of investments. But, the justification for calculating the disallowance is missing. The assessee had not claimed any expenditure in its P&L account and so the onus was on the AO to prove that out of the expenditure incurred under various heads were related to earning of exempt income. Not only this he had to give the basis of such calculation. In any manner disallowance of Rs.16.35 lakhs as against the total expenditure of Rs.13 lakhs claimed by the assessee in P&L account is not justified. Rule 8D cannot and should not be applied in a mechanical way. Facts of the case have to be analyzed before invoking them. Consequently the disallowance is deleted (Justice Sam P. Bharucha.v.ACIT (2012) 53 SOT 192 (Mum)(Trib.) referred).(ITA no 877/M.2013 dt 30-07-2014 Bench "I' (AY. 2009-10)
ACIT .v. Iqbal M. Chagala (2014) 34 ITR 636(Mum.)(Trib.)

S. 14A : Disallowance of expenditure-Exempt income–No disallowance can be made if there is no exempt income-Special bench judgment in Cheminvest & CBDT Circular are not good law [R.8D]
In AY 2009-10, the assessee held investments worth Rs. 14.05 crore and incurred interest expenditure of Rs. 34.80 lakhs. The assessee claimed that no disallowance u/s 14A & Rule 8D could be made as the investments were made out of own funds and no income was derived from the investments. The AO rejected the claim and made a disallowance of Rs. 19.28 lakhs though the CIT(A) deleted it. Before the Tribunal the department relied on Cheminvest Ltd. 121 ITD 318 (SB) & Circular No.5/2014 dated 11.2.2014 and argued that even if the assessee has not earned any exempt income, still disallowance u/s 14A read with Rule 8D has to be made and it is mandatory. HELD by the Tribunal dismissing the appeal:

No doubt in Cheminvest Ltd vs. ITO 121 ITD 318 (SB) the Special Bench of the Tribunal has held that disallowance u/s 14A can be made even in the year in which no exempt income has been earned or received by the assessee. This decision of Special Bench of the Tribunal has been impliedly overruled by the decisions of High Courts in Shivam Motors P Ltd (All HC), CIT vs. Corrtech Energy Pvt. Ltd (Guj HC), CIT vs. Delite Enterprises (Bom HC), CIT vs. Lakhani Marketing (P&H HC), CIT vs. Winsome Textiles Industries Ltd 319 ITR 204 (P&H) where it has been held that when there is no exempt income and no claim for exemption, s. 14A and Rule 8D have no application and no disallowance can be made(ITA NO 1717/Mds/2013 Bench "B" dt 31-07-2014 (AY. 2009-10).
ACIT.v. M. Baskaran (Chennai)(Trib.) www itatonline.org

S. 14A : Disallowance of expenditure - Exempt income –Investments in subsidiaries to be excluded while computing disallowance.[R.8D]

The investments made by the assessee in the subsidiary company are not on account of investment for earning capital gains or dividend income. Such investments have been made by the assessee to promote subsidiary company into the hotel industry. A perusal of the order of the CIT(A) shows that out of total investment of Rs. 64.18 crore, Rs. 63.31 crore is invested in wholly owned subsidiary. This fact supports the case of the assessee that the assessee is not into the business of investment and the investments made by the assessee are on account of business expediency. Any dividend earned by the assessee from investment in subsidiary company is purely incidental. Therefore, the investment made by the assessee in its subsidiary are not to be reckoned for disallowance u/s 14A r.w.r. 8D. The AO is directed to re-compute the average value of investment under the provisions of Rule 8D after deleting investments made by the assessee in subsidiary company.(ITA no 1503 & 1624/Mds/2012 Bench "C" dt 17-07-2013(AY. 2008-09)

EIH Associated Hotels Ltd..v. DCIT (Chennai)(Trib.) www.itatonline.org

S.14A: Disallowance of expenditure - Exempt income-No disallowance of expenditure for investment in shares of subsidiaries & Joint Ventures as the investments are strategic in nature in the subsidiary companies on long term basis and no direct or indirect expenditure was incurred.[R.8D]

The department has not disputed this fact that out of the total investment about 98% of the investments are in subsidiary companies of the assessee and, therefore, the purpose of investment is not for earning the dividend income but having control and business purpose and consideration. Therefore, prima facie the assessee has made out a case to show that no expenditure has been incurred for maintaining these long term investment in subsidiary companies. Accordingly disallowance by the AO was deleted. (ITA No. 4521/Mum/2012dt. 26.03.2014, (AY. 2009-2010)

JM Finacial Ltd .v. ACIT (Mum.)(Trib.)www.itatonline.org.

S.14A: Disallowance of expenditure-Exempt income-Disallowance as per section 14A(2) is required to be made, even if assessee claims that it did not incur any expenditure in earning dividend income. [R. 8D]

The assessee earned dividend income but did not allocate any amount as expenditure incurred in relation to such income and accordingly it did not disallow any amount u/s. 14A. The AO disallowed 0.5% of the average value of investment under Rule 8D(2)(iii). The CIT(A) upheld the disallowance made by the AO and further disallowed proportionate interest expenditure relatable to the exempted dividend income u/s. 14A.

On appeal to the Tribunal, the assessee contended that it did not incur any expenditure in earning the dividend income. It also submitted that the AO was not right in taking average value of all the investments for the purpose of calculating the disallowance of expenses, instead of the average value of dividend yielding investments. The Tribunal observed that as per rule 8D(2)(iii), the average value of investment, income from which does not or shall not form part of the total income is required to be considered, meaning thereby the entire value of investments made in shares is required to be considered. The Tribunal while dismissing the assessee's claim also noted that, as per section 14A(3) disallowance as per section 14A(2) is required to be made, even if the assessee claims that it did not incur any expenditure in earning the dividend income. (AY. 2008-09)

ACIT .v. Kerala State Industrial Development Corporation Ltd. (2014) 29 ITR 45/62 SOT 115 (URO) (Cochin)(Trib.)

S.14A:Disallowance of expenditure-Exempt income-Apportionment of expenses. [R.8D]

No disallowance u/s. 14A can be made if the AO has not recorded his dissatisfaction as regards accounts of the assessee. U/r. 8D(2)(iii) the amount disallowable is equal to ½ percentage of the average value of investment, income from which does not/shall not form part of the total income and not the total investment at the beginning and end of the year. (AY. 2008-09)

REI Agro Ltd. .v. Dy. CIT (2014) 98 DTR339 (Kol.)(Trib.)

S.14A: Disallowance of expenditure-Exempt income-Interest and managerial, administrative expenses-Restricted to 1 lakh.

The Tribunal restored the case to the file of the Assessing Officer with a direction to find out as to whether sufficient own funds / interest free funds were available with the assessee on the date of investment made for earning exempt income and if found so not to make any disallowance for interest cost under this head. As fas as managerial and administrative expenses are concerned Tribunal restricted to 1 lakh only and held that disallowance of Rs. 2,75,000/- is on higher side as there was no separate treasury department and only one employee that too on part time basis, was looking after investments.(AYs. 2006-07 to 2008-09)

Godrej Consumer Products Ltd. .v. Addl.CIT (2014) 159 TTJ 21(Mum.)(Trib.)

S.14A: Disallowance of expenditure-Exempt income-Book Profit-Amount disallowed under section 14A to be added while computing book profit. [S. 115JB]

The Tribunal held that whatever expenditure is found to be disallowed under section 14A, the same is to be added back while computing book profit under section 115JB. (AY. 2007-08)

Godrej Consumer Products Ltd. .v. Addl.CIT (2014) 159 TTJ 21 (Mum.)(Trib.)

S.14A: Disallowance of expenditure - Exempt income-Interest on taxable business activity-For working the disallowance as per Rule, 8D(2)(ii), interest expenditure on loans taken for taxable business purposes has to be excluded.

If the assessee is able to demonstrate that the payment of interest is directly attributable to the assessee's taxable business activity, it cannot be considered under Rule 8D(2)(íi) of the I.T. Rules. (ITA No. 503/JP/2012. dt. 27.01.2014.) (AY. 2007-08)

ITO .v. Narain Prasad Dalamia(2014) 30 ITR 619(Kol.)(Trib.)

S.14A: Disallowance of expenditure - Exempt income-If AO does not deal with assessee's arguments, it means that he has not reached objective satisfaction that assessee's method is incorrect & cannot invoke Rule 8D. [R.8D]

The invoking of Rule 8D to compute the disallowance u/s 14A is neither automatic nor triggered merely because assessee has earned an exempt income. The invoking of rule 8D of the Rules is permissible only when the AO records the satisfaction in regard to the incorrectness of the claim of the assessee, having regard to the accounts of the assessee.

On facts, the AO has given no reasons why the assessee's calculation was not proper except to say that "the said disallowance was not acceptable".

The department's objection that since the assessee was not maintaining separate accounts with regard to the activity of earning exempt income, the satisfaction contemplated u/s 14A be considered as implied is contrary to how the implications of sub-section (2) of s. 14A have been understood and explained by the High Courts in Godrej & Boyce Manufacturing Co. Ltd & Maxopp Investment Ltd.(ITA No. 1733/PN/2012. 30.01.2014.) (AY. 2008-09)

Kalyani Steels Ltd .v. ACIT (Pune)(Trib.), www.itatonline.org

S.14A: Disallowance of expenditure-Exempt income-Controlling interest-No disallowance can be made if primary object of investment is to hold controlling stake in group concern and not to earn tax-free income.[R.8D]

We find merit and substance in the contention of the assessee that no expenditure had been incurred by the assessee for earning the exempt income on this point because the investment has been made by the assessee in the group concern and not in the shares of any unrelated party. Therefore, the primary object of investment is holding and controlling stake in the group concern and not earning any income out of investment. Further, the investments were made long back and not in the year under consideration. Therefore, in view of the fact that the investment are in the group concern we do not find any reason to believe that the assessee would have incurred any administrative expenses in holding these investments. The AO has not brought on record any material to show that the assessee has incurred any expenditure in relation to the income which does not form part of the total income.

Section 14A has within it implicit the notion of apportionment in the cases where the expenditure is incurred for composite/indivisible activities in which taxable and non taxable income is received but when no expenditure has been incurred in relation to the exempt income then principle of apportionment embedded in section 14A has no application. The object of section 14A is not allowing to reduce tax payable on the non exempt income by deducting the expenditure incurred to earn the exempt income. In the case in hand it is not the case of the revenue that the assessee has incurred any direct expenditure or any interest expenditure for earning the exempt income or keeping the investment in question. If there is expenditure directly or indirectly incurred in relation to exempt income the same cannot be claimed against the income which is taxable. For attracting the provisions of section 14A- "there should be proximate cause for disallowance which has relationship with the tax exempt income as held by the Hon'ble Supreme Court in case of CIT Vs. Walfort Share and Stock Brokers P. Ltd. (2010) 326 ITR 1). Therefore, there should be a proximate relationship between the expenditure and the income which does not form part of the total income. In the case in hand the assessee has claimed that no expenditure has been incurred for earning the exempt income, therefore, it was incumbent on the AO to find out as towhether the assessee has incurred any expenditure in relation to income which does not form part of the total income and if so to quantify the expenditure of disallowance. The AO has not brought on record any fact or material to show that any expenditure has been incurred on the activity which has resulted into both taxable and non taxable income. Therefore, in our view when the assessee has prima facie brought out a case that no expenditure has been incurred for earning the income which does not form part of the total income then in the absence of any finding that expenditure has been incurred for earning the exempt income the provisions of section 14A cannot be applied. Accordingly we delete the addition/disallowance made by AO u/s 14A r.w. Rule 8D.(ITA No. 5408/Mum/2012. Dt. 15.01.2014.) (AY. 2009-10)

Garware wall Ropes Ltd..v.ACIT(Mum.)(Trib.),www.itatonline.org

S.15: Salary-Accrual-Salary income accrues at the place where the services are rendered and not where the appointment letter is received. If salary, after accrual abroad, is brought into India, it is not taxable on receipt basis. S. 6(5) which deals with residential status is redundant.[S. 5(2),6(5)]

(i) The AO's stand that because the assessee has offered taxation of interest and pension, he has accepted himself as a "resident" and that the other income also becomes taxable u/s 6(5) is wrong. The pension was paid by his former employer in India, and, therefore, irrespective of his residential status, the income was taxable in India. Similarly, so far as interest on savings bank account was concerned, the interest accrued in India was credited, in income character as such, in India, and was, therefore, taxable in India. This taxability does not require recipient of income to have 'resident' status u/s 6 at all.

Once it is not in dispute that the assessee qualifies to be treated as a 'non-resident' under Section 6 of the Act, the scope of taxable income in the hands of the assessee, under Section 5(2), is restricted to (a) income received or is deemed to be received in India, by or on behalf of such person; and (b) income which accrues or arises, or is deemed to accrue or arise to him, in India.

That 'receipt' of income, for this purpose, refers to the first occasion when assessee gets the money in his own control – real or constructive. What is material is the receipt of income in its character as income, and not what happens subsequently once the income, in its character as such is received by the assessee or his agent; an income cannot be received twice or on multiple occasions. (AY. 2008-09,2009-10)

Arvind Singh Chauhan .v. ITO(2014) 101 DTR 79/31 ITR 105/161 TTJ 791(Agra)(Trib.)

S. 22 : Income from house property - Rental income from unused portion of business premises owned by assessee engaged in software business is income from house property.

The assessee was in the business of development of computer software.The assessee had received rent from unused portion of business premises and had considered the same as business income and further claimed depreciation in respect of the house property.The AO held that the said income would be treated as income from house property and disallowed depreciation in respect of said house property.

The CIT (A) allowed the assessee's appeal. The Tribunal however, treated the income from house property and remanded the matter back to the AO.
The High Court observed that the assessee was in the business of the development of software and not in the business of constructing buildings and letting out the same. It further observed that the assessee had let out the premises so that it could earn some rental income. Hence, the High Court held that such rental income received was to be treated as income from house property and since no substantial question of law arose, the appeal was dismissed.(A.Y. 2003-2004)
Tektronics Engineering Development (India) (P.) Ltd. v. Dy. CIT (2014) 221 Taxman 134 (Karn.)(HC)

S. 22 : Income from house property – Construction- Liable to pay tax on annual letting value on unsold flats.
High Court held that the assessee, a construction company is liable to pay tax on annual letting value of unsold flats owned by it as income from house property. The Court followed its own earlier years order. (AYs. 1999-00, 2002-03, 2003-04)
CIT .v. Ansal Housing and Construction Ltd. (2014) 220 Taxman 157 (Mag.)/ (2013) 40 Taxmann.com 305 (Delhi) (HC)

S. 22 : Income from house property - Business income - Rental income from the unused portion of business premises owned by the assessee engaged in a software business was income from house property & not business income. [S.28(i)]
The assessee was in the business of development of computer software. It had shown a sum of Rs. 28,11,600 received as rent as part of income from business and claimed depreciation in respect of house property. The AO held that the said income would be treated as income from house property. He disallowed depreciation in respect of said house property. On appeal, the Commissioner (Appeals) held that the income arose from the exploitation of the commercial assets. Thus, it should be assessed as 'business' and, further, depreciation should be allowed in respect of the building. On appeal, the Tribunal held that income received by the assessee had to be assessed as income from house property and remanded the matter back to the Assessing Authority to give deduction treating the said income as a rental income. On appeal by the Assessee, The Hon'ble High Court opined that the assessee was not in the business of constructing, furnishing and letting out buildings. The only business of the assessee was the development of software. It owned the scheduled premises. When the assessee did not need the schedule premises, it let out the premises, so that it could earn some rental income. Therefore, the Hon'ble Court agreed with the Tribunal that it was not business income but 'income from house rental. The Hon'ble Court further agreed with the Tribunal that the assessee was entitled to the benefit of certain deductions in respect of rental income from house property that had not been extended by the assessing authority. Therefore, the Tribunal was justified in remanding the matter to the Assessing Authority to give the benefit of the said deductions after treating the income as income from house property. Hence, the Hon'ble Court dismissed the assessee's appeal. (AY. 2003-04)
Tektronics Engineering Development (India) (P.) Ltd. .v. Dy.CIT (2014) 221 Taxman 249 (Karn.)(HC)

S. 23 : Income from house property-Annual value-Municipal valuation-Interest free deposit-Percentage interest free deposit could not be added for determining the annual letting value-Annual ratable value determined by BMC was correctly directed to be adopted-Decided on the facts of the case.[S.23(1)(a), 23(1)(b),Maharashtra Rent Control Act.]
The assesse has let out the premises to sister concern and received the rent and also interest free deposit. The AO took the view that premises being not covered by Maharashtra Rent Control Act , its annual value was determined under section 23(1)(a).CIT(A) and Tribunal directed the AO to adopt the value determined by Bombay Municipal Corporation (BMC) in accordance with provisions of section 23(1)(b).Revenue has filed an appeal the said order. Court observed that the revenue has not challenged the order for the assessment year 2005-06 though the facts are identical. The Court observed that situation in present previous assessment year and the assessment year under

consideration has not changed, therefore larger controversy need not be gone into and does not arise in this appeal. Therefore no question of law arises.
CIT v. Angel Infin (P) Ltd. (2014) 225 Taxman 78 (Bom.)(HC)

S. 23(1)(a) : Income from house property-Annual value-Notional rent on the security deposit cannot be taken into account for the determination of the annual value-Municipal rateable value-Standard rent-The AO either must undertake the exercise to fix the standard rent himself or in terms of the Maharashtra Rent Control Act, 1999 if the same is applicable .[S.22,23(1)(b)]
The High Court had to consider the question of determination of "annual value" u/s 23(1)(a) in the context of (i) whether the municipal valuation of the property was binding on the AO, (ii) whether notional interest on interest-free security deposit could be added and (iii) whether if the property was covered by the Rent Control Act but no standard rent there under, the AO can disregard the standard rent? HELD by the High Court:
As regards municipal valuation:
(i) We are not in agreement with the department that the municipal rateable value cannot be accepted as a bonafide rental value of the property and it must be discarded straightway in all cases. There cannot be a blanket rejection of the same. If that is taken to be a safe guide, then, to discard it there must be cogent and reliable material;
(ii) The market rate in the locality is an approved method for determining the fair rental value but it is only when the AO is convinced that the case before him is suspicious, determination by the parties is doubtful that he can resort to enquire about the prevailing rate in the locality. The municipal rateable value may not be binding on the AO but that is only in cases of afore referred nature. It is definitely a safe guide;
(iii) In the event the security deposit collected and refundable interest free and the monthly compensation shows a total mismatch or does not reflect the prevailing rate or the attempt is to deflate or inflate the rent by such methods, then, as held by the Delhi High Court in Cit .v. Moni Kumar Subba (2011) 333 ITR 38 (Del)(FB), the AO is not prevented from carrying out the necessary investigation and enquiry. He must have cogent and satisfactory material in his possession and which will indicate that the parties have concealed the real position. He must not make a guess work or act on conjectures and surmises. There must be definite and positive material to indicate that the parties have suppressed the prevailing rate. Then, the enquiries that the AO can make would be for ascertaining the going rate. He can make a comparative study and make a analysis. In that regard, transactions of identical or similar nature can be ascertained by obtaining the requisite details. However, there also the AO must safeguard against adopting the rate stated therein straightway. He must find out as to whether the property which has been let out or given on leave and license basis is of a similar nature, namely, commercial or residential. He should also satisfy himself as to whether the rate obtained by him from the deals and transactions and documents in relation thereto can be applied or whether a departure therefrom can be made, for example, because of the area, the measurement, the location, the use to which the property has been put, the access thereto and the special advantages or benefits. It is possible that in a high rise building because of special advantages and benefits an office or a block on the upper floor may fetch higher returns or vice versa. Therefore, there is no magic formula and everything depends upon the facts and circumstances in each case. However, we emphasize that before the AO determines the rate by the above exercise or similar permissible process he is bound to disclose the material in his possession to the parties. He must not proceed to rely upon the material in his possession and disbelieve the parties. The satisfaction of the AO that the bargain reveals an inflated or deflated rate based on fraud, emergency, relationship and other considerations makes it unreasonable must precede the undertaking of the above exercise. After the above ascertainment is done by the AO he must, then, comply with the principles of fairness and justice and make the disclosure to the Assessee so as to obtain his view;
As regards addition of notional interest:
(iv) Notional rent on the security deposit cannot be taken into account for the determination of the annual value. If the transaction itself does not reflect any of the aforestated aspects, then, merely because a security deposit which is refundable and interest free has been obtained, the AO should not presume that this sum or the interest derived therefrom at Bank rate is the income of the assessee till the determination or conclusion of the transaction. The AO ought to be aware of several aspects and

matters involved in such transactions. It is not necessary that if the license is for three years that it will operative and continuing till the end. There are terms and conditions on which the leave and license agreement is executed by parties. These terms and conditions are willingly accepted. They enable the license to be determined even before the stated period expires. Equally, the licensee can opt out of the deal. A leave and license does not create any interest in the property. Therefore, it is not as if the security deposit being made, it will be necessarily refundable after the third year and not otherwise. Everything depends upon the facts and circumstances in each case and the nature of the deal or transaction. These are not matters which abide by any fixed formula and which can be universally applied. Today, it may be commercially unviable to enter into a lease and, therefore, this mode of inducting a 'third party' in the premises is adopted. This may not be the trend tomorrow. Therefore, we do not wish to conclude the matter by evolving any rigid test;

As regards properties where standard rent is not fixed:

(v) As regards properties covered by rent control legislation, the AO cannot brush aside the rent control legislation. The AO has to undertake the exercise contemplated by the rent control legislation for fixation of standard rent. The AO either must undertake the exercise to fix the standard rent himself and in terms of the Maharashtra Rent Control Act, 1999 if the same is applicable or leave the parties to have it determined by the Court or Tribunal under that Act.(AY. 2004-05 to 2006-07)

CIT .v. Tip Top Typography (2014)368 ITR 330/107 DTR 282/270 CTR 262(Bom.)(HC)

S. 24 :Income from house property – Interest paid on interest levied by bank, because of non-payment of instalments of borrowed capital, does not qualify for an admissible deduction

The assessee claimed deduction of compounded interest, i.e. interest paid on the interest levied by bank due to non-payment of instalments of capital borrowed while computing income under the head house property. The AO rejected this claim and completed the assessment while allowing deduction of only simple interest on amount borrowed from bank for construction of building. The Tribunal upheld the Assessment Order.

The High Court observed that section 24(1)(vi) of the Act stipulates that amount of interest payable on capital borrowed, inter-alia, for construction of the property yielding income, is an admissible deduction and that only interest payable on such borrowed capital is to be deducted while computing income chargeable to income tax under the head 'income from house property". Interest paid on interest levied by the bank, because of non-payment of instalments of borrowed capital to the bank, does not qualify for an admissible deduction. Accordingly, following the decision of the Supreme Court in the case of Shew Kissen Bhatter v. CIT (1973) 89 ITR 61 held that interest paid on interest levied by the bank, because of non-payment of instalments of borrowed capital to the bank, does not qualify as an admissible deduction and hence the Tribunal was correct in allowing only simple interest as a deduction. (AYs. 1985-1986, 1986-87 and 1988-89 to 1991-92)

Naman Kumar .v. CIT (2014) 221 Taxman 269 (P&H)(HC)

S.28(i):Business income-Non-convertible debentures with detachable warrants-Sale of part of debentures at a loss of application money - Application money for debentures payable for acquisition of each detachable warrant-Loss not short-term capital loss-Sale proceeds of detachable warrants constitutes business income.

The assessee applied for non-convertible debentures of Rs. 400 each issued by GACL.The assessee paid application money of Rs. 16,92,000. However, only 82,863 non-convertible debentures were issued to the assessee for a sum of Rs. 9,94,356. The excess paid by the assessee by way of application money was refunded to it. The debentures were accompanied by detachable warrants which entitled the assessee to buy an equal number of shares at a rate to be fixed by the company. The assessee sold the partly paid-up non-convertible debentures at a loss of the application money. The buyer paid the balance. Upon such payment, the detachable warrants became tradable. Out of 82,863 detachable warrants, the assessee sold 13,000 detachable warrants at the rate of Rs. 55 each and, thus, realised a sum of Rs. 7,15,000. The balance 69,863 detachable warrants were retained by the assessee. The assessee contended that since it transferred these units only on the consideration of ISL agreeing to pay the remaining unpaid amount, i.e., the call money, the entire application money, amounting to Rs. 12 per debenture which worked out to aggregate of Rs. 9,94,356, constituted short-term capital

loss. Since the cost of acquisition of the detachable warrants was not ascertainable, the sale proceeds of these detachable warrants constituted a capital receipt not liable to tax. The Assessing Officer rejected the contention of the assessee, holding that the application money for non-convertible debentures at Rs. 12 each was payable for acquisition of each detachable warrant. The assessee had retained the detachable warrants worth (69863 x 12) Rs.8,38,356 and recovered a sum of Rs. 7,15,000 on sale of 13,000 detachable warrants. Thus, the total receipt was (8,38,356 + 7,15,000) Rs. 15,53,356. After deducting the application money (15,53,356 - 9,94,356), a sum of Rs. 5,59,000 was earned which was treated as his business income. The Commissioner (Appeals) held in favour of the assessee but the Tribunal restored the order of the Assessing Officer. On appeal :
Held, dismissing the appeal, that it could not be said that the detachable warrants were received by the assessee except at the cost of Rs. 12 subscribed by it. The view taken both by the Income-tax Officer and the Tribunal was a reasonable view in the facts and circumstances of the case. (AY.1993-1994)
Ganapati Enterprises .v. CIT (2014) 365 ITR 480 (Cal.)(HC)

S. 28(i) : Business income–On Money-Change of contention made before lower authorities.
The assessee was engaged in the business of construction and development activities. During the course of survey operations, certain materials were seized leading to Assessing Officer ultimately framing an assessment during which, he held that there was 40% cash component in the projects developed by the assessee. Before the CIT(A), the assessee contended that the entire on-money should not be taken to be the income of the developer and only 35% of such on-money could be considered as the service charges as the income of the assessee developer. The CIT(A) confirmed the addition only of Rs.46,55,000/- on the premise that not the entire on-money but only the income of the assessee which should be taxed. He thus reduced the addition to 35% of Rs.1,33,00,000/- and confirmed it to the limited extent of Rs.46,55,000/-. In appeal before the Tribunal, the assessee contended that the profit from the sale of the bungalows would be in the vicinity of 25% to 35% which could be treated as the income. The Tribunal recorded that the assessee had admitted before the CIT (Appeals) that a developer - assessee would earn profit in the ratio of 35% on the on-money which should be considered as the assessee's service charges and the income. The Tribunal held that the assessee could not be allowed to now turn around such contention. The High Court confirmed the Tribunal order. (AY. 2002-03)
Gargi Construction Co. .v. ITO (2014) 220 Taxman 38 (Mag.) / (2013) 40 taxmann.com 24 (Guj.)(HC)

S. 28(i) : Business income - sale of shops - suppressed sale price.
The Assessee firm was a developer of shopping complexes. During the year, the assessee declared certain income from sale of shops. The AO was of the view that the selling price of shops declared by the assessee was on lower side and thus, rejected the books of accounts and estimated total income at higher amount. The Tribunal noted that all shops sold by the assessee were registered with sub-registrar and sale deeds were executed for transactions in question. The Tribunal observed that the AO simply rejected the sale deeds and a higher sale consideration was adopted for the purpose of computing income without any reference made to the DVO. It further observed that the AO had not tried to inquire about the circle rates fixed by the Sub Registrar and not even called for or examined the sale deeds. The Tribunal held that the revenue failed to establish that the full consideration recorded by the assessee firm was not the actual price for the transfer of shops and accordingly deleted the addition made. On further appeal by the revenue the High Court dismissed the appeal. (AY. 2005-06)
CIT .v. Shanti Enterprise (2014) 220 Taxman 170 (Mag.) (Guj.)(HC)

S. 28(i) : Business income–Additions made on account of unaccounted production and sale of glass-assessee did not commence the production of the glass-additions deleted.
Assessee was engaged in business of manufacturing glass. Assessing Officer added certain amount to income of assessee on account of unaccounted production and sale of glass. Commissioner (Appeals) deleted impugned addition holding that no process of manufacturing of glass during year was carried out and only packaging of same was done. Tribunal confirmed order of Commissioner (Appeals). The High Court held that since issue relating to deletion of addition essentially was in realm of facts and

there being no perversity in deletion of such addition, orders of appellate authorities deserved to be upheld (AY. 1994-95)
CIT .v. Vallabh Glass Works Ltd. (2014) 220 Taxman 129 (Mag.) (Guj.)(HC)

S. 28(i) : Business income-Capital or revenue-Subvention receipts from its principal shareholder was held to revenue receipt.
The assessee company was engaged in manufacturing digital electronic switching systems, computer software and providing software services. During the years under consideration, it received certain amounts from a company 'S', which was its principal shareholder. It explained the said payment as subvention from principal shareholders. It stated that payment made by 'S' was to make good loss incurred by it and it was capital receipt in nature. However, the AO did not agree and treated the receipt as revenue in nature. The Commissioner (Appeals) reversed the order of the AO. The Tribunal also upheld the order of the Commissioner (Appeals). On an appeal by the Department, the High Court, upholding the order of the Tribunal, held that financial aid was made by 'S' to meet recurring expenses. Financial assistance was not extended by 'S' either for setting up any unit or for the expansion of the existing business or for the acquisition of any assets and therefore, the receipts were held to be revenue in nature. (AY. 1999-00 to 2001-02)
CIT .v. Siemens Public Communication Networks Ltd. (2014) 221 Taxman 405 (Karn.)(HC)

S.28(i): Business income–Astrologer–Amounts received for prediction-Assessable as business income.
The assessee, an astrologer by profession, for the assessment year 2002-03, received the amount of Rs. 10 lakhs from certain persons. In their confirmation letters, these persons indicated that they had paid the amount since they were happy on account of the assembly election results of Tamil Nadu in the year 2001. According to the assessee, he predicted the election result of their leader and since these persons were grateful for the prediction made by him, these contributions had been made. The assessee contended that the contribution being in the form of gift were not taxable.AO held that the assessee had rendered services by performing poojas and further procedure hence taxable as business income. The view of AO was confirmed by Tribunal. On appeal the High Court held that the amount of Rs. 10 lakhs wasincome from the business of theassessee. Hence assessable as business income. (AY.2002-03)
N.K.UnnikrishnaPanicker.v. CIT (2014) 361 ITR 187/102 DTR 380/267 CTR 566/222 Taxman 237 (Ker.)(HC)

S.28(i):Business income-Subsidy-Grant in aide-Capital or revenue receipt-Sugar development fund was held to be revenue receipt.
Sum received by assessee by way of grant-in-aid out of sugar development fund to meet expenses of maintaining buffer stock was revenue receipt liable for taxation.
K.M. Sugar Mills Ltd. .v. CIT (2014) 361 ITR 637 (All.)(HC)

S. 28(i): Business income–Settlement of contract–Damages for breach of contract assessable as business income.[S. 43(5)]
The word 'Settled" or 'settlement' in connection with the contract has not been defined in the Income–tax Act or in the Contract Act or in the Sale of Goods Act or in any other statute. However the proper meaning to be given to the words "to contract, settled" in the definition clause would be "a contract determined or concluded or disposed of".By the use of expression "settled" what is intended to be dealt with is a case of performance of contract and not non –performance. If the payment is made as damages for breach of contract, it cannot be considered to be a "contract settled". If the payment is by way of damages and not by way of settlement by a contract, the question of actual delivery or transfer of the goods would be irrelevant. Income was rightly assessed as business income. (AY.1974-75)
CIT .v. Premier Vegetable Products Ltd. (2014) 362 ITR 464 /97 DTR 230(Raj.)(HC)

S.28(i): Business income-Investment management and advisory fees – Consistency-Income to be assessed as business income and not as income from other sources. [S.56].

Held, there was no evidence to prove that assessee did not carry out activity of investment management services. Merely because expenses could not be identified and substantiated by the assessee, it could not be held that income was not derived from business activity. Also, since there was no change in the terms of agreement or in the nature of services rendered vis-à-vis that of earlier year, on the principle of consistency, income had to be treated as business income and not as income from other sources.(AY. 2000-01)

CIT .v. Ashok Mittal (2014) 360 ITR 12/222 Taxman 233 / 100 DTR 233 (Delhi.)(HC)

S.28(i): Business income-Capital gains-Progfits on sale of mutual fund-Dealer in securities-Even a solitary transaction of redemption of (non-tradeable) mutual fund units amounts to a business activity for an assessee dealing in securities.[S.45]

Merely because deposits in mutual funds are not traded in the nature of sale and purchase of equity shares and such transactions are different in effect and consequences is no ground to treat those differently. Frequency of dealings in deposits of mutual funds with the strategy of firstly investing in tenurial plans and then getting redemption within the same year of deposit and at times resulting in huge profits while at other times in loss, was the usual business activity of the assessee. Such before term redemption, is done in the usual course of business by the assessee clearly to increase its actual cash inflow to tide over its commitments made in the market and at times to earn higher interest in other lucrative investment plans contemporaneously emerging in the market. In this case, in the name of consistency the assessee had tried to hoodwink the authorities. Rather previous conduct of the assessee reveals that the accounts had been manipulated by the assessee to treat the investment as a capital asset only as a camouflage and smoke screen. It is a case where intention as also principle of consistency sought to be used by the assessee in its favour rather goes against it as year after year the same manipulation strategy and maneuverability had been adopted to hoodwink the revenue.(AY. 2006-07)

CIT.v.PoojaInvestmentPvt. Ltd.(2014) 106 DTR 269(P&H)(HC)
CIT v. Hero Investments (P) Ltd (2014) 106 DTR 269(P&H)(HC)
CIT v.Bahadur Chand Investment (P) Ltd (2014) 106 DTR 269(P&H)(HC)

S.28(i): Business income-Investment in shares-Not keeping separate books together with frequent transactions means that gains from shares have to be assessed as business profits instead of as STCG.[S.45]

It was observed that separate books were not used. Amounts were freely transferred from the profits gained to business and vice-versa. Since very frequent purchase and sale of shares have been done it indicates that the main intention of the assessee was to earn income out of these shares which have been claimed to be under the head of short term capital gains. Having regard to the short duration of holding of the shares, and the lack of clarity in the account books, this Tribunal was wrong in assessing the gains as STCG instead of as business profits.(AY. 2006-07)

CIT .v. D & M Components Ltd (2014) 223 Taxman 154 (Mag.)/103 DTR 325/364 ITR 179(Delhi) (HC).

Editorial: Refer D&M Corporation Ltd .v.ACIT (2012) 49 SOT 224 (Delhi)(Trib)

S.28(i):Business income-Income from house property – Rental income from temporary letting out of shops flats in commercial complex.[S.22,36(1)(iii)]

Asseessee was engaged in the business of construction and sale of properties. Income from temporary letting out a few units in a complex constituted business income and not income from house property. Deduction under section 36(1)(iii) is available. (AYs. 1995-96 to 2000-01)

Nirmala Sahu (Late) (Smt.).v. CIT (2014) 98 DTR 55 (All.)(HC)

S. 28(i) : Business income-Lease equalization charges-Depreciation-Difference between annual lease charge of leased assets and depreciation allowed on said leased asset under Income-tax Act should be taken into consideration and not difference between annual lease charge and depreciation claimed by assessee in books of account as per Companies Act. [S.145]

The Assessee, a non-banking financial company, engaged in leasing business. During the years under consideration, the assessee had entered into various transactions of finance lease worked out the lease equalization in respect of each and every lease transactions as per the guidelines issued by the Institute of Chartered Accountants of India (ICAI).The lease equalization so worked out was claimed by the assessee was claimed as deduction while computing its total income.AO disallowed the claim which was confirmed by CIT (A). Tribunal held that when the relevant transactions are treated as finance lease and the assessee is allowed depreciation after having found him the owner of the leased assets, the depreciation allowed as per the rates prescribed in the Income Tax Act could be more than the depreciation claimed by the assessee in its books of account at the rate prescribed under the Companies Act. Therefore,it is necessary that while allowing deduction on account of lease equalization charges for the purpose of computing total income under the Income Tax Act, the difference between the annual lease charge of the leased assets and depreciation allowed on the said leased asset under the Income Tax Act should be taken into consideration and not the difference between the annual lease charge and depreciation claimed by the assessee in the books of account as per the Companies Act. Matter was remanded for calculation.(AY. 1994-95 to 1997-98)

Infrastructure Leasing & Financial Services Ltd. .v. Dy.CIT (2014) 146 ITD 297 / (2013) 38 taxmann.com 40/102 DTR 251 (Mum.)(Trib.)

S. 28(i) : Business income -Capital gains – Profit from sale of land –Assessable as business income.[S. 45(2)]

The Tribunal held that there is sufficient evidence to show that the land which was held as capital asset was converted into stock in trade with the intention to develop and sell the same as are organized and systematic activity and, therefore, the profit arising from the sale of land was chargeable to tax as business income and net as capital gains. (AY. 2003-04, 2006-07, 2007-08)

ITO .v. Shiv Kumar Daga (2014) 159 TTJ 415 (Mum.)(Trib.)

S.28(i): Business income -Income from other sources – Interest on fixed deposits with banks for short periods one day to ninety days is assessable as income from business.[S.56]

Interest earned by the assessee-company on fixed deposits for short periods ranging from one day to ninety days is taxable as business income and not as income from other sources. (AY.2009-10)

Green Infra Ltd. .v. ITO (2014) 98 DTR 187/159 TTJ 728 (Mum.)(Trib)

S.28(i):Business income-Interest on fixed deposits with bank for performance guarantee-Assessable as business income.

Fixed deposits with bank were kept by the assessee as its business necessity to obtain the performance guarantee in favour of clients. Interest on such deposits is business income. (AYs. 2002-03 to 2004-05)

ITO .v. Ricoh India Ltd. (2014) 98 DTR 435 / 165 TTJ 211(Mum.)(Trib)

S. 28(i) : Business loss-Amortisation of securities premium–Premium paid for purchases of Government securities at a price higher than their face value- to be amortised for remaining period of maturity-Circular of CBDT is binding on revenue. [S.119]

The assessee is a cooperative bank.As per the RBI Guidelines, it was required to deposit certain amounts in Government Securities and to hold the same till maturity in order to maintain the Statutory Liquidity Ratio (SLR). In certain cases, the acquisition of such securities was at a value higher than the face value of the security itself. The assessee claimed the premium so paid in acquiring the securities as a loss amortised over the entire period of security. The CIT(A) upheld the disallowance by holding that the investment was in the nature of capital asset and cannot be treated as stock-in-trade. The Tribunal deleted the disallowance by following a decision of the Bombay Bench of the Tribunal and also the CBDT Circular dated November 26, 2008.

The High Court dismissed the departmental appeal and held that as per the RBI directives, the assessee had to invest certain amounts in Government Securities and to hold the same till maturityin order to maintain Statutory Liquidity Ratio (SLR). The instructions of the CBDT Circular No.17 of 2008 clearly provide for amortisation of premium paid on acquisition of securities when the same are acquired at the rate higher than the face value. Such amortisation would have to be for the remaining

period of maturity. The High Court also observed that the instruction having been issued u/s. 119(2) of the Act would bind the Revenue.
CIT .v. Rajkot Dist. Co-op. Bank Ltd. (2014) 222 Taxman 240 (Guj.)(HC)

S. 28(i) : Business loss- Valuation of stock-Banking business-RBI guide lines-Loss due to diminution in value of current investment and amortization of premium on investments held to be maturity- Held to be deductible.[S. 37(1), 145]
Held that the assesse was entitled to deduction with respect to the diminution in value of investment and amortization of premium on investment held to maturity on the ground of mandate of the Reserve Bank of India guidelines.(AY. 2001-02 to 2005-06)
CIT v. HDFC Bank Ltd (2014) 366 ITR 505/107 DTR 140 (Bom.)(HC)

S. 28(i) : Business loss-Foreign currency fluctuation loss-Foreign exchange forward contracts-Mercantile system of accounting-Allowable. [S.145]
The assessee entered into foreign exchange forward contracts with banks in order to hedge foreign currency fluctuation. It incurred a (net) foreign exchange loss as a result of 'marking to market' the forward contracts. AO held that loss was not allowable as deduction in the year of incurrence. Tribunal held that the loss has been incurred for hedging of foreign currency fluctuation involved in sales invoices on the basis of forward contracts, which is a business decision to safeguard its interest. The loss has been incurred on the basis of scientific method in the ordinary course of business. The loss being based on a scientific method, on the basis of contractual liability with banks and on mercantile system has to be allowed to the assesse. It is a business loss incurred by the assessee on mercantile system which method is consistently followed by the assessee. Foreign currency fluctuation loss being based on scientific method, on basis of contractual liability with banks and on mercantile system had to be allowed. (AY.2008-09)
Bechtel India (P.) Ltd. .v.ACIT (2014) 146 ITD 733 / (2013) 33 taxmann.com 213 (Delhi)(Trib.)

S.28(i):Business loss-Lease equalization charges-Depreciation allowed on said leased asset under Income-tax Act should be taken into consideration and not difference between annual lease charge and depreciation claimed by assessee in books of account as per Companies Act. [S.32]
Assessee had entered into transactions of finance lease and after working out the lease equalization in respect of each and every lease transactions as per the guidelines issued by the ICAI, the lease equalization so worked out was claimed by the assessee as deduction while computing its total income. A.O. disallowed claim for deduction of lease equalization charges. Commissioner (Appeals) held that by claiming the deduction on account of lease equalization reserve in addition to the depreciation on leased assets, the assessee was claiming double deduction on account of the cost of assets leased, therefore the assessee being eligible for deduction of the entire cost of leased assets in the form of depreciation, there was no question of allowing separate deduction in the form of lease equalization reserve. Tribunal held that,while allowing deduction on account of lease equalization charges for the purpose of computing total income under the Income Tax Act, the difference between the annual lease charge of the leased assets and depreciation allowed on the said leased asset under the Income Tax Act should be taken into consideration and not the difference between the annual lease charge and depreciation claimed by the assessee in the books of account as per the Companies Act. While allowing deduction on account of lease equalization charges, only difference between annual lease charge of leased assets and depreciation allowed on the said leased asset under Income-tax Act should be taken into consideration. Matter remanded. (AYs. 1994-95 to 1997-98)
Infrastructure Leasing & Financial Services Ltd. .v. Dy.CIT(2014) 146 ITD 297 /164 TTJ 128 (2013) 38 taxmann.com 40 (Mum.)(Trib.)

S. 28(i):Business loss-Income-Amount debited to squared up account-No disallowance can be made .[S.4]
Assessee debited in the P&L account of “loss on transfer of telephone infrastructure” on account of squared up corresponding credit of equal amount representing “amount withdrawn from reserve for business structuring” in the inner column of the P& Loss account , there was no effective debit to the P& Loss account and these entries being absolutely profit neutral so far as the profit as per P& Loss

account therefore no adjustment were required and therefore the disallowance of the impugned loss made by the AO was not sustainable.(ITA NO 5816/2012 DT 11-03-2014)(AY. 2008-09)
Bharati Airtel Ltd .v. ACIT (2014) 101 DTR 154 (Delhi)(Trib.)

S.28(v): Business income - non-compete fee [position prior to 1-4-2003] Since amendment in Finance Act, 2002 was not clarificatory but amendatory in nature, non-competition fee received under a negative covenant was taxable only with effect from 1-4-2003, and not retrospectively, therefore, non-compete fees received were capital receipts and not taxable.[S.4]
The High Court dismissed the appeal of the revenue by relying on the decisions in the case of Guffic Chem (P.) Ltd. v. CIT [2011] 332 ITR 602 and CIT v. K. Chandrakanth Kini[2012] 347 ITR 388 (Kar.) wherein it has been held that the payment received as non-competition fee under a negative covenant would be treated as a capital receipt till the assessment year 2003-04. After the amendment to section 28 *via* the Finance Act, 2003, with effect from 1st April 2003 such capital receipts would be taxable. The amendment made by Finance Act, 2002 would apply prospectively.(AYs. 1998-99, 1999-2000)
CIT .v.Prakash Ladhani (2014) 220 Taxman 213 (Karn.)(HC)

S.28(va): Business income–Cash or kind–Capital asset-Income from sale of shares-Under an agreement wherein all pervasive control being entrusted to purchaser and absolute exclusion of the seller whether as a shareholder or for its management and control would be business income and not capital gain. [2(14), 45]
The Assessee disclosed income from short-term and long-term capital gains on account of sale of shares vide a share purchase agreement. The AO referred to various clauses of the agreement, including the clause on non-compete fees, and concluded that the transfer was of business from assessee to the purchaser with all passive control and thus treated the income from it as business income u/s. 28(va). The Tribunal upheld the view of the AO. On an appeal by the Assessee, the High Court held that transfer was not an innocent transfer of sale of shares that would take place within section 2(14) but a transfer of business with all pervasive control being entrusted to purchaser to complete and absolute exclusion of the seller, whether as a shareholder or for its management and control, and hence it would be taxable as business income. (AY. 2006-07)
Sumeet Taneja .v. CIT (2014) 220 taxman 368 (P&H)(HC)
Editorial:The agreement specificaaly mentioned consideration was for non copete fees.
S. 28(va) : Business income- Capital gains –Non compete fee- Sale of shares coupled with restrictive covenant. [S. 48, 55(2)(a)]
Tribunal held that prior to assessment year 2003-04, non-compete fee was a capital receipt not liable to tax and, therefore 25 per cent of the sale consideration of the shares is not liable to tax in A.Y. 2002-03.
Reliance Industries .v. Addl. ACIT (2014) 159 TTJ 349 /(2013) 55 SOT 8 (Mum.)(Trib.)

S. 31 : Repairs and insurance of machinery, plant and furniture - Replacement of an old machine with a new one.
The assessee engaged in the business of manufacture and sale of yarn, replaced the old machine with the new one and claimed such amount as revenue expenditure. The Assessing Officer disallowed the claim of revenue expenditure on the premise that the same was capital in nature. The CIT(A) held that expenditure incurred on modernization by replacing old worn out machinery with new machines could only be treated as a revenue expenditure. The Tribunal confirmed the CIT(A) order. The High Court observed that the entire machinery cannot be regarded as a single asset and each separate machinery was held to be an independent entity, though all machines put together constitute the production process. The asset gives the assessee an enduring benefit of better and more efficient production over a period of time. Such replacement of assets was held to be not amounting to "current repairs". Hence, High Court decided in favour of revenue and the orders of Tribunal and CIT(A) were set aside. (AY. 1991 – 92)
CIT .v. Madras Spinners Ltd. (2014) 220 Taxman 116 (Mag.) (Ker.)(HC)

S.32 : Deprecation–Sale and lease back- Records of the assessee clearly depicted that transaction of sale and lease back lacked genuine – Deprecation was not allowable on the assets.
Where the statement given by the managing director of the assessee company as well as, the record of the assessee Company clearly depicted / established that the purchase and lease back transaction were lacking genuineness, further, the records showed that the funds were received back by the assessee within a few days. On basis of the facts the High Court held that depreciation on the assets was not allowable. (AY. 2001 – 02)
MARG Constructions Ltd. v. ACIT (2014) 102 DTR 113 / 223 Taxman 249 (Mag.)(Mad.)(HC)

S. 32 : Depreciation-Additional depreciation-Manufacture-Processing of iron ore in plant and generation of wind energy-Eligible additional depreciation. [S.32(1)(iia), 263]
The assesse is engaged in business of processing of iron ore in the plant and also generation of windmill energy. It claimed additional depreciation on machinery and wind mill. The said claim was allowed by AO. CIT revised the order of AO under section 263 and directed to disallow the claim of additional depreciation. On appeal Tribunal allowed the claim of additional depreciation to assesse. On appel by revenue, dismissing the appeal the court held that the activities of assesse,ie.processing of iron ore in plant and generation of wind energy / eligible for additional depreciation.[S.32(1)(iia)]: Followed the ratio in CIT v. Sesa Goa Ltd (2005) 271 ITR 331(SC).
CIT v. V.M. Salgaonkar & Brothers (P) Ltd. (2014) 225 Taxman 27(Mag.)(Bom.)(HC)

S. 32 : Depreciation - 100% Depreciation on temporary wooden structure and partition for running computer centers.
Assessee put up temporary wooden structure and partition for running computer centres, 100 per cent depreciation on partition and structures was to be allowed (AY.1998-99)
CIT .v.Amrutanjan Finance Ltd. (2014) 363 ITR 135 / (2011) 203 Taxman 295 (Mad.)(HC)

S. 32 : Depreciation –Imported Motor cars acquired on merger/amalgamation-merger/amalgamation after 1.4.2001 –Clause(a) to Proviso to section 32(1) not applicable and depreciation allowable u/s 32. [S. 2(47), 43(1), 43(6)]
Under the scheme sanctioned by High Court, three concerns merged with assessee company from the appointed date which was 1.4.2004. The assessee company, inter alia, received imported motor cars on merger/amalgamation. The assessee company issued share in consideration of the merger/amalgamation. These imported cars were acquired by the transferor concern between 28.2.1975 to 1.4.2001. On the imported cars assessee company claimed depreciation u/s 32 which was denied by the AO by relying on the Proviso to Section 32(1). The High Court held on amalgamation/ merger the imported cars were transferred to the assessee company in view of Explanation 7 to section 43(1) which specifically deals with the acquisition of an asset under amalgamation. Further, they were acquired by merged entities and became the property of the assessee company w.e.f. 1.4.2004. Therefore, assessee company was eligible for depreciation u/s 32 and proviso to section 32(1) was not applicable to the assessee company. (A. Y. 2005-06 to 2008-09)
CIT .v. Mira Exim Ltd. (2014) 220 Taxman 156 / (2013) 359 ITR 70 / 262 CTR 441 / 94 DTR 41 (Delhi)(HC.)

S. 32 : Depreciation – Sale and lease back-Boiler-Genuiness of transaction was doubted.
The Assessee purchased a boiler and subsequently leased it out to sister concern of seller. In return of income, assessee claimed depreciation on said boiler. Assessing officer found that boiler was attached to land and sale could not be completed by mere issue of sale bills. It was further noticed that boiler was still lying and functioning in factory of the seller and it was not installed in its sister concern. Assessing officer thus taking a view that transaction in question was a loan transaction and it was wrongly given colour of lease transaction, disallowed assessee's claim. Tribunal upheld the assessment order. The High Court observed that the Assessee had not questioned the findings of facts as regards the genuineness of the lease transactions. Thus when the finding of the fact on genuineness being not challenged in the manner known to law the same having attained finality, there exists no ground to interfere with the order of lower authorities rejecting the claim of depreciation. On the submission of the counsel of the assessee, to raise additional grounds on genuineness of lease

transactions, the court held that question regarding genuineness is a pure and simple factual one and considering the materials discussed by authorities below, the court did not find any justifiable ground to interfere with the order. (AY. 1995 – 96,1996 – 97)

Upasana Finance Ltd. .v. Jt. CIT (2014) 220 Taxman 6 (Mag.)(Mad.)(HC)

S. 32 : Depreciation – Computer accessories and peripherals – Integral part of computer systems – Eligible for depreciation at the rate of 60%.

Assessee claimed depreciation at the rate of 60% on computer accessories and peripherals. Assessing officer rejected the claim of the assessee. CIT(Appeals) and Tribunal allowed the claim of the assessee on the contention that computer accessories and peripherals are integral part of computer systems. On appeal by revenue to High Court, Tribunal's order was upheld. (AY. 2004 – 05)

CIT .v. BSES Yamuna Powers Ltd. (2013) 358 ITR 47/40 Taxmann.com 108(2014) 220 Taxman 51 (Mag.)(Delhi)(HC)

S. 32: Depreciation - Intangible asset – Disallowance of depreciation on software.

Depreciation on software cannot be declined where valuation report of assets indicated that software was developed and installed by assessee in system and assessee produced all vouchers and receipts for same (AY. 2005-06)

CIT .v. Shree Ram Multi Tech Ltd. (2014) 220 Taxman 76 (Mag.) (Guj.)(HC)

S. 32 : Depreciation – Foreign exchange rate difference - Considered as a part of cost to plant and machinery

Assessee claimed depreciation on account of foreign exchange rate difference capitalized to plant and machinery. Assessing Officer rejected assessee's claim holding that amount was not actually paid at end of accounting year and same was allowable only at time when liability was actually paid. Commissioner (Appeals) and Tribunal had allowed depreciation in case of assessee in earlier assessment years on similar facts. Since facts in relevant year were identical, the High Court, following principle of consistency, allowed assessee's claim.

Addl. CIT .v. Gujarat Narmada Valley Fertilizers Co. Ltd. (2014) 220 Taxman 117 (Mag.) (Guj.)(HC)

S. 32 : Depreciation – Rate – Toll roads / bridges to be considered as building for the purpose of granting depreciation.

Toll roads and bridges are to be considered as building for the purpose of granting depreciation. (AY. 2004-05)

CIT .v. Noida Toll Bridge Co. Ltd. (2014) 220 Taxman 06 (Mag.) (All.)(HC.)

S. 32: Depreciation-Vibro bed dryer-Entitled to hundred percent depreciation.

Vibro bed dryer is entitled to hundred per cent depreciation.(ITA No. 254 of 2001 dt 10-02-2014)

CIT .v. McLeod Russel (India) Ltd. (2014) 361 ITR 663 (Cal.)(HC)

S. 32: Depreciation–Ownership of asset–Possession-Eligible depreciation.

In light of finding that assessee had acquired possession of asset and was using it for the purposes of business, assessee was held entitled to depreciation. (AY. 2001-02)

CIT, Large Taxpayers Unit .v. India Railway Finance Corporation Ltd. (2014) 362 ITR 548 (Delhi)(HC)

S. 32: Depreciation – Transfer of business – Ownership of asset-Entitled depreciation.

Held, transferee was put in possession of building, plant and machinery in terms of agreement to sell and running undertaking in its own right. Hence, it was entitled to depreciation. The fact that legal title conveyed under lease agreement and deed of sale was executed in subsequent years is not material. (AY.2001-02)

CIT .v. WEP Peripherals Ltd.(2014) 362 ITR 508 / 102 DTR 219 /268 CTR 88 (Karn.)(HC)

S. 32: Depreciation–Dominion over asset–User-Entitled depreciation.

The assets had been transferred by the Government of Rajasthan to the assessee-society and for that purpose the value had been adopted as the value to the previous owner. The assessee-society became the owner of the assets and was actually using the property in its own right as an owner on and from the date of order of the Governor and formation of the society. It was entitled to depreciation. Principle laid down in Mysore Minerals Ltd..v. CIT (1999) 239 ITR 775 (SC), is applied.(AY. 2007-08)

CIT .v. Jawahar Kala Kendra (2014) 362 ITR 515 / 100 DTR 65 / 222 Taxman 222 (Raj.)(HC)

S.32: Depreciation–Goodwill–Amendment is not retrospective hence depreciation is not allowable on good will for the asst year 1987-88.

Depreciation is not allowable on goodwill in AY 1987-88 as amendment of s. 32 we f 1-4-1997 is not retrospective. (AY. 1987-88)

CIT .v. Wipro Ltd. (No.2) (2014) 360 ITR 658 (Karn.)(HC)

S.32: Depreciation–Tanker mounted on chassis of Truck–Entitle to 100% depreciation.

Tanker mounted on chassis of truck is not part of truck, and hence, is entitled to 100 percent depreciation. (AY. 1986-87)

CIT .v. H.B. Leasing and Finance Ltd. (2014) 360 ITR 362 (Delhi)(HC)

S.32: Depreciation–Motor vehicles–Used in business of leasing-Entitled 40% depreciation.

Assessee entitled to depreciation at higher rate of forty percent on leased vehicles instead of normal rate of thirty percent. (AY. 1986-87)

CIT .v. H.B. Leasing and Finance Ltd. (2014) 360 ITR 362 (Delhi)(HC)

S.32: Depreciation–Rate-Leased assets-Assessee was entitled to get higher depreciation on trucks at 40 per cent instead of normal rate of 25 per cent.

The assessee had leased out 19 trucks to M/s. Damodar Mangalji & Co. Ltd. for period of 5 years who in turn leased out trucks to drivers with a condition that they would transport the ore of the assessee. The assessee claimed 40 per cent depreciation at enhanced rate and the same was rejected by Assessing Officer and granted normal depreciation of 25 per cent. On appeal, the Commissioner (Appeals) and Tribunal observed that in case of leasing of vehicle the entire expenditure on maintenance and running was borne by the lessee whereas in case of hiring of trucks the entire expenditure was borne by hirer and, thus, higher depreciation would be allowable only to the hirer of a vehicle and not to a lessor. On appeal, the High Court relied on law laid down by Hon'ble Supreme Court in I.C.D.S. Ltd. v. CIT [2013] 350 ITR 527/29 taxmann.com 129/212 Taxman 550 and held that what has been postulated is that the assessee must use the asset for the purpose of business. The section does not postulate the use of the asset by the assessee himself and therefore the question was answered in favor of the assessee. (AY.1997-1998).

Damodar Mangalji Mining Co. .v. JCIT (2014) 220 Taxman 344/264 CTR 182 (Bom.)(HC)

S.32: Depreciation–Rates-Parts of assets-A tanker or a gas cylinder attached to body of a truck continues to be a gas cylinder and is, accordingly, entitled to depreciation as applicable to gas cylinder, i.e., 100 per cent depreciation.

The Assessee claimed depreciation @ 100% on gas cylinder attached to the part of truck considering it to be separate part for the purpose of claiming depreciation. The AO denied the Assessee's contention for claiming 100% depreciation on gas cylinder. Lower authorities reversed the order of the AO. On an appeal, the High Court relied on the decision of CIT v. Goyal MG Gases Ltd. [2008] 296 ITR 72 (Delhi) wherein a similar controversy had arisen and it was held that a tanker or a gas cylinder attached to the body of a truck continues to be a gas cylinder and is accordingly entitled to depreciation as applicable to gas cylinder as per Appendix I to the Income-tax Rules i.e. @ 100%.(AY. 1986 - 87)

CIT .v.H.B. Leasing & Finance Ltd. (2014) 220 Taxman 215 (Delhi.)(HC)

S.32: Depreciation-Rate-Leased assets-Where assessee engaged in business of leasing and financing of leased vehicles to third parties, assessee would be entitled to depreciation at higher rate of depreciation i.e. 40 per cent.

The High Court relied on the Supreme Court's decision in *I.C.D.S. Ltd.* v. *CIT* [2013] 350 ITR 527 and held that the assessee engaged in the business of leasing and financing leased vehicles to third parties, it would be entitled to depreciation at higher rate of 40 per cent. (AY. 1986 – 87)

CIT .v.H.B. Leasing & Finance Ltd. (2014) 220 Taxman 215 (Delhi)(HC)

S.32:Depreciation-Interest-Distinction between "hire purchase transactions" and "loan transactions" explained

The vehicles were registered in the name of the respective customers. However, in the registration certificate a remark in terms of agreement was to be recorded to the effect that vehicle is held by the registered owner under a hire purchase agreement with the assessee. A "Sale Letter" was executed, reciting that the customer had on the date of the application for loan sold to the financier the motor vehicles. The sale of vehicles have not been shown by the assessee in its profit and loss account and no sales tax return has been filed by it. In its audited account, filed with the income tax returns, the assessee has shown the finance charges as revenue receipts. The auditor has certified that the assessee is not a trading company. The auditor has also certified that the assessee has followed the norms issued by the Reserve Bank of India for non-banking financial companies (NBFC). This shows that the assessee is a finance company engaged in financing of vehicles. There is no evidence that assessee is a trader dealing in purchase and sale of vehicles. Thus the hirer is the real purchaser of vehicles from the dealer. He selects the vehicle for purchase and also the dealer from whom it was to be purchased. At this stage the assessee does not come into picture. After the hirer identified the vehicle and the dealer i.e. the seller then he approached the assessee for finance due to his inability to purchase out of his own funds. At this stage the assessee extended the facility of finance to hirer on willingness of the hirer to pay a price for this facility. The total amount of hire that hirer pays to the assessee exceeds the price at which the vehicle was purchased from the dealer. This is more than that part of the purchase consideration which was paid by the assessee to the dealer as finance to the hirer. The excess amount so paid by the hirer to the assessee is nothing but interest on loan. The amount so invested by the assessee in the purchase of vehicles is the amount of loan advanced by it to the hirer. When tested on the principles of law laid down by Supreme Court in Sundaram Finance Ltd the only conclusion that can be reached is that the transactions entered by the assessee with the customer/hirer is a loan transaction and the finance charges were nothing but interest.(ITA no. 367 of 2012, dt. 13.12.2013.)

CIT .v. Commercial Motors Finance Ltd. (All.)(HC), www.itatonline.org

S. 32 : Depreciation – Unabsorbed-Period of set off-Available for setting off for a period beyond eight years.[S.32(2)]

During assessment proceedings, AO. held that unabsorbed depreciation in hands of assessee for relevant assessment years could only be carried forward for setting off up to eight assessment years. By following the ratio in the General Motors India (P.) Ltd. v. Dy. CIT [2013] 354 ITR 244 (Guj.)(HC) it was held that unabsorbed depreciation relating to assessment years in question was available for setting off for a period beyond eight years. (AYs. 1999-2000 to 2002-03)

Dy.CIT .v. Bajaj Hindustan Ltd. (2014) 149 ITD 709 / 47 taxmann.com 333 (Mum.)(Trib.)

Editorial: Ratio of CIT v. Times Guaranty Ltd (2010) 40 SOT 14(SB((Mum)(SB) was held to be not good law.

S. 32 : Depreciation–Sale & lease back-Depreciation was held to be not allowable.

The assessee purchased electricity meters from Gujarat State Electricity Board (GEB) and leased them back to GEB. Tribunal held that the annual account of GEB showed that the real intention was to enter into transaction of loan / finance only and the assessee was never intended to be the real and legal owner of the assets. The Tribunal held that the depreciation was rightly denied to the assessee. (AY. 1994-95)

Hathway Industries (P) Ltd. .v. Addl. CIT (2014) 163 TTJ 141 (Mum.)(Trib.)

S. 32 : Depreciation–Valuation of land to be taken as per valuation report and not on estimation-Depreciation was held to be allowable on superstructure.

The Tribunal held that the estimation of the value of land by the Assessing Officer himself cannot be sustained in the presence of the report of the Government approved valuer given by assessee itself and directed that the value of the land be taken as per the valuation report given by the assessee and the claim of depreciation of the superstructure be allowed accordingly. (AY. 1994-95 to 1996-97, 2000-01 to 2002-03)

Hathway Industries (P) Ltd. .v. Addl.CIT (2014) 163 TTJ 141 (Mum.)(Trib.)

S. 32 : Depreciation –Goodwill-Depreciation is allowable.

The Tribunal followed the decision of Hon'ble Supreme Court in the case of CIT v. SMIFS Securities Ltd. (2012) 348 ITR 302 (SC) and held that the assessee is entitled to depreciation on goodwill. (AY. 2006-07)

ACIT .v. Bharti Teletech Ltd. (2014) 163 TTJ 36(UO) (Delhi)(Trib.)

S. 32 : Depreciation – WDV – Depreciation not claimed in earlier year.

The Tribunal held that the assessee did not claim depreciation in A. Y. 2001-02. Therefore, the WDV of the assets as on 31st March 2001 has to be taken for considering the depreciation to be allowed to the assessee in A.Y. 2002-03. (AY. 2002-03)

Reliance Industries .v. Addl. ACIT (2014) 159 TTJ 349 / 55 SOT 8 (Mum.)(Trib.)

S.32: Depreciation-Lease of assets-Assessee (Bank) is entitled to depreciation on assets given on lease.

In so far as the issue relating to the claim of depreciation on leased transactions is concerned, the Supreme Court in I.C.D.S. Ltd. vs. CIT (2013) 350 ITR 527(SC) had the occasion to consider the question "whether the Assessee is entitled to depreciation on vehicles financed by it which is neither owned by the Assessee nor used by the Assessee?" The Supreme Court after perusing the lease agreement and other related factors held that the lessor is the owner of the vehicles. As an owner, it used the assets in the course of its business satisfying both the requirements of S. 32 of the Act and hence is entitled to claim depreciation. A similar view was taken by the Delhi High Court in CIT v. Cosmos FilmsLtd.(2011) 338 ITR 266 (Delhi) wherein the Delhi High Court considered the implications of S. 19 of Sale of Goods Act, 1930. The Tribunal, Mumbai Bench in the case of Development Credit Bank Ltd has followed the decision of the Supreme Court in the case of ICDS and the decision of Delhi High Court in the case of Cosmos Films and allowed the claim of depreciation. The Tribunal, Mumbai bench, in the case of L&T has considered a similar issue and followed the findings of the Supreme Court in the case of ICDS and also of the co-ordinate bench in the case of Development Credit Bank Ltd and allowed the claim of depreciation on sale of lease back assets. Considering all these judicial decisions in the light of the facts, we direct the AO to allow depreciation(ITA No. 3643 & 3644/Mum/2001dt. 23.05.2014.(AYs. 1996-97 & 1997-98,)

ICICI Bank Ltd. v. JCIT (Mum.)(Trib.),www.itatonline.org

S.32:Depreciation–Depreciation on computer accessories and peripherals allowable at 60%.

Depreciation is allowable at the rate of 60% on the printers, Ups and computer peripherals. (AY. 2006-07)

Dy.CIT .v. CNB Finwiz Ltd. (2014) 159 TTJ 146(Delhi)(Trib.)

S. 32(1)(iia) : Depreciation –Wind mill generating machinery- Additional depreciation allowed on setting up of wind electric generator to a chemical manufacturer.

The assessee was engaged in the business of manufacture and sale of various specialty chemicals and had claimed additional depreciation u/s. 32(1)(iia) on the cost incurred by it for installation of a Wind Electric Generator. The AO did not grant the said additional depreciation on the ground that the assessee was not in the business of generation and distribution of power. The CIT(A) following the decisions of the Madras High Court in the case of CIT .v. VTM Ltd. (2009) 319 ITR 336 and in case of CIT .v. Hi Tech Arai Ltd. (2010) 321 ITR 477 deleted the disallowance so made. The Tribunal confirmed the Order passed by the CIT(A).

The High Court dismissed the departmental appeal and held that the assessee was entitled to claim additional depreciation. The High Court observed that the Madras High Court had an occasion to consider the similar issue and it is held that while claiming the deduction under Section 32(1)(iia) setting up wind-mill has nothing to do with the power industry and what is required to be satisfied in order to claim additional depreciation is that the setting up of 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. (AY. 2007-2008)

CIT .v. Diamines & Chemicals Ltd. (2014) 222 Taxman 218/271 CTR 98/109 DTR 62 (Guj.)(HC)

S. 32(1)(iii) : Depreciation-Block of assets-Glow sign boards-Damaged-Loss debited to P& L account-Matter remanded. [S.2(11)]

Glow sign boards owned by assessee got damaged. Assessee debited the amount in profit and loss account representing value of glow sign boards written off. AO held that since assessee-company's block of 'furniture and fixtures' was still appearing in its schedule of assets, expenditure on account of damage to glow sign boards could not be charged to profit and loss account. Assessee should have applied provisions of section 32(1)(iii) for treating said loss. Tribunal held that Glow sign boards pertained to block of assets of "furniture and fixtures" which was still appearing in schedule of assets in balance sheet, issue was remitted to the file of AO to state allowance of depreciation.(AY. 2006-07, 2007-08)

Haier Appliances India (P.) Ltd. .v. Dy.CIT (2014) 146 ITD 730 / (2013) 35 taxmann.com 203 (Delhi)(Trib.)

S.32(1)(iii):Depreciation-Intangible asset- Client acquisition cost-Eligible depreciation.

Customer base of the micro-finance business of SKS was acquired by the assessee as a part of transfer of entire business. Commercial assets of SKS facilitate the assessee to carry on the business smoothly and effectively and was in the nature of business and commercial rights and, therefore, the client acquisition cost paid by the assessee was eligible for depreciation u/s. 32(1)(iii). (AYs. 2006-07 to 2008-09)

SKS Microfinance Ltd. .v. Dy.CIT (2014) 98 DTR 321(Hyd.)(Trib.)

S. 32A : Investment allowance-Reserve-Creation of reserve in next year is held to be sufficient compliance.

The assessee established sugar factory which was fully owned by the State of UP. The assessee filed return claiming investment allowance under section 32A(1). The AO rejected the claim by observing that assessee had created a reserve which was less than 75 per cent of the claim made. On appeal, the Commissioner (Appeals) deleted the addition. On appeal, the Tribunal upheld order of AO. On further appeal, the High Court held that if during the assessment year relevant to the year of installation or use the total assessed income of assessee, is nil or negative, then the assessee cannot be expected to create an actual and non-illusory reserve equivalent to 75 per cent of the claim and as such reserve can only be created out of assessed profits. There can be no obligation on the part of the assessee to create a reserve as a condition merely for carrying over the development rebate without it being actually allowed to the assessee by setting off the rebate against the assessed profit. It would be sufficient if reserve was created in subsequent years in which assessee was assessed to profits. (AY. 1987-88)

Kisan Sahkari Chini Mills Ltd. .v. ITAT (2014) 220 Taxman 117 (Mag.) / 41 taxmann.com 35 (All.)(HC)

S. 32A : Investment allowance – Composite technology.

The assessee was engaged in manufacture of caustic soda. It applied to the Secretary, Department of Science and Technology (respondent), for issue of certificate under section 32A(2B), for use of technology developed by Central Electrochemical Research Institute (CECRI), a unit of National Research and Development Corporation of India (NRDC). The application of assessee was rejected on ground that M/s Titanium Equipment and Anode Manufacturing Company Ltd. (TEAM) was

utilizing the technology developed by CECRI to manufacture Titanium Substrate Insoluble Anodes (TSIA), while the assessee was only using the TSIA manufactured by TEAM for manufacturing caustic soda, which use was not covered under section 32A(2B). Also, a certificate under section 32A(2B) had been issued to TEAM, who had availed of same by claiming higher investment allowance at the rate of 35 per cent under the section. The High Court held that the technology developed by CECRI was a composite technology both for manufacture of TSIA as well as for its utilization in manufacturing caustic soda, and hence it was eligible for issue of certificate under section 32A(2B) for availing higher rate of investment allowance.

Grasim Industries Ltd. .v. Secy. Deptt. of Science & Technology, Govt. of India (2014) 220 Taxman 78(Mag) / (2013) 40 taxmann.com 468 (Delhi) (HC)

S. 32A: Investment allowance–Plant-Hotel building is not plant and not entitled investment allowance.

A hotel building is not a "plant" and is not entitled to investment allowance. (AY. 1986-87)

CIT .v. SB Properties and Enterprises Ltd. (2014) 362 ITR 483 / 100 DTR 33 (Raj.)(HC)

S.35:Expenditure on scientific research-R&D expenditure approved by the DSIR eligible for weighted deduction-Neither AO nor CIT(A) can decide the quantum of expenditure, only appropriate authority can decide.

The assessee had claimed a deduction of Rs. 48.58 crores u/s. 35(2AB). However, the Ministry of Science & Technology, the Department of Scientific and Industrial Research (DSIR) had vide their certificate in form 3CL, approved of R& D expenditure of Rs. 31.26 crores only as being eligible for weighted deduction. Accordingly, AO granted weighted deduction of Rs. 46.89 crores (being 150% of Rs. 31.26 crores).

On appeal, the Tribunal observed that neither the AO nor the CIT(A) can decide on the expenditure which will be entitled to weighted deduction u/s. 35(2AB). S.35(2AB)(3) provides that if any question arises about extent of deduction, the matter should be referred to the DSIR whose decision will be final and cannot be tampered with by the Tribunal. Even if the assessee is right in that there is a mistake in the certificate issued by the DSIR, same can only be rectified by DSIR and not in appellate proceedings. (AY. 2007-08)

Electronics Corpn. of India Ltd. .v. ACIT (2014) 29 ITR 637 (Hyd.)(Trib.)

S. 35ABB : Know-how-Telecommunication Licence-Licence fee-Capital or revenue-Licence fee for acquiring licence was held to be capital and to be amortised-Yearly licence fee on the basis of revenue sharing basis was held to be revenue in nature.[S.37(1)]

Assessee company was engaged in business of telecommunication services and value added related services. It procured licence from Government for telecommunication services initially under 1994 agreement which was subsequently governed by New Telecom Policy 1999. In terms of licence agreement, assessee had to pay entry fee payable up to 31-7-1999 and, thereupon, licence fee was payable as a percentage of gross revenue under licence effective from 1-8-1999. Assessee claimed that payment of licence fee was allowable being revenue in nature. Revenue authorities rejected assessee's claim taking a view that payments were of capital nature. Tribunal allowed assessee's claim. On appeal by revenue the court held that, since a part of licence fee was payable to acquire an asset i.e. right to establish cellular telephone service, and remaining part of payment was attributable to yearly licence fee on revenue sharing basis for carrying on business as cellular telephone operator, payment of licence fee was to be regarded as partly capital and partly revenue in nature. Licence fee paid to Government for providing telecommunication services, in view of fact that a part of licence fee was payable to acquire an 'asset' i.e. right to establish cellular telephone service was held to be capital in nature and remaining part of payment was attributable to yearly licence fee on revenue sharing basis for carrying on business as cellular telephone operator, payment in question was to be regarded as revenue in nature.(AY. 1999-2000 to 2007-08)

CIT v. Hutchison Essar Telecom (P) Ltd (2014) 97 DTR 294 (Delhi)(HC)
CIT v. Bharti Airtel Ltd. (2014) 97 DTR 294 (Delhi)(HC)
CIT v. Bharti Cellular Ltd. (2014) 97 DTR 294 (Delhi)(HC)
CIT v. Bharti Telenet Ltd. (2014) 97 DTR 294 (Delhi)(HC)

S. 35ABB : Licence to operate telecommunication services - Payment was regarded as partly revenue and partly capital in nature.

The assessee company was engaged in telecommunication services and value added related services. It procured a licence from Government for telecommunication services initially under 1994 agreement which was subsequently governed by New Telecom Policy 1999. In terms of the licence agreement, the assessee had to pay an entry fee payable up to 31-7-1999 and, thereupon, the licence fee was payable as a percentage of gross revenue under the licence effective from 1-8-1999. The assessee claimed that payment of the licence fee was allowable being revenue in nature. The Revenue authorities rejected the assessee's claim taking a view that payments were of capital nature. Tribunal, however, allowed the assessee's claim. On appeal to the High Court, it held that since a part of the licence fees was payable to acquire an asset i.e. the right to establish cellular telephone services, and the remaining part of payment was attributable to a yearly licence fee on a revenue sharing basis for carrying on business as a cellular telephone operator, payment of licence fees was to be regarded as partly capital and partly revenue in nature(AY. 1999-00, 2007-08)

CIT .v.Bharti Hexacom Ltd. (2014) 221 Taxman 323 (Delhi)(HC)

S. 35D : Amortization of preliminary expenses - No nexus between investment and project - Interest income not to be adjusted against pre-operative expenses - Interest on investment assessable as income from other sources. [S.28(i), 56]

Assessee manufacturing human vaccines received substantial financial grant. It invested said funds and promoters capital with banks under 'Portfolio management scheme' under which assured return was guaranteed by bank. Assessee adjusted interest income on said bank deposit against pre-operative expenses relating to a project. Where there was no inextricable link between investment and project, interest income on said investment could not be permitted to be adjusted against pre-operative expenses in respect of said project. Interest on investment is assessable as income from other sources. (AY. 1992-93)

CIT .v.Indian Vaccines Corporation Ltd(2014) 363 ITR 295 / 222 Taxman 207 (MAG) (Delhi)(HC)

S. 35D : Amortization of preliminary expenses- Rule of consistency – Satisfaction of conditions.

The AO disallowed preliminary expenses claimed by the assessee. On appeal the CIT(A) allowed the expenses on ground that in earlier years, benefit under section 35D was allowed to the assessee. The Tribunal set aside the order of the CIT(A) holding that the rule of consistency should not come in the way and that the issue should be looked into on merits. The High Court held that the since neither the ITAT not the CIT(A) had considered the issue on merits, the case was to be remanded to the ITAT to consider where deduction under section 35D was allowable on the merits of the issue. (AY. 2004-05)

Gujarat Power Corporation Ltd. .v. Addl.CIT (2014) 220 Taxman 119 (Mag.) / (2013) 40 taxmann.com 349 (Guj.)(HC)

S.35D:Amortisation of preliminary expenses–Substantial increase in equity base-purchase of machinery and subsequent increase in sales turnover can be attributed to extension of undertaking

The assessee, a public company engaged in the business of manufacture and sale of windmills. The AO disallowed preliminary expenses written off u/s. 35D, holding the same to be capital in nature. The CIT(A) confirmed the order of the AO.

In the appeal before the Tribunal, the assessee pointed out that legal and consultancy expenses were incurred for increase in capital base of the company, there was increase in number of windmills, machinery, etc., purchased during the year, which in turn had led to substantial increase in sales turnover which was allowable u/s. 35D. The Tribunal allowing the claim of the assessee observed that the expenditure incurred can be attributed to extension of undertaking and is thus eligible for deduction u/s. 35D of the Act. (AY. 2009-10)

Chiranjeevi Wind Energy Ltd. .v. ACIT (2014) 29 ITR 534 (Cochin)(Trib.)

S.36(1)(ii):Bonus or commission paid to employee–Directors giving personal guarantee-Guarantee commission paid to directors was held to be deductible.

Directors provided personal guarantees to bank as pre-condition for grant of credit facilities to company for business purpose. Commission was paid to directors for furnishing such guarantee. If commission would not have been paid, sum would not have been distributed to them as dividend. Held, guarantee commission paid to directors deductible. (A. Y. 2006-07)

Controls and Switchgear Contractors Ltd..v. Dy. CIT (2014) 365 ITR 312 / 104 DTR 117 / 269 ITR 44 (Del.)(HC)

S.36(1)(iii):Interest on borrowed capital-Investment in shares of a foreign company-Interest was held to be not allowable as it was not in the course of assessee's business.[S.37(1)]

High Court held that no evidence was placed on record by the assessee to support the argument of commercial expediency hence interest on borrowings for investment in shares of a foreign company was rightly disallowed by Tribunal , since it was found to be not in the course of business.(AY. 2005-06)

Crescent Organics (P) Ltd..v.Dy.CIT (2014) 108 DTR 393 (Bom.)(HC)

S. 36(1)(iii) : Interest on borrowed capital- Share trading-Interest allowable as deduction.

If the main business of the assessee is to trade in shares as per its Memorandum of Association, the interest paid on the borrowed funds to its sister concern is allowable as business expenditure. (AY. 2003 – 2004)

CIT v. Peninsular Investment Ltd. (2014) 265 CTR 601 (AP)(HC)

S. 36(1)(iii) : Interest on borrowed capital–Deduction can be claimed even if interest not paid u/s. 36(1)(iii).

The assessee company received interest bearing loan from the state government. The assessee claimed deduction pertaining to interest u/s 36(1)(iii) but has not paid any interest to the government. The AO made the addition on the ground that the same has not been actually paid. The CIT(A) and the Tribunal deleted the addition. On appeal the High Court observed that the assessee is entitled for deduction as the books are maintained on the mercantile system and affirmed the order of Tribunal. (AY. 2004 – 05)

CIT .v. UP State Agro Industrial Corp. Ltd. (2014) 220 Taxman 119(Mag.) (All.) (HC)

S. 36(1)(iii) : Interest on borrowed capital-Set up of business-Interest on the loan taken on 16-5-2006 i.e. prior to date of joint venture agreement is allowable. [S. 28(i)

The assessee company was incorporated on 4-8-2005 to carry on a real estate business. It had taken a loan on 16-5-2006. On 31-5-2006, it entered into a MoU with third parties in respect of a project. Subsequently, a joint venture agreement was executed on 5-7-2006 between the assesse and the third parties. For A.Y. 2006-07, assessee had filed a return of income declaring business loss. In the return of income filed for A.Y. 2007-08, the assesse company claimed a deduction of interest on the loan taken. The Assessing Officer disallowed the said claim on the ground that the business of the assesse was set up on 5-7-2006 i.e. the date of joint venture agreement. On appeal, the CIT(A) allowed the claim of the assesse which was upheld by the Tribunal as well. On appeal to the High Court, the Bench did not agree with the AO's contention that the date of the joint venture agreement was the date of setting up of business. Setting up of business takes place when the business is ready and first steps are taken. In case of real estate, the said setting up was complete when the first steps were taken by the assessee to look around and negotiate with parties to enter into a written understanding. The MoU is the culmination of the negotiations and in the instant case required payments to be made. The assessee had, therefore, arranged for funds. Thus it is obvious that the loan was taken for its business and to proceed further with negotiations and conclude the deal. Thus, interest on the loan taken on 16-5-2006 i.e. prior to date of joint venture agreement is allowable u/s. 36(1)(iii) as the business was already set up at the time of taking the loan. (AY. 2007-08)

CIT .v.Arcane Developers (P.) Ltd. (2014) 221 Taxman 475 (Delhi)(HC)

S.36(1)(iii): Interest on borrowed capital-No requirement that an assessee should have a separate account in respect of non-interest bearing funds from that of interest bearing funds to establish that investments have been made out of its own funds.

The assessee earned dividend income from investment in mutual funds. The AO noticed that the assessee had borrowed certain sums during the relevant year and had paid interest thereon. On this basis, the AO concluded that part of the amount was invested out of borrowed funds and thus disallowed a part of interest amount claimed as deduction under section 36(1)(iii). The Commissioner (Appeals) recorded a finding of fact that investment in mutual funds was made directly from sales tax deferral amount available to the assessee, thus deleting the AO's disallowance. The Tribunal upheld the order of the Commissioner (Appeals). Both the authorities arrived at a concurrent finding that the investment in mutual funds was made by the respondent-assessee out of its own funds and not out of interest bearing borrowed funds. The High Court held that there was no requirement under law that the assessee has separate account for non-interest bearing funds and interest bearing funds to establish that investments had been made out of its own funds i.e. non-interest bearing funds, and thus upheld the Tribunal's order. (AY.2004-05)

CIT .v.Mahanagar Gas Ltd. (2014) 221 Taxman 80 (Bom.)(HC)

S. 36(1)(iii) : Interest on borrowed capital- Interest paid by an assessee on a loan utilised for setting up a V-SAT facility was eligible for deduction.

Interest paid by assessee on loan utilized for setting up a V-SAT facility held to be allowable. High Court relied on the decision of the Apex Court in the case of Dy. CIT .v. Core Health Care [2008] 298 ITR 194 and allowed the interest expense u/s. 36(1)(iii). (AY.1997-98)

CIT .v.Kirloskar Computer Services Ltd. (2014) 221 Taxman 391/270 CTR 331/ 106 DTR 395(Karn.)(HC)

S. 36(1)(iii): Interest on borrowed capital–Interest free advance to sister concern-No fresh bowing in year under appeal and reduction of bowed funds-Availability of interest free funds-Disallowance of interest was to be restricted only for the remaining sum.

The assessee gave interest-free loans to sister concerns. Held, there was no fresh borrowing in year under appeal and there was reduction of borrowed funds. Held, it could not be assumed that borrowed funds were used for non-business purpose. Also, there was availability of interest-free funds. Hence, disallowance of interest was to be restricted only for the remaining sum. (AYs. 2003-2004, 2004-2005**)**

CIT .v. Kajal Exports (2014) 362 ITR 328 /226 Taxman 65 (Mag.)(Guj.)(HC)

S.36(1)(iii): Interest on borrowed capital–Advance to sister concern-Failure to establish commercial expediency disallowance was justified.

Borrowed capital must be used for commercial expediency. Assessee's sister concern was incurring huge loss and its account was declared non-performing asset by bank. The plea of loss of reputation and goodwill of assessee in view of sister concern being declared non-performing asset was held not justified, and hence, assessee failed to establish commercial expediency. Therefore, disallowance of interest was justified.(AY. 2005-06)

C.R. Auluck and Sons P. Ltd. .v. CIT (2014) 360 ITR 193 (P&H)(HC)

S.36(1)(iii): Interest on borrowed capital–Loans were made from funds provided by assessee him self-Colourable transaction-Interest was held to be not deductible.

The Assessee took loan from the three persons, namely, BS, TS and JS and the interest paid to them at the rate of 16 per cent. per annum, it was found that so far as BS was concerned, he was the son of the assessee and TS and JS were his nephews. It was also found by the AO as well as the Tribunal that the assessee made a gift of Rs. 20 lakhs to each of the three persons on June 19, 2007, and, immediately thereafter, the three persons placed the same amount in the hands of the assessee on which interest at the rate of 16 per cent. aggregating to Rs. 7,46,965 was claimed as deduction. The entire series of transactions were illusory, colourable and not genuine for the purpose of the business. There was no borrowing of capital and, therefore, the requirement of s. 36(1)(iii) was not fulfilled and, therefore, the disallowance by the AO was justified.(AY.2008-09)

JayeshRaichand Shah .v. ACIT (2014) 360 ITR 387 (Guj.)(HC)

S.36(1)(iii): Interest on borrowed capital-Interest free advances from own capital and advances from customers-No disallowance can be made.

Assessee made interest-free advances to related concerns out of its own capital and interest-free trade credits/advances from customers apart from the fact that he was having substantial trade dealings with two such concerns. Therefore, the Tribunal correctly came to the conclusion that the interest paid by the assessee on borrowings was allowable as deduction and no disallowance was justified. (AY. 2006-07)

CIT .v. Jugal Kishore Dangayach (2014) 98 DTR 95 (Raj.)(HC)

S. 36(1)(iii) : Interest on borrowed capital-Interest rate–Disallowing interest exceeding 18 per cent was held to be not justified.

Assessee paid interest to creditors as well as trade parties upto 30 days at rate of 18 per cent and beyond 30 days at rate of 21 per cent and claimed deduction of same. AO disallowed interest exceeding 18 per cent. Assessee explained that where payment was made within 30 days interest was paid at rate of 18 per cent and in other cases interest was paid at rate of 21 per cent. The rate of interest chargeable for delayed payments are mentioned in the invoices itself. This fact clearly establishes payment policy of the assessee-company. Disallowance of interest exceeding 18 per cent was held to be not justified.(AY. 2009-10)

ITO .v. Axon Global (P.) Ltd. (2014) 146 ITD 473 / (2013) 38 taxmann.com 392 (Jodh.)(Trib.)

S. 36(1)(iii) : Interest on borrowed capital – Interest free loan to subsidiary companies.

Tribunal held that in the absence of any nexus establishing that the interest bearing borrowed funds were given as interest free to its subsidiaries, the disallowance of interest is not justified. (AY. 2002-03)

Reliance Industries .v. Addl. ACIT (2014) 159 TTJ 349 / 55 SOT 8 (Mum.)(Trib.)

S. 36(1)(iii) : Interest on borrowed capital-Rate of interest-Disallowance of interest exceeding 18 per cent was held to be not justified.

Assessee paid interest to creditors as well as trade partiesupto 30 days at the rate of 18 per cent and beyond 30 days at the rate of 21 per cent and claimed deduction of the same. A.O. disallowed interest exceeding that where payment was made within 30 days, interest was paid at the rate of 18 per cent and in other cases interest was paid at the rate of 21 per cent. CIT(A) deleted the addition. Affirming the view of CIT(A) Tribunal held thatthe rate of interest chargeable for delayed payments are mentioned in the invoices itself. This clearly establishes payment policy of the assessee-company. (AY.2009-10)

ITO .v. Axon Global (P.)Ltd. (2014) 146 ITD 473 / (2013) 38 taxmann.com 392 (Jodh.)(Trib.)

S.36(1)(iii):Interest on borrowed capital–Usance interest and buyers line of credit-No disallowance can be made.

Usance interest (6.79 per cent) and interest on the buyers line of credit availed from bank (6.9 per cent) was agreed to be paid at international Libor which was much lower than the rate of interest of 13.50 per cent charged for CC limit availed from bank in Indian rupee. AO's objection regarding higher level of stock of imported items was satisfactorily met by the assesee. Relevant international transactions of assessee company with its foreign holding company were accepted by TPO in his transfer pricing analysis. AO was not justified in disallowing expenditure towards usance interest and BLC interest. (AYs. 2002-03 to 2004-05)

ITO .v. Ricoh India Ltd. (2014) 98 DTR 435 (Mum.)(Trib.)

S.36(1)(vii):Bad debt-Loans advanced to associate company-Security scam-Allowed as bad debt.[S.36(2)]

During the year the assessee wrote off advance made to associate company.AO held that the advance was not in the ordinary course of business hence disallowed the claim. On appeal the claim of the assessee was allowed by CIT (A) on the ground that it could not have forseen that it would not be

recoverable and held that the amount advanced to associate company was lost only on account of security scam in assessment year 1993-94. On appeal Tribunal held that in any banking business there were a lot of considerations involved in making advances and merely expressing doubt the genuineness of the advance was not sufficient to take away discretion of the bankers to make advance. Appeal of revenue was dismissed. On appeal by revenue the Court held that there are concurrent findings of fact arrived by the CIT(A) and Tribunal .It is not shown that the said findings of fact are in any manner perverse. Accordingly the order of Tribunal was up held.(AY.1993-94)

DIT(IT) .v.Deutche Bank A.G (2014) 225 Taxman 399 (Bom.)(HC)

S. 36(1)(vii) : Bad debt- Bad debts written off on the basis of books of accounts placed before the AO allowable as a deduction.

The AO, on a perusal of the return of income filed by the assessee, observed that it would not be possible for the assessee to establish that the outstanding debts had become bad and doubtful and hence disallowed the deduction of bad and doubtful debts to a certain extent. However, the Tribunal allowed the deduction for the same.

The High Court dismissing the departmental appeal observed that the fact that the assessee could establish before the AO that a debt had become bad was a matter of appreciation. The High Court held that the relevant books of accounts were placed before the AO and hence the Tribunal was correct in allowing the deduction of bad and doubtful debts written off on the basis of materials placed on record. (AY 1986-87, 1987-88 and 1992-93)

CIT .v. Wipro Ltd. (2014) 222 Taxman 181 (Karn.)(HC)

S. 36(1)(vii) : Bad debt – No requirement to prove by documents / evidences that sufficient efforts to recover the debts were made

The High Court held that, after the amendment in section 36(1)(*vii*), there is no requirement to establish that debt has become irrecoverable in the accounts of the assessee for the previous year. Clause (*vii*) of section 36(1) provides for allowing deductions subject to provisions of sub-section (2), the amount of any bad debt or part thereof, which is written off as irrecoverable in the accounts of the assessee for the previous year. There is no requirement under sub-section (2) of section 36 that assessee should produce evidence before the Assessing Officer that he has made sufficient effort to recover the amount. (AY. 2006 – 07)

CIT .v. Accord Communication Ltd. (2014) 220 Taxman 120 (Mag.) / (2013) 40 Taxmann.com 437 (All.)(HC)

S. 36(1)(vii) : Bad debt-Loans and advances (NPA)–Diminution in the value of investments-Matter remanded.

Assessee-NBFC classified irrecoverable advances as non-performing assets and made provision for same in books of account and claimed that said transaction was allowable as deduction. Assessing Officer held that assessee was not entitled to claim deduction unless debts were written off in accounts - In Vijaya Bank .v. CIT Apex Court has held that for allowing claim of deduction, apart from debiting profit and loss account to extent of impugned bad debt, assessee must simultaneously show reduction in amount of loans and advances at year end on asset side of balance sheet so that balance sheet shows net of provisions for bad debt – In the light of said pronouncement, Assessing Officer should consider claim of assesse. Matter remanded. (AY. 1998-99)

CIT .v.Amrutanjan Finance Ltd. (2014) 363 ITR 135 (2011) 203 Taxman 295 (Mad.)(HC)

S. 36(1)(vii) : Bad debt–Matter remanded to Commissioner(A). [S.260A]

Bad debts disallowed by Assessing Officer. Revision order passed without considering the bad debts issue. Consequential order passed by the Assessing Officer. Assessee filed appeal before the CIT(A) raising the issue of bad debts. Disallowance set aside by the CIT(A) and confirmed by the Tribunal. Matter remanded to CIT(A). (AY.1999-2000).

CIT .v. Canara Bank (2014)363 ITR 156 (Karn.)(HC)

S.36(1)(vii): Bad debt–Share broker-Commodity market-Write off of debt owed by client was allowed.[S.28(i), 36(2)]

Assessee was stock broker in commodity market. Assessee claimed business loss on accounts of write off of debts owed by its client. AO disallowed claim as it was debt qua brokerage charge claimed by assessee from its client for services rendered. Tribunal held that there was nothing to show that relevant contract had not been squared up by assessee prior to year end and gain or loss arising thereon being only on behalf of client, adjusted in his account therefore bona fide write off in accounts itself was sufficient for claim of deduction u/s. 36(1)(iii). What is relevant is not year to which debt written off pertains, but year in which loss in its respect, relates to. Assessee claiming loss on debt as irrecoverable and written off, in absence of anything to contrary would imply loss on that account to be for year of its write off. Even otherwise by regarding impugned loss as business loss, assessee's claim merited acceptance. (AY. 2006–07)

Angel Commodities Broking (P.) Ltd. .v. Dy.CIT (2014) 146 ITD 754 /164 TTJ 275 (2013) 40 taxmann.com 234/106 DTR 131 (Mum.)(Trib.)

S.36(1)(vii): Bad debt–Irrecoverable amount due from clients-Allowable as deduction after reducing the sum recoverable from dale proceeds of shares with assessee.

The Tribunal held that the assessee is entitled to deduction in respect of the amount becoming unrecoverable from its clients. However the deduction has to be restricted to the amount determined after reducing the sum recoverable from sale proceeds of shares with assessee. The Tribunal set aside the matter and restored back to file of the Assessing Officer to decide afresh after allowing a reasonable opportunity of being heard to the assessee. (AY. 2008-09)

ACIT .v. Rishiti Stock & Shares (P) Ltd. (2014) 159 TTJ 300 /97 DTR 92/29 ITR 61(Mum.)(Trib.)

S.36(1)(viia): Bad debt--Banks-Provision for bad and doubtful debts-Non-scheduled banks-Co-operative banks-Definition of Rural Branch applies to Co-operative banks also.

Co-operative banks cannot claim deduction of 10% of the aggregate average advances while computing the income irrespective of falling under rural branch in accordance with the Explanation. The benefit of deduction of 10% of the aggregate average advances is applicable to co-operative banks provided their rural branches as explained under Explanation(ia), have advanced such amounts. Definition of rural bank applies to Co-operative bank also.

Kannur District Co-op Bank Ltd. .v. CIT (2014) 365 ITR 343 (Ker.)(HC)

S. 36(1)(viia) : Bad debt-Banks-Provision for bad and doubtful debts-Entitled to deduction subject to upper limit of deduction laid down in said section.

The assessee-bank filed its return claiming deduction on account of provision for bad and doubtful debts under section 36(1)(viia). The AO allowed the claim of the assessee for deduction on account of provision for bad and doubtful debts in respect of rural advances only to the extent of provision created in the books of account by the assesse. Tribunal held that In order to allow assessee's claim under section 36(1)(viia), it has to be seen by A.O. is as to whether provision for bad and doubtful debts is created irrespective of whether it is in respect of rural or non-rural advances by debiting profit and loss account and, to extent PBDD is so created, assessee is entitled to deduction subject to upper limit of deduction laid down in said section.(AYs. 2003-04, 2004-05)

Dy. CIT .v. ING Vysya Bank Ltd. (2014) 149 ITD 611 / 62 SOT 26 / 42 Taxmann.Com 303 (Bang.)(Trib.)

S.37(1) :Business expenditure-Benefit to foreign principals- Advertisement expenditure incurred by agent to popularize the business of the channel run by the foreign principal is allowable as there is a direct business between the expenditure and the assessee's business as agent. The fact that the foreign principals also benefited does not entail right to deny deduction.

The main grounds on which the revenue has questioned the order of the tribunal are (a) non disclosure in form 3CEB of the fact that the principal is also a beneficiary of the advertising expenses; (b) that the advertising and promotional expenses are not wholly for the benefit of the assessee but it also benefited the principal who was an associated enterprise; (c) that advertising and publicity expenses were far higher than the amount of revenue earned and lastly, that although foreign principals i.e. Associated Enterprise benefited from advertising and publicity no compensation was paid by the

foreign principals to the assessee to avail of such benefits. Dismissing the appeal of revenue the Court held that;

(1) It is not possible to accept the Revenue's contentions for the following reasons: Firstly, the contention that there was no proper disclosure of the benefit before the Transfer Pricing Officer cannot now be a reason to entertain the questions and the order of Transfer Pricing Officer is final. It was admitted position that the assessee is a agent of foreign principal and would naturally benefit from advertising carried on by agent in India. However, these benefits were not ascertainable. The contention of the assessee that the benefits were not ascertainable or taxable in view of extra territory appears to be correct and justified. In the instant case we find that the assessee has not suppressed any information. It has offered to tax its income from both business, namely, distribution business as well as advertisement and promotion business. In the assessment year in question, the Assessing Officer has proceeded to grant 33.33% of the total advertising expenses as allowable deduction. We do not find any justification for such restriction of the same. Furthermore, the Appellant's case during argument that the fact of the foreign principal benefiting had been disclosed in the Form 3CEB and the Transfer Pricing Officer `could' have taken a different view. Admittedly therefore the Transfer Pricing Officer had followed a possible view which cannot now be faulted.

(2). The contention that the expenditure should have been wholly and exclusive for the purpose of business of the assessee under section 37(1) read with provisions of section 40A(2) as being excessive and unreasonable does not appeal to us. There can be no doubt in the instant case, that in view of decision of the Supreme Court in Sassoon J. David and Co ,(P) Ltd v. CIT (1979) 118 ITR 261 (SC) it cannot be said that the expenditure was not wholly or exclusively for benefit of the assessee. The mere fact that foreign principals also benefited does not entail right to deny deduction under section 37(1). Furthermore, it is seen that all the amounts earned by the assessee were brought to tax, especially in view of the fact that the payment of expenses were made to Indian residents and there payments were not required to be included in form 3CEB since Section 92 which governs the effect of form 3CEB covers only international transactions. Furthermore, it is seen that the respondents income from subscription fee is variable and through commission received on the advertising sales is 15% of the value of Ad-sales. The Assessing Officer's contention that the assessee received fixed income is not justified and there is certainly, in our view, a direct nexus between the amount spent on advertising and publicity, and the appellant's revenue.

(3). Advertisers who advertise on these channels act through media houses and advertising agencies and they work to media plans designed in the manner so as to maximise value for the advertiser. They will evaluate expenditure with channel penetration in the market place inasmuch as only channels with high viewership would justify the higher advertising rates which is normally sold in seconds. Merely having high quality content will not ensure high viewership. This content has to be publicized. The great reach of the publicity, the higher chances of larger viewership. The larger the viewership, the better chances of obtaining higher advertisement revenue. The higher advertisement revenue, the higher will be commission earned by the assessee. Accordingly, we have no doubt that there is a direct nexus between advertising expenditure and revenue albeit the fact that there may be a lean period before revenue picks up notwithstanding high amount spent on such publicity. This justifies the higher expenditure vis-a-vis revenue noticed by the department.

(4).It is also not necessary that the foreign enterprises must compensate the Indian agent for the benefit it receives or it may receive from the advertisement and promotion of its channels by agent in India. The agent in India earns commission from adsales and distribution revenue, both of which have sufficiently compensated the assessee. We would not expect the revenue to determine the sufficiency of the compensation received by the agent and as such we do not find any justification in this ground either.(ITA No 538 of 2012 , dt. 13.10.2014.)

CIT .v. N.G.C. Network (India) P. Ltd. (Bom.)(HC);www.itatonline.org

S.37(1): Business expenditure-Foreign tour expenses-Disallowance of 10 percent of foreign tour expenses of directors and auditor for incorporation of company was held to be reasonable.

Tribunal has restricted the disallowance of the foreign travel expenses of the Directors and auditors for the incorporation of a foreign company to 10 percent. On appeal High Court affirmed the view of Tribunal by observing that it was reasonable. (AY. 2005-06)

Crescent Organics (P) Ltd..v.Dy.CIT (2014) 108 DTR 393 (Bom.)(HC)

S. 37(1): Business expenditure-Accrual of liability–Professional fees-Accrual, crystallisation and finalisation relatable to year in which returned.[S.145]

The assessee, a joint venture enterprise, received an advance for equity to the extent of Rs. 7 crores from the Central Government and started its business of comprehensive mobility studies and consultancy to the State Government and local bodies, aimed at restructuring and reforming the public transport delivery system in the year 1994. The amounts given by the Central Government were deployed in investments. The Central Government insisted on return of its contribution of the share application during the financial year 2006-07 (assessment year 2007-08) and as a result the assessee repaid the amount of Rs. 7 crores together with the interest earned from the investments. The Assessing Officer, for the assessment year 2007-08, refused the assessee's claim for deduction of the professional fee paid to W and the interest paid over to the Central Government as business expenditure, on the ground that the assessee did not carry on business in the relevant accounting year and did not earn revenues by utilising the services of W. Held, the Tribunal recorded a finding of fact that not returning the amount to the Government would have cost the assessee its business prospects and its title over the business by way of withdrawing the joint venture. In these circumstances, the assessee in order to protect its business interest and business propriety refunded the amount which could be termed as compensation, return, interest or by whatever name. Its accrual, crystallization and finalisation were relatable to the assessment year 2007-08. Thus, the amount returned was allowable to the assessee as business expenditure. Since the assessee's business had already commenced the entire amount paid to W was to be allowed being professional fee for consultancy services. (AY. 2007-08)

CIT .v. Urban Mass Transit Ltd. (2014) 365 ITR 442 (Delhi)(HC)

S.37(1): Business expenditure–Capital or revenue-Lump-sum payment-Held to be capital expenditure.

Lease for eighty years from State Industrial Development Corporation with option of renewal of lease.The assignment deed itself did not say anything about reversion of the property to the hands of the assignor, namely, IFML. On the other hand, the rights of the assignor on approval of the assignment came to an end in toto. The lump sum amount paid did not make a permanent lease any less alienation than a sale. The expenditure was capital in nature and not deductible. (AY. 1994-1995)

CIT .v. Rane Brake Linings Ltd. (2014) 365 ITR 401 / 269 CTR 423 (Mad.)(HC)

S.37(1):Business expenditure-Contractor-Payment by account payee cheques-Expenditure on soil testing and surveying-Disallowance part of expenditure was not justified.

Assessee made payment by account payee cheques and receipts were admitted by sub –contractors hence disallowance of part of expenditure was held to be not justified.Similarly disallowance of part of expenditure on soil testing and surveying was held to be not justified.(AY. 2004-05)

CIT .v. Consulting Engineering Group Ltd. (2014) 365 ITR 284 (Raj.)(HC)

S.37(1):Business expenditure-Guest house expenses-Disallowance on estimate basis-Deletion of addition was held to be justified.

Court held that there was no material to indicate that any other expenses had been incurred by the assessee apart from paying the rent. As no expenditure was incurred and addition was based on estimate Deletion of addition was held to be justified.(AYs. 1993-94, 1994-95)

CIT .v. Modi Xerox Ltd. (2014) 365 ITR 200 (All.)(HC)

S.37(1):Business expenditure-Aggregate trips each employee and not basis of each trip. [Rule 6D]

Court held that question (B) really arises on an interpretation of Rule 6D of the Income Tax Rules, 1962 which dealt with expenditure incurred by the Assessee in connection with the travel of an employee. In the present case, the CIT (Appeals) directed the Assessing Officer to recompute disallowance under Rule 6D of the Rules on the basis of the aggregate trips of each employee and not on the basis of each trip undertaken by the said employee. This direction of the CIT (Appeals) was confirmed by the Tribunal.It is common ground before us that even this Question is squarely covered

by a judgment of this Court in the case of Commissioner of Income Tax v/s AOROW India Ltd., reported in [1998] 229 ITR 325.
CIT .v. Mafatlal Dyes and chemicals Ltd. (Bom.)(HC);www.itatonline.org

S. 37(1) : Business expenditure – Payment to labourers cannot be claimed as a deduction if proper books and vouchers are not produced to justify the payment and expenditure cannot be proved to have been incurred
The assessee was engaged in the business of manufacture of pesticide on job work basis. It claimed deduction on account of expenditure incurred on payments made to labour force. The AO after examination of the wage register and other bills and vouchers disallowed the expenditure since proper bills and vouchers had not been maintained. The CIT (A) enhanced the addition on a presumptive basis. The Tribunal deleted 50 percent of enhancement.
The High Court observed that proper books of account with regard to expenditure were never produced or established and huge amounts were said to have been incurred with regard to labour payment. The High Court further observed that disallowance u/s. 37 would not arise only if the expenditure was shown to have been incurred or proved on account of payment for casual labour, etc. The High Court held that since no proper books of account and vouchers, etc., had been produced, the expenditure was not proved to have been incurred and hence the benefit of section 37 could not be granted. (AY. 2007-08)
S. S. Crop Care Ltd. .v. CIT (2014) 221 Taxman 399 (MP.)(HC)

S. 37(1) : Business expenditure–Deduction of brokerage fees paid not allowable when evidence on record discloses that amount paid was not brokerage even if payment is confirmed by third parties.
The assessee was engaged in the manufacture of yarn. The AO disallowed brokerage paid on cotton purchased on the ground that the persons to whom some brokerage was paid were closely connected to directors of the assessee and in some cases, no such brokerage fee was paid at all. The CIT (A) confirmed the findings of the AO. The Tribunal allowed the deduction in some cases where it observed that the brokerage had been paid and remanded the matter back to the AO for proper verification and calculation in other cases.

The High Court observed that the material on record showed that the persons to whom the brokerage was paid were closely connected to the Directors of the assessee and that the evidence disclosed that the amounts paid were in itself not brokerage. Allowing the departmental appeal, the High Court held that even though the amount of brokerage paid was confirmed by third parties, the same would not be eligible for a deduction.(AY. 2001-2002)
Bhandari Spinning Mills Ltd. .v. ITO (2014) 221 Taxman 397 (Karn.)(HC)

S. 37(1) : Business expenditure–Amounts paid to drivers as incentives out of amounts received from manufacturers as a part of the incentive scheme is an allowable business expenditure.
The assessee had debited amounts paid as incentives to drivers to the P&L account and had shown it as a liability payable in the subsequent years. The AO disallowed the claim stating that he did not find the explanation of the assessee satisfactory. The CIT (A) also upheld the order of the AO and held that incurring of incentive expenditure was contingent upon future action and conduct of the drivers and since it was not within the control of the assessee, in absence of any certainty of liability, such amount needed to be construed as an income of the assessee. However the Tribunal allowed the assessee's appeal by holding that the same was not a contingent liability.
The High Court observed that if the assessee was maintaining accounts on a mercantile system and a liability had accrued, though discharged at a future date, the same was an allowable deduction. The High Court held that as per the principle of commercial practice and accountancy, such deductions were held permissible and such a liability was not held to be contingent liability. (AY. 2007-2008)
CIT .v. Shree Dhain Auto Transport Corporation (2014) 42 Taxman 281 (Guj.)(HC)

S. 37(1) : Business expenditure-Daughter studies abroad-Law firm-Expenditure not allowable.

The assesse is a firm of advocates. The daughter joined the firm and immediately was sent for education abroad. The expenditure on studies were claimed as business expenditure. AO disallowed the expenditure. In appeal CIT (A) observed that the firm of assesse there were more than 14 associate advocates and none were given an opportunity to go abroad prior for higher education and some of them were working for more than 15 years. Whereas within three months of joining the daughter was sent abroad. Even after completing education she was continued to stay abroad and permitted to join other firm. Considering the facts the disallowance of expenses was confirmed.Tribunal also confirmed the order of lower authorities. On appeal confirming the view of Tribunal the High Court held that expenditure on assesse's daughter for studies abroad was not to be interest of the activities of the profession of the form of advocates but for the career prospects of the child /daughter hence was rightly disallowed.(AY.2005-06)

Divyakant C.Mehta .v. ITO (2014)365 ITR 423/269 CTR 452/226 Taxman 48(Mag) (Bom.)(HC)

S. 37(1): Business expenditure-Service tax-Interest for late payment –Not penalty for infraction of law-Allowable as deduction.

The assesse has not collected and deposited service tax on some services in earlier years. Demand was raised including interest thereon. Assessee paid the said amount. AO held that the said amount having been expanded for infraction of law , deduction was not allowable. On appeal disallowances were deleted by the Tribunal. On appeal the court held that the amount was incurred in the ordinary course of business, it is only because the assesse failed recover the service tax the amount was paid by them. Further, the said amount cannot be stated to be penalty for infraction of law. Court also held that it is equally well settled that payment of interest is compensatory in nature and would not pertake the character of penalty.(AY.2009-2010)

CIT .v. Kaypee Mechanical India (P) Ltd. (2014) 223 Taxman 346 / 45 taxmann.com 363/108 DTR 237 (Guj.)(HC)

S. 37(1) : Business expenditure- Capital or revenue- Leas hold property-Remitting the matter was held to be justified.[S.260A]

Assessee spent huge amount of money to improve the lease hold property. The matter was remanded back by the ITAT to find our whether any brick-work was carried out or not during the improvement work which will entitle the assessee for deduction u/s 37(1). As this is purely question of fact, no question of law involved.

CIT v. EDS Electronic Data Systems (I.)(P.) Ltd. (2014) 265 CTR 31 (Delhi)(HC)

S.37(1):Business expenditure-Capital or revenue-Interest on delayed payment of telecommunication licence fee-Partly capital and partly revenue-Matter was remanded.

If the interest paid was in respect of licence fee payable for the period prior to 31st July ,1999 , it will have to be capitalised ie. Before commencement of operation. If the payment was payable on licence fee for the post, 31 July, 1999 , it should be treated as revenue in nature . if after commencement of operation. Matter was remanded. (AY. 1999-2000 to 2007-08)

CIT v. Hutchison Essar Telecom (P) Ltd (2014) 97 DTR 294 (Delhi)(HC)
CIT v. Bharti Airtel Ltd. (2014) 97 DTR 294 (Delhi)(HC)
CIT v. Bharti Cellular Ltd. (2014) 97 DTR 294 (Delhi)(HC)
CIT v. Bharti Telenet Ltd. (2014) 97 DTR 294 (Delhi)(HC)

S.37(1): Business expenditure-Capital or revenue-Construction of drainage for disposal of effluents–Land not owned by assesse- Capital in nature–Ensure to the benefit of the assesse from year to year.

Assessee runs a paper mill at Ahmednagar and therefore discharged effluents. During the previous year relevant to the assessment year, the assessee applied to the pollution control board and forest department, for permission to discharge effluents into the Tallewal drain. The department of Environment and Forest prepared a proposal to allow excavation of an open drain, through forest land, to enable assessee to discharge effluents into Tallewal drain, which was subject to many conditions like legal status of the ownership of the forest land will remain unchanged, forest department would raise a compensation afforestation on both sides of the drain, forest land will only be used for the

purpose it is being permitted to use, etc., The question that arose before the Hon'ble Court was that whether the expenditure incurred by the assessee for construction of the drainage in the nature of capital or revenue.The Court held that expenditure incurred by the assesse for the construction of drainage for disposal of effluents has brought in to existence a capital asset which the shall use from year to year for discharge of effluents and would,therefore, ensure to the benefit of the assesse from year to year; expenditure was therefore capital in nature ,notwithstanding the fact that land is not owned by assessee.(AY. 1996-97)
CIT .v. Shreyans Industries Ltd. (2014) 97 DTR 329 (P&H)(HC)

S. 37(1) : Business expenditure–Banking business-Broken period interest was held to be deductible.
Broken period interest was held to be allowable.(AY. 2001-02 to 2005-06)
CIT .v. HDFC Bank Ltd (2014) 366 ITR 505/107 DTR 140 (Bom.)(HC)

S. 37(1) : Business expenditure–Foreign travel – Promotion of business.
Assessee was in the business of manufacturing and selling of tea. It claimed expenses in respect of foreign travel of its directors and executives for promotion of its business. AO disallowed one third of the expenditure on the ground that there were already three non-resident director in looking after overseas business. High Court held that there is no need for the assessee to prove that the expenditure was necessary for the purpose of the business. Further, assessee had produced necessary vouchers and bills to prove the same. Thus, the High Court held that the expenditure was allowable. (AY. 2002-03)
CIT .v. Williamson Tea (Assam) Ltd.(2014) 220 Taxman 102 (Mag.) (Gau.)(HC)

S. 37(1) : Business expenditure–Adhoc disallowance by the AO-Deletion was held to be justified.
Assessee claimed deduction of manufacturing and other expenses of Rs. 50.42 lakhs as business expenditure. Assessing Officer disallowed expenses of Rs. 5 lakhs for want of necessary details. Commissioner (Appeals) deleted impugned disallowance holding that assessee had filed audited accounts with regard to expenses claimed and in absence of any adverse comment by auditor no disallowance should be made. The Tribunal and the High Court confirmed the order. (AY. 1994-95)
CIT .v. Vallabh Glass Works Ltd. (2014) 220 Taxman 129 (Mag.) (Guj.)(HC)

S. 37(1) : Business expenditure– Advertisement - Sponsorship of programs-Held to be allowable.
Assessee was in the business of manufacturing and selling of tea. It claimed expenses in respect of sponsorship of programs. AO disallowed such expenditure. High Court held that it is for the assessee to decide where and in what manner publicity of the business is to be done. Accordingly, it allowed such expenditure incurred by the assessee. (AY. 2002-03)
CIT .v. Williamson Tea (Assam) Ltd. (2014) 220 Taxman 102 (Mag.)(Gau.)(HC)

S. 37(1) : Business expenditure – Provision for warranty-Remanded back.
Provision for warranty on the basis of principle for matching can be allowed but the amount claimed should have some rational and scientific basis and it cannot be on mere ipse dixit. Though the question of law was decided in favour of the Assessee, the Court remanded back to the Assessing officer, to examine the provision of warranty as claimed, including the actual warranty expenses incurred during the year and then determine and decide the quantum of the claim.(AY.2005 – 2006)
Wooward Governor India Ltd. .v. CIT (2014) 220 Taxman 126 (Mag.)(Delhi)(HC)

S. 37(1) : Business expenditure –Commission paid to sub agent-Held to be allowable.
Assessee a del credit agent received commission pursuant to the selling agreements. It claimed brokerage expenses for sales effected through sub-brokers. The AO observed that not a single penny was paid to the Brokers as brokerage and the amount was simply credited in their respective accounts. The AO concluded that there was no necessity to engage services of sub-brokers in light of agreement with principal company. The AO further held that the appellant-assessee did not incur the said expenditure as small time Sub-brokers would work for the appellant-assessee without even receiving any amount towards the services they claimed to have rendered. The CIT(A) and ITAT upheld the order passed by the AO. The ITAT and the lower authorities had given factual findings in their orders

that no services were rendered by sub-brokers and no amount was paid to them either during year or even later. On appeal, the High Court held that there was no perversity on the finding of fact recorded by revenue authorities and therefore no question of law arose. (AY. 1998-99)

Gyan Chand Jain .v. CIT(2013) 354 ITR 662 / 40 taxmann.com 258 / (2014) 220 Taxman 7(Mag.) (Raj.)(HC)

S. 37(1) : Business expenditure–Interest expense-Matter remanded.

The Assessing officer made addition on the ground that the Assessee had taken overdraft in earlier year but claimed interest payment in profit and loss account during the relevant assessment year. On appeal, the Commissioner (Appeals) and Tribunal affirmed the assessment order. The High Court observed that the appellate authority has not examined and had summarily confirmed the assessment order. The matter was remanded back for fresh adjudication. (AY.1987-88)

U. P. State Bridge Corpn. Ltd. .v. ITAT (2014) 220 Taxman 109 (Mag.) (All.)(HC)

S. 37(1) : Business expenditure – Interest paid on account of its failure to fulfill export obligation under EPCG scheme.

Assessee had imported jewellery manufacturing machinery under Export Promotion Capital Goods Scheme (EPCG Scheme) at a concessional rate with an export obligation. Assessee did not fulfill the obligation and was required to pay interest @ 24% per annum to DGFT. Assessing Officer disallowed the interest payment u/s 37(1) on account that it was penal in nature. CIT(A) allowed the assessee's appeal. Tribunal dismissed the revenue's appeal on account that amount paid was compensatory and not penal in nature as it was as per the declared policy of the government and there was no violation of any law. On appeal by revenue to High Court, Tribunal's order was upheld.

CIT .v. Enchante Jewellery Ltd. (2014) 220 Taxman 8 (Mag.) / (2013) 40 Taxmann.com 216 (Delhi) (HC)

S. 37(1) : Business expenditure-Expenses incurred on replacement of parts of machinery.

The assessee operated as a stone crusher and debited certain amount as machinery maintenance. The assessing officer disallowed the expenses on the ground that same were incurred to convert old machinery into new one and to increase their durability. On appeal, the Commissioner (Appeals) and the Tribunal allowed the deduction claimed by finding that repairs were made by assessee towards replacement of parts of machines to keep it operational and in working condition and no new machine was purchased. On appeal, the revenue accepted that assessment order was cryptic and did not refer to adverse facts. It, therefore, prayed to the HC to remand matter for fresh enquiry by the assessing officer. The HC stated the prayer for remand cannot be accepted as that it was the duty or responsibility of the assessing officer to deal with the contention and facts stated by the assessee. The factual matrix as discussed by the appellant authorities is not controverted and denied by the appellant by filing requisite material. The details of the maintenance expenses have not been placed on record to question the factual findings. The appeal is devoid of merits and, thus, the appeal is dismissed. (AY. 2008-09)

CIT .v. Gokul Chand Hari Chand (2014) 220 Taxman 9 (Mag.) (Delhi)(HC)

S. 37(1) : Business expenditure-Lease expenses–Tenancy rights– nature of expense.

Assessee purchased a running hotel business. As per terms of agreement it was responsibility of vendor to secure transfer of lease of premises in favour of purchaser. The vendor had to negotiate on behalf of purchaser with owner for transfer of unexpired lease period in favour of purchaser and also extension of lease subject to payment of enhanced rent and deposit. Out of total sale consideration of Rs. 70 lakh, Rs. 55 lakh was paid towards tenancy right. The assessee claimed the said expenditure to be revenue in nature and while submitting the return, the assessee claimed write off of $1/5^{th}$ of said expenditure every year. The AO disallowed the expense on the grounds that it was capital in nature. The CIT(A) and the ITAT upheld the order of the AO. On appeal to the High Court, held that, the record disclosed that expenditure incurred for getting the said restaurant was revenue expenditure and it could not be treated as capital expenditure. The advantage secured by incurring expenditure for absolution or immunity from liability on revenue account would be in field of revenue and not capital. Hence allowed the appeal of the assessee (AY. 1997-98)

S. M. Dayanand .v. Dy. CIT (2014) 220 Taxman 104(Mag) / (2013) 40 taxmann.com 420 (Karn.)(HC)

S. 37(1) : Business expenditure–Freight charges– Statement of truck owners not creditworthy– No other material –Expenditure allowed.

Assessee was engaged in transportation of goods. Since assessee did not own any truck, he used trucks available in market for transportation of goods. In assessee's books of account, certain outstanding liabilities in respect of freight charges were shown. Assessing Officer on basis of statements of truck owners, arrived at finding that no trade liabilities as disclosed in books of account were existing. Accordingly, amount of outstanding freight charges was added back to total income of assessee. Commissioner (Appeals) as well as Tribunal set aside said addition. The High Court noted that statements of truck owners who appeared for cross examination before Assessing Officer were not creditworthy. It was also apparent that if statements of those witnesses were excluded from consideration, there was no material on record which could justify doubting of entries by Assessing Officer. In aforesaid circumstances, impugned addition made by Assessing Officer was rightly set aside by Tribunal. (AY. 2005-06)

CIT .v. Pawan Sharma (2014) 220 Taxman 8 (Mag.)(Raj.)(HC.)

S. 37(1) : Business expenditure – Training expense before the commencement of the business of manufacturing – Allowable as the expenditure was for new manufacturing unit of the existing business.

The assessee company incurred training expenses on training given to technical and non technical persons. The AO disallowed the expenditure on the ground that it gives enduring benefit and allowed to amortize over the period of 6 years. The CIT(A) disallowed the entire expenditure on the ground that training was given before the commencement of the business of manufacturing. The Tribunal observed that the expenditure for new manufacturing unit was an extension of existing business, for which commercial operations were started in 1996-97 , and new manufacturing unit was an extension of existing business. In view of the decision of CIT .v. Cement Industries Ltd. 91 ITR 170 (Guj), it held that the whole expenditure was allowable in the current year. The High Court dismissed the appeal filed by the revenue. (AY. 1998-99)

CIT .v. Samsung India Electronics Ltd. (2014) 220 Taxman 150 (Delhi)(HC)

S. 37(1) : Business expenditure – Commission expenses – Payment made by cheques – unrelated party- Held to be not bogus.

The Assessing Officer disallowed the commission on the ground that M/s. Shree Shantinath Silk Industries did not maintain its record and its name did not appear on sale bill. When it was challenged before the CIT(A) it was of the opinion that only one party had been examined by the Assessing Officer and the person examined for and on behalf of such party in fact was not dealing with sales, and therefore, would not be having any knowledge of the brokerage. After dealing with the issue at length, it sustained addition of Rs. 36.18 lacs. When CIT(A)'s order was challenged before the Tribunal, the Tribunal deleted the entire addition observing that no evidence had been placed on record that the commission expense is bogus. Assessee made payment of commission through account payee cheques for sales canvassed by the party and also in consideration of the collection recovered from purchaser. Payments cannot be unreasonable particularly when M/s. Shree Shantinath Silk Industries is not related to the assessee and so even disallowance made by CIT(A) is not proper. The High Court held that the Tribunal has, with cogent reasons dealt with the issue, no question of law, much less any substantial question of law arises.

CIT .v. Nangalia Fabrics P. Ltd. (2014) 220 Taxman 17 (Mag.) (Guj.)(HC)

S. 37(1) : Business expenditure – Payment made to workers on closure of business allowable as revenue expenditure.

The payment on account of gratuity, retrenchment compensation and leave encashment made to workers in connection with Voluntary Retirement Scheme on closure of business was allowable as revenue expenditure. (AY. 2000 – 01)

CIT .v. Swan Mills (2014) 220 Taxman 10 (Mag.) (Bom.)(HC)

S. 37(1) : Business expenditure–Pre-operative expenses-Held to be allowable.
Assessee made certain expenses for exploring the possibility of setting up a paper project at Saharanpur which could not materialize. No asset of permanent nature with enduring benefit was acquired by the assessee. The plant could not be set up to which such an expenditure made could possibly be capitalized. The High Court allowed the expenses as revenue expenditure. (AY. 1995 – 96)
CIT .v. Majestic Auto Ltd. (2014) 220 Taxman 42 (Mag.)(P&H)(HC)

S. 37(1) : Business expenditure –Bogus Purchases –Tribunal has passed order on basis of concession given by both parties – Matter remanded to decide the case on merits
Tribunal has partly allowed the appeal preferred by the assessee by restricting disallowance to 25% of the bogus purchases. Before High Court, it was undisputed that the Tribunal has not entered into the merits of the orders passed by the authorities below and has passed the impugned order solely on the basis of the concession given by both the parties. High Court quashed the order passed by the Tribunal and the matter is remanded to the Tribunal to decide the appeal afresh in accordance with law and on merits. (AY 2002-03)
ACIT .v. Pawanraj B. Bokadia (2014) 220 Taxman 77 (Mag.) (Guj.)(HC)

S. 37(1) : Business expenditure - Commission expenses higher that earlier years-No disallowance can be made.
Merely because in current year more expenses were incurred by assessee, disallowance could not be made in absence of any defect in records and maintenance of books of account. (AY. 2005-06)
CIT .v. Shree Ram Multi Tech Ltd. (2014) 220 Taxman 76 (Mag.) (Guj.) (HC)

S. 37(1) : Business expenditure- License fee for use of courtyard – Revenue expenditure.
Licence fees paid for use of the courtyard is only for facilitating the assessee's business operations and therefore a revenue expenditure (AY.1998-99).
CIT .v. ITC Hotels (2014) 363 ITR 254 / 269 CTR 308/103 DTR 103 (Karn.)(HC)

S. 37(1) : Business expenditure-Year of allowability – Additional liability on account of exchange rate fluctuation.
Under mercantile system of accounting, the claim of liability is required to be worked out at the close of the accounting year**.** Additional liability on account of exchange rate fluctuation against purchase of goods at the yearend was allowable in the relevant year itself. (AY. 1990-1991)
Gilletle India Ltd .v. CIT (2014) 101 DTR 258 (Raj.)(HC)

S. 37(1) : Business expenditure-Excise duty-Mercantile system of accounting-Allowable in the year in which was paid.[S.43B,145]
It was held that where assessee's liability to pay excise duty relating to earlier years was adjudicated during relevant assessment year, assessee could claim deduction of amount so paid in assessment year in question even though books of account were maintained on mercantile system of accounting.(AY.1984-1985)
ITC Ltd. .v. CIT(2014)365 ITR 532/101 DTR 358 / 44 Taxman.com 209 (Cal.)(HC)

S. 37(1) : Business expenditure-Expenditure on issue of shares under the employees stock option was allowable as revenue expenditure.
Assesee had debited a sum of Rs 66.82 lakhs under the head of staff welfare expenditure incurred in respect of Employee staff option plan and on allowing the shares to the employees, the difference in value was credited to the account of the company to be allowed as expenditure. It was held that difference between the market value of the shares and the value at which the shares were allotted to the employees under employees stock option plan as per SEBI guidelines was rightly allowed as an expenditure.(AY. 2000-2001)
ACIT .v. PVP Ventures Ltd. (2014) 101 DTR 161 / (2012) 211 Taxman 554 (Mad.)(HC)

S. 37(1) : Business expenditure-Capital or revenue-Corporate debt restructuring expenses-Allowed by spreading it over a period of six years.

It was held that the Tribunal was right in directing to allow corporate debt restructuring expenses of Rs. 2.57 crore on payment to financial consultants in connection with waiver of loans, by spreading it over a period of 6 years as agreed to by the assessee. (AY. 2004-2005)**.**

CIT .v. Gujarat State Fertilizers & Chemicals Ltd. (2014) 101 DTR 175 / (2013) 217 Taxman 229 / 358 ITR 323 (Guj.)(HC)

S. 37(1) : Business expenditure - Repair and maintenance expenses by an assessee in business of running business centers is an ongoing process for such business – Allowable as revenue expenditure.

The assessee had deducted expenses on repairs and maintenance which the AO disallowed on the grounds that the same were capital in nature. The CIT (A) and the Tribunal deleted the disallowance.

The High Court dismissing the departmental appeal observed that the expenses were an on-going process for the type of business run by the assessee. The High Court further observed that the quantum of expense can never be a factor to conclude that the expenses are of a capital nature. Accordingly, the High Court held that the expenses incurred were not for bringing any new asset into existence hence allowable as revenue expenditure. (AY. 1999-2000)

CIT .v. DBS Corporate Services (P.) Ltd. (2014) 222 Taxman 31 (Mag.) (Bom.)(HC)

S. 37(1) : Business expenditure–Software-Expenses incurred for upgrading, improving or removing problem areas in an existing old product would be treated as revenue expenditure.

In course of the assessment proceeding the AO noticed that the assessee had claimed an amount of Rs. 90,37,605/- under the head 'Product Improvement Expenses' towards product development expenses for the new product (software). The AO held the said expenditure to be a capital expenditure since the software was capitalized by the assessee and there was a dedicated team of professionals whose job was to carry out further improvement in the software and the expenses incurred were to enhance the value of the capital asset resulting in enduring benefit. The CIT(A) confirmed the findings of the AO.The Tribunal held that the major portion of the expenses were incurred towards salary paid, rent, consultancy charges, electricity charges, etc., which were not expenses incurred towards creating any capital asset for enduring benefits but were normal day to day expenses and were, thus, revenue in nature.

The High Court dismissing the departmental appeal held that expenditure which enables the profit making structure to work more efficiently leaving the source of profit making structure untouched, would be revenue in nature.It observed that the assessee had to keep pace with the rapidly changing requirements of the mobile phone users. The assessee was competing with other software providers. Thus, new features, upgrades, patches for removing glitches had to be provided, to keep up with matching needs and requirements of the mobile phone users. The expenditure did not bring into existence a new asset but rectified and improved the product being sold.These were normal day-to-day expenses for running the business in question and did not create enduring rights or advantage or benefit over a long period time. While determining and deciding a question whether the expenditure is capital or revenue in nature, the determination should be based upon consideration of facts and circumstances and by applying principles of commercial trading and business expediency. Enduring benefit test is not a universal test and can break down. It noted that the said principles had been rightly applied by the Tribunal in the facts of the present case to hold that expenditure incurred was revenue in nature and not capital. (AY. 2003-2004 & 2007-08)

CIT .v. ACL Wireless Ltd. (2014)361 ITR 210/ 222 Taxman 335 / 264 CTR 164 / 97 DTR 60 (Delhi)(HC)

S. 37(1) : Business expenditure – Free sample distribution expenses- allowable even if there is no effective sale during the year.

The assessee-company was an export trading house and had distributed carpets and shawls as samples during the year The assessee claimed deduction on account distribution of free samples. The AO disallowed the claim by holding that the free sample distribution expenses could be allowed as

business expenditure provided the same were sales promotion expenses and there was sale. The CIT(A) and the Tribunal both deleted the disallowance.
The High Court dismissing the departmental appeal held that section 37 (1) nowhere provides that unless actual sales take place, the deduction would not be admissible. Further, the provision nowhere envisages that the expenditure would be admissible only where such expenditure results in earning of income.The High Court also observed that the samples distributed were not extraneous to the business of the assessee and that the samples were given to the foreign agents in person during their business exploratory visit in India and the same would fall under the expenditure laid out or expended wholly and exclusively for the purpose of such business.(AY. 2004-05)
CIT .v. Bazar Decor (India) (P.) Ltd. (2014) 222 Taxman 328 (P&H)(HC)

S. 37(1) : Business expenditure – Allowability of car expenses - Supporting documents not produced to prove that amount was for business purposes - Allowance restricted to 50%
The assessee debited a sum of Rs. 1,55,234/- towards car maintenance. The AO asked the assessee to substantiate the above claim that, the car was running exclusively for the purpose of the business by producing the details of the travel, the clients visited, the vehicle service maintenance record, fuel bill, repair bills, etc. However, no evidence was produced by the assessee and therefore the AO added back 50% of the said expenditure to the total income of the assessee. The CIT(A) and the Tribunal confirmed the action of the AO.
The High Court dismissing the assessee's appeal at the admission stage held that since there was no substantial question of law arising out of the appeal, the action of the lower authorities was confirmed. (AY. 2008-2009)
K. Sivakumar .v. ACIT (2014) 222 Taxman 59 (Mag.) (Mad.)(HC)

S. 37(1) : Business expenditure–Expenditure towards religious funds, charitable institutions, social clubs or for charity do not stand to test of commercial expediency – no materials placed on record to support expenditure claim expenses are not allowable.
The assessee incurred expenditure for "community development" in a backward area where its factory was located. The AO disallowed the expenditure on the ground that they related to charity and were not connected to the business of the assessee. The CIT(A) upheld the findings of the AO whereas the Tribunal allowed the assessee's appeal.

The High Court allowing the departmental appeal observed that expenditure towards the religious funds, charitable institutions, social clubs or for charity do not stand the test of commercial expediency and further the expenditure under these heads cannot be stated to be exclusively for the purposes of business of the assessee. Accordingly, the High Court held that the assessee had failed to place any material, in support of their case so as to claim the expenditure under this head as contemplated by Section 37(1) of the Act as being commercial expediency thereby allowing the departmental appeal. (AYs. 1986-87, 1987-88, 1992-93)
CIT .v. Wipro Ltd. (2014) 222 Taxman 181 (Karn.)(HC)

S. 37(1) : Business expenditure - Shifting of old machinery to make way for installation of new machinery - is capital expenditure.
The High Court following the decision of the Supreme Court in the case of CIT v/s. Sri Mangayarkarasi Mills (P.) Ltd. (2009) 315 ITR 114 held that the expenditure incurred for removal of the existing machinery only to make way for installation of new machinery would be treated as capital expenditure and hence could not be allowed under Section 37(1) of the Act. (AYs. 1986-87, 1987-88, 1992-93)
CIT .v. Wipro Ltd. (2014) 222 Taxman 181 (Karn.)(HC)

S. 37(1) : Business expenditure - Expenditure incurred for aesthetic purpose or for having better working environment is not capital expenditure.
The High Court dismissing the departmental appeal held thatthat the expenditure incurred by the assessee for purchase of paintings to improve aesthetic and working environment cannot be treated as

capital expenditure and hence the same was allowable as a business expenditure u/s. 37(1) (AY. 1986-87, 1987-88, 1992-93)
CIT .v. Wipro Ltd. (2014) 222 Taxman 181 (Karn.)(HC)

S. 37(1) : Business expenditure – Commission - Percentage of commission allowed by AO cannot be enhanced by the appellate authorities without any material on record.[S.251]
The AO, in the course of the assessment proceedings restricted the commission paid on sales to 1% of the total sales (against the claim of 2.75% of sales) by holding the vouchers produced did not contain the signature or complete address of the recipients of the commission. The CIT (A) allowed the claim of the assessee at 2.5% and disallowed the balance. The Tribunal also concurred with the view of the CIT(A).
The High Court allowing the departmental appeal observed that on facts there was no material to re-fix the commission at 2.5%. It noted that the AO had relied upon the fact that no material was produced to prove the payment of commission and the vouchers produced were unsigned and allowed 1% as commission. In order to increase the said commission to 2.5%, necessarily some additional materials should have been available with the appellate authorities, in the absence of any material to arrive at such a conclusion, the finding is perverse and not substantiated by any materials on record.
CIT .v. E.S. Jose (2014) 222 Taxman 29 (Mag.)(Ker.)(HC)

S. 37(1) : Business expenditure–Capital or revenue-Expenditure incurred on replacement of Chamber assembly in intermix machine is allowable as a current repair.
The assessee engaged in the business of manufacturing procured tread rubber. On being asked as to why there was a sudden increase in the repair and maintenance expenses, the assessee submitted that the sudden increase in the expenses was due to replacing of 'Mixing Chamber Assembly', one of the major parts of intermix Machine used for manufacture of rubber compound. The AO treated the said expenditure as a capital expenditure. The CIT(A) held that the expenditure incurred by the assessee is a repair expense as the machinery is not replaced but only overhauled.The Tribunal dismissed the department appeal by referring to a technical report which was placed before it wherein a picture of the intermix machine and the explanation regarding the function of the unit was shown. The Tribunal observed that, as per the said technical report and the detailed explanation, the mixing chamber (chamber assembly) seems to be one of the integral part of the intermix machine. The chamber assembly has no independent and separate function unless it is supported with rotors and other parts of the intermix machine. The Tribunal therefore relying on the decision of the Apex Court in the case of CIT .v. Sharavana Spg. Mills (P.) Ltd. (2007) 293 ITR 201 held that the replacement of chamber assembly which is an integral part of intermix machine is nothing but a current repair and not a capital expenditure.
The High Court dismissing the departmental appeal, observed that the two appellate authorities had gone into the factual aspect of the matter in order to understand the actual functioning of chamber assembly in intermix machine and had thereafter opined that the expenditure was not a capital expenditure. (AY. 2007-08)
CIT .v. Midas Rubber (P.) Ltd. (2014) 222 Taxman 27 (Mag.) (Ker.)(HC)

S. 37(1) : Business expenditure–Capital or revenue-Electricity transmission lines neither becoming property of assessee nor bringing any enduring benefit deductible as revenue expenditure.
The assessee made payments to the UP State Electricity Board (UPSEB) for laying electric transmission lines in the assessee's premises and considered the same as revenue expenditure. The AO however disallowed the expenditure. The CIT(A) and the Tribunal allowed the expenditure as deductible on the ground that the transaction lines were not owned by the assessee and the property in them remained with the UPSEB and hencethere was no enduring advantage to the assessee.
The High Court dismissing the departmental appeal followed its own decision in the case of CIT .v. Saw Pipes Ltd. (2008) 300 ITR 35 (Delhi) and held that the expenditure did not bring in any enduring benefit and was deductible as revenue expenditure. (AY. 1997-1998)
CIT .v. Samsung India Electronics Ltd. (2014) 222 Taxman 21 (Mag.) (Delhi)(HC)

S. 37(1) : Business expenditure - Advertisement expenditure incurred in running of business cannot be disallowed merely because a part of expenditure resulted into some benefit to a third party.

The assessee treated brand building expenses, dealer loyalty expenses, etc. as deferred revenue expenditure. The AO noted that the assessee had entered into an agreement with Samsung Electronics Company Ltd. of Korea, which was the parent company under which a part of the expenditure inured for the benefit of the brand "Samsung" and therefore the expenditure could not be said to be wholly and exclusively incurred for the purpose of the assessee's business thereby disallowing the entire expenditure. The CIT (A) noted that since the assessee as well as the company in Korea benefited from the advertisements and hence allowed only 50% of the expenditure. On appeal, the Tribunal allowed the entire expenditure as a deduction.

The High Court dismissing the departmental appeal followed the decisions in the case of Eastern Investment Ltd. .v. CIT (1951) 20 ITR 1, CIT .v. Royal Calcutta Turf Club (1961) 41 ITR 414 (SC) and CIT .v. Chandulal Keshavlal & Co. (1960) 38 ITR 601 (SC) and held that even if to some extent the expenditure endures a benefit to a third party it cannot in law defeat the effect of the finding as to the whole and exclusive nature of the purpose. (AY. 1997-1998)

CIT .v. Samsung India Electronics Ltd. (2014) 222 Taxman 21 (Mag.) (Delhi)(HC)

S. 37(1) : Business expenditure - Year in which deductible - Premium payable on debentures can be spread over entire life period of debentures.

The High Court, dismissing the departmental appeal, followed the decision of the Supreme Court in the case of Madras Industrial Investment Corpn. Ltd. .v. CIT (1997) 225 ITR 802 and observed that allowing the entire expenditure in one year might give a very distorted picture of the profits of a particular year and hence held that deduction for premium payable on debentures could be spread over the life of the debentures.

Dy. CIT .v. Atul Products Ltd. (2014) 222 Taxman 130 (Mag.) (Guj.)(HC)

S. 37(1) : Business expenditure –Method of accounting - Prior period expenses crystallised during the relevant assessment year on receipt of bills and hence, the expenses were allowable as expenditure, even though assessee was following the mercantile system of accounting. [S.145]

The assessee claimed some expenditure as prior period expenses. The AO disallowed the assessee's claim on the ground that since the assessee had followed the mercantile system of accounting, expenditure relatable to an earlier year could not be allowed as deduction in the assessment year under consideration. The Commissioner (Appeals) and Tribunal, however, held that in view of the consistent practice followed by the assessee, prior period expenses crystallised during the assessment year under consideration on receipt of bills were to be allowed as expenditure. The High Court directed Revenue too to adopt the consistent approach and allow the expenditure. (AY.2004-05)

CIT .v.Mahanagar Gas Ltd. (2014) 221 Taxman 80 (Bom)(HC)

S. 37(1) : Business expenditure-The annual license fee paid by it in the form of bandwidth charges for improving facilities of telephonic connectivity for transfer of data in and out of the office, is allowed as revenue expenditure.

The assessee company was engaged in providing facilities of telephonic connectivity for transfer of data in and out of the office. To improve said particular facility, the assessee wanted to set up a V-SAT facility and, thus, paid site charges which were in the nature of licence fee for bandwidth charges. The assessee claimed deduction of the said amount as revenue expenditure. The AO rejected the assessee's claim holding it to be capital in nature. He also disallowed the interest since it was paid on the loan for setting up the said facility.The Commissioner (Appeals) upheld the order of the AO.The Tribunal, however, allowed assessee's claim holding the expenditure to be revenue in nature. On the revenue's appeal, the High Court observed that the assesse was already using the telephone line and subsequently, a cable network for data transfer but the operation was slow. Hence, the assessee has switched to a new technology in order to increase the capacity and speed of transfer. Thus, the expenditure was held to be revenue in nature allowable under section 37(1). (AY.1997-98)

CIT .v.Kirloskar Computer Services Ltd. (2014) 221 Taxman 391/270 CTR 331 (Karn.)(HC)

S. 37(1) : Business expenditure –Payment for acquisition of master copies of soft ware-Revenue expenditure.[S.35A]

The assessee-company in pursuance of a license agreement entered with its holding company incorporated in the USA acquired master copies of software from the holding company and made duplicate copies and sold them to local clients, payment by the assessee for the acquisition of master copies was held to be an expenditure of revenue .(AY. 1994-95 to 2004-05)

Oracle India (P.) Ltd. .v.CIT(2013) 221 Taxman 249 (Delhi)(HC)

S. 37(1) : Business expenditure - Where the assessee purchased superior quality goods from its sister concern at a higher rate than the market value but third parties purchased the same at much higher rate, excess payment would be allowable.

The assessee firm purchased finished goods of superior quality from its sister concern at a higher price than the market value of such goods. The sister concern charged much higher rates than other entities to which it supplied similar finished goods. The sister concern was also paying tax on profit at the same rate as the assessee and, thus, there could have been no incentive for the sister concern to supply goods at a higher rate than the market rate because it would increase its profits. Thus, excess payment was held by the High Court as allowable u/s. 37(1).

CIT .v.Mansarover Impex (2014) 221 Taxman 81 (Mag.) (P&H)(HC)

S. 37(1):Business expenditure-Expenditure on education of director is personal consideration and not commercial consideration-Not allowable

The expenditure incurred for the education of the Director of the assessee viz. Mr. Krishna Kachalia was out of personal consideration and not commercial consideration. The judgement in Sakal Papers Pvt. Ltd. v. CIT (1978) 114 ITR 256 (Bom.) has been considered in D.C. Mehta v/s. ITO (Income Tax Appeal No.840 of 2012). In that case, the assessee, Mr. D. C. Mehta, an Advocate by profession claimed a deduction of Rs.22L as expenditure incurred for higher education for his daughter, Hemali. The justification for the said deduction was that she joined the Appellant's firm of Advocates and gave an undertaking that on attaining higher qualification and degree from the University abroad, she would join the firm for a minimum period of five years and thus, the said expenditure was incurred for the business of the assessee and was allowable as a deduction. It was found that the daughter Hemali joined the assessee and immediately was sent for education abroad. The assessee had not been able to bring on record anything and particularly the scheme for higher education abroad for employees and associates. Despite other associate Advocates working in the firm of the Assessee, none were given an opportunity to go abroad for higher education despite the fact that some were working with him for the last 15 years. Despite the aforesaid, within a period of two to three months, after the daughter Hemali became an Advocate and joined the firm as an Associate, she went abroad. In this view of the matter, the Division Bench upheld the contention of the authorities below in disallowing the deduction. The judgment in Sakal Papers must be seen in the peculiar facts and background and the cumulative impact of all events & circumstances must be seen. Only because there was no commitment or contract or bond taken from the trainee, the expenditure cannot be disallowed to the assessee, particularly when as a result of that expenditure, the trainee had secured both, a degree and training which would be of assistance to the assessee Company. The facts of the present case are totally different from that of Sakal Papers and almost identical to that in D. C. Mehta's case (CIT v. ChandulalKeshavlal (1960) 38 ITR 601 (SC). The assessee to pay costs of Rs.50,000 to the Respondents. (AY.2005-06, 2006-07)

Shreenath Motors Pvt. Ltd. .v. CIT (2014) 365 ITR 536/107 DTR 28/269 CTR 456(Bom.)(HC)

S. 37(1): Business expenditure–Genuineness of transaction–Books of accounts not rejected-Deletion of addition on account of purchase transaction was held to be justified.[S.145]

Tribunal noticed that assessee's books of account as well as sales tax records of seller and found that purchase was a genuine transaction. Also, there was no rejection of books of account by the authorities. Held, deletion of addition on account of purchase transaction justified. (AY. 2006-07)

CIT .v. Sunrise Tooling System P. Ltd. (2014) 361 ITR 206 (Delhi)(HC)

S.37(1):Business expenditure-Amount paid to sub-contractors-Tribunal order based on facts–No substantial question of law.[S.260A].

Assessee is engaged in the business of construction. AO disallowed the payments made to sub contractors. CIT(A) relying on remand report and supplementary report partly confirmed the disallowance. Tribunal by passing detailed order deleted the disallowance.On appeal by revenue, the Court held that Tribunal exhaustively noted the details furnished by the parties and deleted entire addition. Held, Tribunal order was based on facts and no question of law arose. (AY. 2005-2006)

CIT .v. B.M.S. Projects P. Ltd. (2014) 361 ITR 195 (Guj.)(HC)

S. 37(1): Business expenditure–Tea coffee etc for customers-Allowable as business expenditure.

In view of the finding that expenditure on tea, coffee etc. was for business purposes and that it was very low, the sum was to be allowed as deduction. (AY 1974-75)

CIT .v. Premier Vegetable Products Ltd. (2014) 362 ITR 464 (Raj.)(HC)

S. 37(1): Business expenditure–Lease equalization charges–Accounting Standard followed-Allowable as deduction.

Lease equalisation charge results in debit or credit entry in the profit and loss account and helps the income be staggered or matched during the entire period of lease. As long as the assessee does not indulge in any manipulation of the figures and the capital cost, internal rate of return, etc., are computed in accordance with the accounting standards, no error can be found. Held, lease equalisation charges should not be disallowed. (AY. 2001-02)

CIT, Large Taxpayers Unit .v. India Railway Finance Corporation Ltd. (2014) 362 ITR 548 (Delhi)(HC)

S. 37(1): Business expenditure–Bond issue expenses–Capitalor revenue-Allowable as revenue expenditure.

Expenses incurred on bonds issued for the purposes of business are allowable as deduction. (AY. 2001-02)

CIT, Large Taxpayers Unit .v. India Railway Finance Corporation Ltd. (2014) 362 ITR 548 (Delhi)(HC)

S.37(1): Business expenditure–Salaries to relatives-Excessive and unreasonable payments–Not for purpose of business-Disallowance was justified.

Salaries were paid to relatives of assessee. It was found that payments were not made exclusively for purposes of business. Hence, disallowance was held to be justified. (AY.2008-09)

Jayesh Raichand Shah .v. ACIT (2014) 360 ITR 387 (Guj.)(HC)

S.37(1): Business expenditure-for purposes of business- Contributions for religious functions and social clubs-Held to be not allowable.

Contributions for religious functions and social clubs and donation to municipality for digging bore-well in backward area where assessee's factory was located was not allowable as there was no evidence that the same was incurred for business purposes. (AYs. 1986-87, 1987-88, 1992-93)

CIT .v. Wipro Ltd. (No.2) (2014) 360 ITR 658 (Karn.)(HC)

S.37(1): Business expenditure–Capital or revenue-Expenditure on shifting of machinery is capital expenditure.

Expenditure on shifting machinery to make way for installation of new machinery is capital expenditure. (AY. 1986-87, 1987-88, 1992-93)

CIT .v. Wipro Ltd. (No.2) (2014) 360 ITR 658 (Karn.)(HC)

S.37(1): Business expenditure–Capital or revenue-Expenditure on painting to improve working environment is revenue expenditure.

Expenditure on painting to improve working environment was held to be revenue expenditure. (AYs. 1986-87, 1987-88, 1992-93)

CIT .v. Wipro Ltd. (No.2) (2014) 360 ITR 658 (Karn.)(HC)

S.37(1): Business expenditure-Capital or revenue-Pre-operational trial run expenses was held to be revenue expenditure.
Pre-operational trial run expenses are revenue expenditure.(AY.1998-99)
CIT .v. Dhampur Sugar Mills Ltd. (2014) 360 ITR 82 (All.)(HC)

S.37(1): Business expenditure–Capital or revenue-Expenditure on raising loan to obtain Technical knowhow is revenue expenditure.
The assessee was engaged in manufacture and sale of sugar. The B unit was set up in the same line of business from the funds borrowed by the company. There was no material to contend that the new unit was under a different management or that there was no unity of control between the business of manufacture and selling sugar and that in the new unit at B. The expenditure on raising loan for obtaining technical know-how was deductible. (AY.1998-99)
CIT .v. Dhampur Sugar Mills Ltd. (2014) 360 ITR 82 (All.)(HC)

S.37(1): Business expenditure-Capital or revenue- Dematerialization of securities-Amount paid under statutory obligation is for the purpose of business hence allowable.
Amount paid to National Securities Depository Limited under statutory obligation for dematerialization of securities Expenditure is for purposes of business.(AY. 1998-99)
CIT .v. Infosys Technologies Ltd. (2014) 360 ITR 714/104 DTR 282/270 CTR 523 (Karn.)(HC)

S.37(1): Business expenditure–Installation of traffic signals to enable employees to reach place of work early was held to be for the purpose of business.
Expenditure on installing traffic signals to enable employees to reach place of work early is for purposes of business. (AY.1998-99)
CIT .v. Infosys Technologies Ltd. (2014) 360 ITR 714/104 DTR 282/270 CTR 523 (Karn.)(HC)

S.37(1): Business expenditure–Provision for warranty – Assessee was not able to specify post-sales expenses-Not allowable as deduction-Matter remanded.
Where no separate accounts maintained and Assessee was not able to specify post-sales expenses, Tribunal was not justified in granting deduction. Matter remanded. (AY.1998-99)
CIT .v. Infosys Technologies Ltd (2014) 360 ITR 714 /104 DTR 282/270 CTR 523(Karn.)(HC)

S.37(1): Business expenditure–Issuing of convertible premium notes –Expenditure to be spread over six years.
Expenditure on convertible premium notes was spread over the period of life of the convertible premium notes for six years. The year of payment was the sixth year and on which the expenditure was incurred by paying maturity value. The expenditure had to be spread out for a period of six years, and was not allowable in the years 1997-98 and 1998-99 alone.(AY.1988-89)
CIT .v. Dhampur Sugar Mills Ltd. (2014) 360 ITR 82 (All.)(HC)

S.37(1): Business expenditure–Electricity expenses-For user of premises belongs to others-Allowable as deduction.
Tribunal arrived at the finding that the assessee was using the premises belonging to another concern and made payment for actual user of electricity in that premises and that similar claim was being regularly made right from A.Y. 2003-04. The same had been allowed in entirety in the past. The claim for deduction of electricity expenses is allowable. (AY.2006-07)
CIT.v. Jugal Kishore Dangayach (2014) 98 DTR 95 (Raj.)(HC)

S.37(1):Business expenditure-Secret commission and distribution of specimen-Matter remanded for reconsideration.
Any secret transaction/payment that is made to secure an unfair advantage, would necessarily be repugnant to law. When neither the incurring of expenditure as a fact under the two given heads has been properly accounted for nor application, in their relation and impact of Explanation added to s.37

has been taken into consideration, the impugned order is legally vitiated. Matter remanded. (AY. 1990-91)

CIT .v. Dhanpat Rai & Sons (2014) 98 DTR 209/362 ITR 7 (P&H)(HC)

S.37(1): Business expenditure-provision made towards gratuity and leave encashment are not contingent liabilities and hence such provision is deductible.

The High Court relied on the decision of Hon'ble Supreme Court in the case of *Bharat Earth Movers* v. *CIT* [2000] 245 ITR 428/112 Taxman 61 (SC) wherein it was held that an assessee maintaining the accounts on a mercantile system, a liability already accrued though to be discharged at a future date would be a proper deduction while working out the profits and gains of his business, regard being had to the accepted principles of commercial practice and accountancy. Deduction was not only permissible for amounts actually expended or paid. The liability would be an accrued liability and would not convert into a conditional one merely because the liability was to be discharged at a future date. Therefore based on above gratuity payable and encashment of earned leave was not a contingent liability and provision thereof is deductible from the total income.(AY. 2002-2003)

CIT .v. Kirloskar Systems Ltd. (2014) 220 Taxman 1 (Karn.)(HC)

S.37(1): Business expenditure-Rent enhancement with retrospective effect- Year of allowability-Assessee would be entitled for claim of additional amount only in subsequent assessment year i.e. 1998-99, and not in any earlier assessment year.

The assessee was engaged in the business of mining and export of ore. It engaged barges for which freight was paid. The rates of freight were enhanced with retrospective effect from 9-5-1997. The assessee made a provision in its accounts for assessment year 1997-98 and claimed additional amount which had been paid by way of rent to the barge owners. The AO, CIT (Appeals) and Tribunal did not allow the claim for AY 1997-1998 and held that it could be allowed only in AY 1998-1999. On appeal to the High Court, it held that in both the orders of the Commissioner (Appeals) and of the Tribunal, it has been consistently held that since the liability accrued on 9-5-1997, the claim was allowable only in Assessment Year 1998-99 and not in AY 1997-98, and hence no interference is called for. (AY. 1997-1998).

Damodar Mangalji Mining Co. v. JCIT (2014) 220 Taxman 344 (Bom.)(HC)

S.37(1):Business expenditure-Foreign education-Son of director-Expenditure on foreign education of employee (Son of director) is deductible if there is business nexus.

(i) The question is whether these twin requirements are said to have been satisfied in the circumstances of this case. The first is what are the materials on record? The assessee furnished its resolution authorizing disbursement of the expenses to fund Dushyant Poddar's MBA. It secured a bond from him, by which he undertook to work for five years after return within a salary band and he had in fact worked after graduating from the University for about a year before starting his MBA course. In Natco Exports P. Ltd. v. CIT (2012) 345 ITR 188 (Del), the student had applied directly when she was pursuing her graduation. There was a seamless transition as it were between the chosen subject of her undergraduate course and that which she chose to pursue abroad. In the present case, the facts are different. Dushyant Poddar was a commerce graduate. The assessee's business is in investments and securities. He wished to pursue an MBA after serving for a year with the company and committed himself to work for a further five years after finishing his MBA. There is nothing on record to suggest that such a transaction is not honest. Furthermore, the observation in Natco Exports with respect to a policy appears to have been made in the given context of the facts. The Court was considerably swayed by the fact that the Director's daughter pursued higher studies in respect of a course completely unconnected with the business of the assessee. Such is not the case here. Dushyant Poddar not only worked but as stated earlierhis chosen subject of study would aid and assist the company and is aimed at adding value to its business;

(ii) Whilst there may be some grain of truth that there might be a tendency in business concerns to claim deductions under Section 37, and foist personal expenditure, such a tendency itself cannot result in an unspoken bias against claims for funding higher education abroad of the employees of the concern. As to whether the assessee would have similarly assisted another employee unrelated to its management is not a question which this Court has to consider. But that it has chosen to fund the

higher education of one of its Director's sons in a field intimately connected with its business is a crucial factor that the Court cannot ignore. It would be unwise for the Court to require all assessees and business concerns to frame a policy with respect to how educational funding of its employees generally and a class thereof, i.e. children of its management or Directors would be done. Nor would it be wise to universalize or rationalize that in the absence of such a policy, funding of employees of one class unrelated to the management would qualify for deduction under Section 37(1). We do not see any such intent in the statute which prescribes that only expenditure strictly for business can be considered for deduction. Necessarily, the decision to deduct is to be casedependent.(AY.2006-07)
KostubInvestment.v.CIT(2014)365ITR 436/102DTR97(Delhi)(HC)

S.37(1): Business expenditure-Sales commission-In the absence of any credible evidence, sales commission cannot be allowed
The assessee was dealing in sanitary equipments, plywood's and flooring, among other things. During the year, it had paid sales commission to his agents at the rate of 2.5 per cent of the total turnover and claimed deduction. The Assessing Officer, after considering the general practice of giving commission, restricted the commission payment to 0.5% of the total turnover. The CIT(A), after considering the fact that the assessee was marketing a new product and there was stiff competition, commission at 2.5 per cent of the total turnover was justified and hence, was allowed. The Tribunal uphold the order of the CIT(A). On an appeal filed by the department, the High Court held that there was no material on record, verified or relied upon by the CIT(A) to increase the commission from 1 per cent to 2.5 per cent. Therefore, High Court set aside the order of the Tribunal and the CIT(A) and upheld the order of the AO. (AY. 1995-1996)
CIT .v. E.S. Jose (2014) 220 Taxman 32 (Ker.)(HC)

S.37(1): Business expenditure-Year of deductible-Research and development-Allowable in the first year of claim as per return. [S.35D]
The Assessee was engaged in manufacturing and selling of computers. The assessee, in its books of accounts, debited one-third of the research and development expenditure as relating to the assessment year under appeal and the remaining two-third was written off in the succeeding two years. The assessee claimed the entire expenditure in the first year i.e. the assessment year under question, on the ground that it was revenue expenditure and has to be allowed in the first year itself. The Tribunal allowed the entire expenses in the first year. The High Court, confirming the Tribunal's order, held that since the expenditure incurred by the assessee was revenue in nature and had been spent wholly and exclusively for the purposes of business, it was allowable as deduction in the year under question. (AY. 1992-93)
CIT .v. Modi Olivetti Ltd. (2014) 220 taxman 388 (All)(HC)

S.37(1): Business expenditure-Payment to retiring partner- Payment of Goodwill made to the retiring partners was held to be not allowable. [S.263]
The assessee was originally a partnership firm of four partners involved in the business of pharmaceutical distribution. During the course of its business, three new partners were introduced; all four original partners then retired from the partnership firm, leaving the three new partners. The firm continued to run the business. The assessee firm claimed deduction of amounts paid to the retiring partners on account of goodwill for the particular assessment year. The claim was allowed by the AO. The assessment was reopened *suo moto* by the Commissioner under Section 263. He disallowed the claim. On appeal, the Tribunal disallowed the claim and stated that there was no question of payment of any goodwill to a retiring partner, as the partnership continued to be a firm carrying on the business without any change in the nature of business by using the earlier name. On appeal filed before High Court it was held that when one partner retired from the business, there was no severance of status so far as the partnership was concerned, as the retiring partner would take his capital investment and retire from partnership and the others would continue the business. By adopting this method, the four partners had not transferred the entire business concern to the new partners, but had chosen to continue for some time and at their leisure, and then retire from partnership one after the other; therefore, both tangible and intangible assets and liabilities of the firm remained the same throughout. A share of the capital came to be paid to the retiring partners, but it could not be treated as cost paid to

them towards acquisition of any rights from them. A partner who retired from a partnership firm would take its initial investment and profit, if any, payable to him. Similarly, if he was accountable for any loss in a particular assessment year, that would also be worked out at the time of retirement. Therefore, there was no transfer of any interest and the money paid was only towards the share of the capital invested by that partner along with some profit, if any, and nothing beyond that. Therefore, the question of each year some money paid towards the goodwill would not arise in the facts of the present case. Therefore, the Income Tax Appellate Tribunal was justified in disallowing the payment of goodwill claimed by the appellant assessee. (AY. 2004-2005)

Oberon Trading Corpn. .v. ITO (2014) 360 ITR 19 / 220 Taxman 350 (Ker.)(HC)

S.37(1): Business expenditure-Operational expenses-Held to be allowable.

The assessee-company was engaged in mobilizing deposits from the general public at large. It had entered into a MOU with Sahara India whereby Sahara India agreed to work as an agent to the assessee-company for collecting money, supplying receipts and documents, and communicating various schemes and proposals launched by the assessee-company from time to time. The assessee-company claimed the operational expenses paid to Sahara India. The Assessing Officer found that the operational expenses paid by the assessee accounted for 18.85 per cent of the total collection made during the year and, based on an estimate, allowed only 3 per cent of the collection. On appeal, the CIT(A) as well as the Tribunal, allowed the expenditure up to 4.5 per cent of the total deposit. On appeal by the Revenue, the High Court held that the expenses so claimed pertained to the establishment, travelling, stationery and printing, advertisement and publicity and business development and that these expenses were therefore related to the business of the assessee. The same fund was allocated according to the MOU between the parties. Thus, unless a case had been made that the payments were not genuine then there was no scope for any interference. (AY. 1992-93 to 1994-95)

CIT .v. Sahara India Mutual Benefit Co. Ltd. (2014) 220 Taxman 16 (All.)(HC)

S.37(1):Business expenditure-Capital or revenue-Bond registration chrges was held to be revenue expenditure.

Payment of Bond registration chrges was held to be revenue expenditure.(AY.2006-07)

CIT v.Hindustan Organics Chemicals Ltd (2014) 366 ITR 1/107 DTR 105/270 CTR 478 (Bom)(HC)

S.37(1): Business expenditure -Foreign travel expenditure-Matter remanded.

Assessee Company engaged in business of development and sale of real estate had taken up a real estate development project. Tribunal held that expenditure on foreign travel was held to be allowable if the same was incurred for purpose of business. Matter remanded . (AY. 2008-09)

Dy.CIT .v. S.P. Real Estate Developers (P.) Ltd. (2014) 149 ITD 617 / 47 taxmann.com 281 (Hyd.)(Trib.)

S. 37(1) : Business expenditure-Disallowance of consent fee paid to SEBI-Not penalty-Payment for technical violation-Allowable as deduction.

The Circular issued by SEBI for "Consent application" clearly specifies that the action taken under section 11 of the Act fall in the category of "administrative or civil action". Further, order passed by SAT also clearly states that the irregularities alleged against the assessee are "technical violations". Most of all, the amount of Rs.50.00 lakhs paid by the assessee are not related to the penalty, if any, imposed by the SEBI, rather it was a "Consent Fee" paid by the assessee for settlement of dispute, legal expenses and other administrative charges of SEBI. The said amount was paid clearly specifying that it was paid without admitting or denying the guilt. Hence, in our view, it cannot be said that the assessee has paid the amount of Rs.50.00 lakhs by duly accepting or upon proving the irregularities alleged against it. On the contrary, it is the case of the assessee that it has taken the decision to settle the dispute on commercial expediency and upon business interests.(ITA No. 274/Mum/2013, dt. 22.10.2014.) (AY. 2008-09)

ITO .v. Reliance Share and Stock Brokers(P) Ltd. (Mum.)(Trib.); www.itatonline.org

S. 37(1) : Business expenditure-Legal fees to defend criminal proceedings-Held to be not allowable.

As the assessee was arrested in Custom Duty Evasion criminal case by the DRI and the payment of legal expenses and fees to the lawyers was made to defend and to secure bail for the assessee in that case. In this situation following the decision of Hon'ble Supreme Court in the case of CIT v. H. Hirjee (1953) 23 ITR 427(SC), we reach the logical conclusion that the authorities below were right in holding that the payment of legal fees and expenses towards defending in a criminal prosecution not allowable as business expenditure because the same was not expended wholly and exclusively for the purpose of business.(ITA No. 3674/Del/2010, and ITA No. 5261/Del/2011, dt 31.10.2014.) (AY.2007-08)

Praveen Saxena .v. JCIT (Delhi)(Trib.) www.itatonline.org

S. 37(1) : Business expenditure–Leave encashment expenses of earlier years was held to be allowable on actual payment. [S.43B]

Tribunal held that the assessee is entitled to deduction on leave encashment expenses though pertaining to earlier years on actual payment basis as assessee has not claimed in earlier year. (AY. 2006-07)

ACIT .v. Bharti Teletech Ltd. (2014) 163 TTJ 36(UO) (Delhi) (Trib.)

S. 37(1) : Business expenditure-Capital or revenue-Expenditure by way of royalty for use of technology cannot be disallowed on the ground of being capital in nature or for non-business purpose-There is no legal requirement that for allowing expenses there has to be an agreement.

The arrangement between the assessee and the Australian company has been duly signed by both the parties. The rate per piece has also been specified therein. The royalty has been paid in actual. MACNAUGHT is not a related concern of the assessee. There is no allegation that the payments were bogus and it was an arranged affair. This is an actual payment after deduction of TDS and remitted through proper banking channel in foreign exchange. Therefore, the observation of the CIT (A) is not based on any specific finding. The rate, the products on which these are payable are clearly stated in the agreement. There is no legal requirement that there should be a detailed agreement between the parties. However, the only thing required is that there should be an arrangement under which payments have to be made. Section 37(1) of the Income-tax Act, 1961 provides for allowability of the expenditure incurred wholly and exclusively for purposes of the business. The assessee has actually incurred this expenditure for the business purposes, therefore, the CIT (A) was not justified in sustaining the disallowance. (ITA No. 637 & 638/Del/2013, Dt. 14/10/2014.) (AYs. 2005-06 & 2006-07)

Groz Engineering Tools Pvt. Ltd. v. DCIT (Delhi)(Trib.); www.itatonline.org

S.37(1):Business expenditure-Payment to related party without obtaining prior approval of the Central Government-Procedural irregularity- Cannot be disallowed treating the same as offence or prohibited by law.[Companies Act, 1956, S.297]

AO disallowed the payment made to related party on the ground that, the assessee has not obtained the prior permission of Central Government in accordance with section 297 of the Companies Act, 1956 hence the explanation to section 37(1) is applicable .Order of AO was confirmed by CIT(A). On appeal the Tribunal held that payments to related parties without obtaining prior approval of the Central Government in accordance with provisions of section 297 of the Companies Act, 1956 was merely an irregularity and cannot be disallowed treating the same as an offence or prohibited by law.(ITA no. 844/Del/2013/ "D" dt 20-06-2014)(AY. 2009-10)

Jai Surgicals Ltd. .v. ACIT (2014)106 DTR 333/163 TTJ 724(Delhi)(Trib.)

S.37(1):Business expenditure-Premium paid on the insurance policies on the partners was held to be allowable.[S.10(10D)]

Insurance Policies were purchased in the name of the partners and the firm remains the proposer therein and on its maturity, the assured sum is payable to the firm, not to the partners. In the policies the partners were shown as assured person only. Therefore, these policies were purchased to protect the interest of the firm in case of sudden demise of the partners. ITAT Held that, the premium paid on

the insurance policies on the partners is allowable as expenditure under section 37(1) of the Act, but in order to give these policies the colour of Keyman, the assessee is required to give an undertaking to the Life Insurance Corporation of India that at the time of receipt of sum assured, the same would form part of the total income of the assessee and no benefit of exemption under section 10(10D) of the Act would be available to the assessee. With these conditions, the claim of the assessee is allowable.(AY.2008-09)

Reliance International .v. ITO (2014) 61 SOT 86 (URO)/ (2013)36 taxmann.com 129(Luck.)(Trib.)

S. 37(1) : Business expenditure -Discount-Entries in the books of account is not a decisive or a conclusive factor - Overseas commission represented a discount given to purchasers and not a business commission-Disallowance was not justified.

Assessee company engaged in business of manufacturing and trading of fabric. During the year, the assesse paid certain amount as agency commission and overseas commission and claimed deduction of same. Agency commission had been paid to local agents for their services provided for introducing to overseas parties, to whom it sold goods on principal to principal basis. AO accepted local commission paid and disallowed overseas commission on ground that no services had been rendered by overseas agents. Overseas commission represented a discount given to purchasers and not a business commission. Tribunal held that the AO. was wrong in disallowing overseas commission without appreciating real nature of entries. Amount represents a discount given to the purchases and not a business commission. The transactions are found to be on principal to principal basis. There is no element of 'agency' to attract the provisions of section 194H. The overseas parties do not sell the goods as agents of the assessee-company. The assessee is not crediting the personal accounts of the overseas parties. It is a settled principle of law that existence or absence of entries in the books of account is not a decisive or a conclusive factor in ascertaining the income or claiming the expenditure. Therefore, no such disallowance u/s 37(1) can be made. (AY. 2009-2010)

ITO .v. Axon Global (P.) Ltd. (2014) 146 ITD 473 / (2013) 38 taxmann.com 392 (Jodh.)(Trib.)

S. 37(1) : Business expenditure – Construction of road-Disallownce of only 25 percent of the total claim of expenditure incurred on road construction would be justified .

Assessee claimed that during year it had incurred an expenditure of Rs. 22.10 crores for construction of temporary roads at its contract work sites at Ratnagiri, Maharashtra and Bellary, Karnataka and claimed deduction of same as business expenditure. It explained to Assessing Officer that it had entered into service and supply contracts with two parties, namely, 'J' and 'W' for engineering and construction of thermal power plants for them at Ratnagiri and Bellary. Assessing Officer disallowed claim of assessee on plea that it was bogus - Whether since 'J' and 'W' had stated that assessee might have constructed temporary roads for execution of work, to deny whole of claim of expenditure for laying access road to project sites would be unfair.The Tribunal held that disallowance of 25 per cent of the total claim of expenditure incurred on road construction would be justified. (AY. 2009-10)

Edac Engineering Ltd. .v. ACIT (2014) 149 ITD 341 / 159 TTJ 526 (Chennai)(Trib.)

S. 37(1): Business expenditure–Capital or revenue-Share issue expenses-Capital in nature. [S.35DD]

Expenditure incurred on account of issuance of share certificates cannot be considered as revenue expenditure.(AY. 2006 - 07)

Ricoh India Ltd. .v. Dy. CIT (2014) / (2013) 38 taxmann.com 264 (Mum.)(Trib.)

S. 37(1): Business expenditure–Discount-Agency commission was held to be allowable.

Assesseeis engaged in business of manufacturing and trading of fabric, Duringthe year.agency commission had been paid to local agents for their services provided for introducing to overseas parties, to whom it sold goods on principal to principal basis, (ii) in invoices from gross amount of sales deduction upto 12.5 per cent had been given in name of commission, and (iii) in books after recording gross sales, deduction was separately recorded as overseas commission. A.O. accepted local commission paid, but disallowed overseas commission on ground that no services had been rendered by overseas agents. Overseas commission represented a discount given to purchasers and not a

business commission. Tribunal held that AOwrongly disallowed the overseas commission without appreciating real nature of entries made in books of account. Appeal of revenue was dismissed (AY.2009-10)

ITO .v. Axon Global (P.)Ltd. (2014) 146 ITD 473 / (2013) 38 taxmann.com 392 (Jodh.)(Trib.)

S.37(1):Business expenditure-Explanation-If the purpose of the expenditure is not an offense/ prohibited by law, fact that prior approval of the Govt. was not obtained cannot be the basis of disallowance.[Companies Act , 1956 , S. 297]

The Explanation to s. 37(1) is a deeming provision and disallows expenditure incurred by an assessee for 'any purpose' which is either an offence or prohibited by law. The inquiry to determine the applicability or otherwise of the Explanation is restricted to ascertaining the purpose of the expenditure. In simple words, the investigation should be carried out to see the object and consideration for the expenditure incurred. If the purpose of the expenditure is neither to commit an offence nor is prohibited by any law, then there can be no question of disallowance. It means that the offence or prohibition under law should be judged with the 'purpose' of the expenditure on a standalone basis divorced from the fulfillment or otherwise of the procedural formalities attached with and necessary for the incurring of such expenditure. To put it in simple words, if the expenditure is otherwise lawful and neither amounts to offence nor is prohibited by law, but the procedural provisions attached for incurring it are not complied with, no doubt irregularity will creep in, but such irregularity would not make the expenditure itself as unlawful so as to be brought within the scope of the Explanation. On facts, the payment of job work charges is not an offence or prohibited by law. The fact that there was no prior approval from the Central Government u/s 297 of the Companies Act does not make the expenditure of job work charges disallowable.(AY. 2009-10))

Jai Surgicals Ltd. .v. ACIT (2014) 150 ITD 60 (Delhi)(Trib.)

S. 37(1):Business expenditure-Foreign education expenditure of whole time director-Allowable as business expenditure.

The assessee company debited foreign education expenditure and claimed it as allowable expenditure.AO treated the said expenditure as personal nature and disallowed it. On appeal the Tribunal held that the expenditure was incurred as per resolution passed by the company and as per the agreement he will work for two years after his return from USA. Tribunal held that expenditure incurred on foreign education of Mr.Goenka, the whole time director, under authority of a resolution passed pursuant to which an agreement between the assessee and Mr Goenka, is a business expenditure which is allowable.(ITA no 3231/Ahd/2010 dt.13-09-2013)(AY.2003-04)

Gujarat Carbon & Industries Ltd. .v. ACIT (2014) July-BCAJ-P.32(Ahd.)(Trib.)

S.37(1): Business expenditure-Foreign tour expenses-Foreign visits undertaken by directors to places other than Singapore could not be said to be wholly and exclusively for business purposes- Disallowance was confirmed.

Assessee company incurred export promotion expenses which included foreign travelling expenses of directors, claimed to be undertaken for discussion with buyers.AO observing that assessee manufactured products only for its Associated Enterprise (AE) in Singapore, held that foreign travel expenditure was for personal purposes too, allowed only estimated expenditure towards visit to Singapore and disallowed remaining part. Where assessee manufactured product as per specification of AE in Singapore and was its captive supplier of finished goods, foreign visits undertaken by directors to places other than Singapore could not be said to be wholly and exclusively for business purposes. Disallowance of expenses was confirmed. (AY.2003-04)

Advance Power Display Systems Ltd. .v. ACIT (2014) 146 ITD 761 / (2013) 35 taxmann.com 145 /30 ITR 481/105 DTR 269(Mum.)(Trib.)

S.37(1): Business expenditure-Audit fee-Bad debts-Entries in the account after survey-Matter was set aside for readjudication. [S.133A].

Assessee's claim for audit fees, consultancy fees and bad debts written off was disallowed on ground that assessee's final accounts as found during course of survey were at variance with final audited balance-sheet and thus, assessee had manipulated its accounts after close of year and claimed inflated

expenses. Assessee submitted that passing entries after close of year was not precluded by law, i.e., as long as there was basis thereto and that statements found during survey were unsigned but had failed to provide proper clarification with regard to said claim .Onus to establish its case being on assessee, matter remitted for readjudication.(AY. 2008-09)

Alliance Finstock Ltd. .v. ACIT (2014) 146 ITD 739 / (2013) 40 taxmann.com 176 (Mum.)(Trib.)

S.37(1): Business expenditure–Capital or revenue- Only longevity of the facility cannot make capital asset.

The assessee incurred huge expenditure in laying cables for providing domestic viewers. It had shown the expenditure in its P & L A/c. as revenue incurred for the purpose of its business. The AO held that the assessee having secured an enduring benefit by laying down the cables, the expenditure incurred was capital in nature and hence disallowed the expenditure, however, allowed depreciation thereon @ 25%. The CIT(A) held that the expenditure was revenue in nature.

On appeal by the Department, the Tribunal confirming the Order of the CIT(A) held that even though the cables were laid by the assessee for carrying on business, the cables did not satisfy the basic features of a capital asset. Enduring benefit in the assessee's case related to safeguarding cable laid down underground or drawn over the electric poles. If an external agency interfered and the cables were damaged, the assessee had no course of action, it could not retrieve the cables profitably nor could it protect the cables. Accordingly, the costs involved was a sunk cost even though the assessee might get the benefit out of the cable for more than a year. That longevity of the facilitycould not make the cable a capital asset. Therefore, the Tribunal held that the expenditure on laying cables was revenue in nature. (AYs. 2003-04,2005-06)

ACIT .v. Gemini TV P. Ltd. (2014) 29 ITR 32 (Chennai)(Trib.)

S.37(1): Business expenditure–Capital or revenue-Expenditure neither creating an asset or for providing enduring benefit is a revenue expenditure.

Out of the capital work-in-progress, the assessee claimed the amount on salary, travelling and communication expenditure as revenue expenditure. The AO held that since these expenses are shown as pre-operative expenses and treated the amount as capital in nature in the books and hence the same cannot be allowed as revenue for income-tax purposes. The stand of the AO was confirmed by the CIT(A).

On appeal the Tribunal held that the AO did not dispute the fact that the expenditure was incurred for expansion of the existing line of business and was in the nature of salary, etc. These expenses did not create any asset nor provided any enduring benefit to the assessee so as to treat this as capital. Therefore the Tribunal held that the expenses cannot be treated as capital expenditure. (AY. 2008-2009)

Reliance Footprint Ltd. .v. ACIT (2014) 29 ITR 82/63 SOT 124(URO) (Mum.)(Trib.)

S.37(1):Business expenditure–Expenditure incurred on film which was abandoned halfway - Allowed as revenue expenditure. [R. 9A]

The assessee, a film producing company, abandoned a film under production as continuation would have led to a higher loss and claimed the expense incurred as revenue in nature. The AO disallowed the expense as expenditure incurred before release of a film was capital expenditure. The CIT(A) held that during production, the film was a stock-in-trade and on being abandoned was to be treated as revenue expense.

On appeal by the department, the Tribunal held that only when expendituregives rise to an enduring benefit, it can be regarded as capital in nature. As per Rule 9A, for feature films (full cost of production of which is generally realizable within a period as low as 90 days), the cost of production of the incomplete project, is deductible as a business expenditure on its abandonment. Thus in the instant case, where suspension was not temporary, the expense is to be treated as revenue in nature. (AY. 2005 – 06)

ACIT .v. A.K. Films (P.) Ltd. (2014) 29 ITR 308 (Mum)(Trib.)

S.37(1): Business expenditure - Expenditure incurred on an abandoned film–is a revenue loss and allowable expenditure.[S.28(i)]

The assessee is engaged in the business of hiring cine equipment, distribution and export of films. The AO disallowed the loss of Rs. 60 lakhs claimed by the assessee in respect of an abandoned film on account of non-advancing of a legal justification and held the same to be capital in nature. The CIT(A) allowed the claim of the assessee observing that since the film no longer had commercial viability, it was scrapped and the amounts incurred till date were written off.

On appeal by the department, the Tribunal relying on the decision of the Bombay High Court in the case of CIT v. Mukta Arts P. Ltd. (ITA No. 584 of 2001) and other decisions on the subject observed that the fact that the film in question was never released, it was simply a stock-in-trade and there was no question of it being a capital asset. Accordingly, the Tribunal confirmed the order of the CIT(A) and dismissed the departmental appeal. (AY. 2006-07)

ITO .v. Abdul Nadiadwala (2014) 29 ITR 528 (Mum.)(Trib.)

S.37(1): Business expenditure–Provision for arrears arising on account of wage revision - Allowable expenditure.

The assessee had made provision for arrears in wage revision. It was argued that the assessee entered into wage agreement for 10 years from 01.01.1997 to 31.12.2006. Therefore, due date for revision of wages and salaries were from 01.01.2007. Even though final memorandum of settlement of demands of workers was reached on 24.09.2009 increase in salary was effective from 01.01.2007. The enhanced salary is an accrued and crystallized liability for 2007. Merely because the same was quantified later would not alter the fact that the amount is a crystallized liability. The AO and CIT(A) disallowed the expenses.

On appeal, the Tribunal allowed the provision as a business expense u/s. 37(1) relying on the decisions of the Apex Court in the case of Bharat Earth Moversv. CIT [2000] 245 ITR 428 and Rotork Controls India (P.) Ltd. v. CIT [2009] 314 ITR 62 and the accounting standard issued by the CBDT u/s. 145 in terms of which any liability which has accrued during any financial year is to be allowed in that year notwithstanding the fact that the actual quantification and settlement of the liability is made at a later point of time. (AY. 2007-08)

Electronics Corpn. of India Ltd. .v. ACIT (2014) 29 ITR 637 (Hyd.)(Trib.)

S.37(1): Business expenditure-Expenditure incurred on providing free meals to employees-essentially for employee's welfare- allowable as business expenditure.

The assessee incurred expenses towards food and refreshments, which was included in the expenditure claimed under the head "staff welfare expenses". The AO was of the view that expenses incurred towards free meals to employees during office hours, cannot be treated as allowable expenditure and disallowed 25% of the said expenses. The CIT(A) confirmed the order of the AO.

On appeal, the Tribunal observed that such expenses are essential for the purpose of employee welfare and it is a common, industry-wide practice followed in India by IT companies and hence are allowable as business expenditure u/s.37(1). (AYs. 2004-05 to 2008-09)

SAP India (P.) Ltd .v. DCIT (2014) 29 ITR 469/104 DTR 82 (Bang.)(Trib.)

S.37(1): Business expenditure-Expenses for advertising product of its holding company in Indian sub-continent - regarded as sales promotion expenses - allowable

The assessee had incurred certain expenses towards sales promotion. The AO disallowed the expenses - specifically, expenses incurred towards sponsorship of events, hosting of conferences, promotional gifts, public relations as he was of the view that the said expenses cannot be said to be incurred exclusively for business purposes. The CIT(A) reduced the disallowance to 10% of the claim.

During the appeal to the Tribunal, the assessee submitted that such sales promotion expenses are necessary to create awareness of the different SAP products and its utility for the buyer in the Indian sub-continent. It was submitted that the expenses claimed by the assessee are not uncommon expenses and are incurred by any software product company. The quantum of sales promotion expenses are not abnormally high and were incurred wholly and exclusively for its business purposes and would satisfy the test of commercial expediency. Accordingly, the claim of the assessee was fully allowed by the Tribunal u/s. 37(1). (AYs.2004-05 to 2008-09)

SAP India (P.) Ltd. .v. DCIT (2014) 29 ITR 469/104 DTR 82 (Bang.)(Trib.)

S.37(1): Business expenditure–Commencement of business-ROC issued certificate of commencement of business-Business set up-Expenses including depreciation is allowable.
ROC had issued the certificate of commencement of business to the assessee company during the relevant year. The company had already set up three subsidiaries in furtherance of one of its main objects. It is entitled for deduction of all legitimate expenses including depreciation. (AY. 2009-10)
Green Infra Ltd .v. ITO (2014) 98 DTR 187(Mum.)(Trib.)

S.37(1): Business expenditure–Vehicle lease rental-Operating lease-Lease rental are allowable as revenue expenditure.
Tribunal held that lease in question can be said to be essentially an operating lease and not a finance lease. Assessee has not claimed any depreciation. Thus the assessee is entitled to deduction under section 37(1). The Tribunal followed the decision of Supreme Court in the case of I. C. D. S. Ltd. v. CIT (2013) 255 CTR 449 (SC). (AY. 2005-06 to 2007-08)
Godrej Consumer Products Ltd. v. Addl. CIT (2014) 159 TTJ 21 (Mum.)(Trib.)

S.37(1): Business expenditure-Personal expenses –Amount suffered FBT can also be disallowed if the expenditure is of personal nature.[S. 115WB]
Assessing Officer disallowed telephone expenses on account of personal use. Assessee claimed that telephone expenses also suffered Fringe Benefit Tax. Since FBT could only be in respect of expenses incurred for business purpose, it could not be co-related with expenses disallowed on ground of personal use. Where disallowance was effected on ground of non-business or personal nature, said disallowance could not be deleted on the ground that the amount has sufferedFBT.(AY. 2007–08)
Hercules Pigment Industry .v. ITO (2014) 146 ITD 31 /(2013) 35 taxmann.com 650 (Mum.)(Trib.)

S.37(1): Business expenditure-Provision for foreseeable losses is allowable as deduction.[S.145, AS-7]
Assessee is in business of infrastructure development .Job was done on contractual basis. It claimed entire foreseeable losses of future years in relevant assessment year. Tribunal held that as it was executing fixed price contract, as per AS-7 assessee was entitled to make provision for foreseeable losses.. Foreseeable losses provided by assessee in its books of account is to be allowed.(AY.2004-05)
ACIT .v. ITD Cementation India Ltd. (2014) 146 ITD 59 /(2013) 36 taxmann.com 74 /160 TTJ 628/98 DTR 452(Mum.)(Trib.)

S.37(1): Business expenditure-Software development--Not allowable as revenue expenditure-Depreciation was allowable in the year of capitalization.
Expenditure incurred on software development expenses was not allowable as revenue expenditure; same was to be treated as capital work-in-progress, which would be entitled to depreciation in year of capitalisation. (AY. 2003-04 to 2006-07)
3i Infotech Ltd..v. Add.CIT (2014) 146 ITD 405 / (2013) 38 Taxmann.com 422/(2014) 162 TTJ 184 (Mum.)(Trib.)

S.37(2): Business expenditure- Entertainment-Held to be allowable.
The Tribunal allowed the entertainment expenses by following the decision of Delhi High Court in the case of CIT vs. EXPO Machinery Ltd. (190 ITR 576). On appeal by revenue the High Court affirmed the view of Tribunal. (AY. 1992-93)
CIT .v. Modi Olivetti Ltd. (2014) 220 taxman 388 (All.)(HC)

S.37(2A):Business expenditure-Hotel-Entertainment expenditure-The key word in Explanation is "work". There could be a scenario where in the given set of facts and circumstances it could be validly contended that a hotel was a place of the work of the employees of the Assessee Company-On facts the question was answered against the assessee.
Whether expenses incurred in a hotel would fall within "or other place of their work" appearing in Explanation 2 to Section 37(2A) of the Act, would entirely depend on the facts of each case. There cannot be any generalization in this regard. The key word in Explanation is "work". There could be a

scenario where in the given set of facts and circumstances it could be validly contended that a hotel was a place of the work of the employees of the Assessee Company, but the same has to be examined on a case to case basis. In the present case, the factual findings given by the authorities below and as can be discerned from paragraph Nos.12 to 14 of the Tribunal's Order, are against the Applicant/Assessee. Nothing has been brought to our notice to controvert those findings or to show that they are perverse or vitiated by any error of law apparent on the face of the record. It can hardly be argued that by the employees accompanying their customers for lunches and dinner, they were engaged in work and would therefore fall within "other place of their work" as contemplated in the said Explanation. In view of these factual findings of the authorities below, which are uncontroverted before us, we answer Question Nos.14 to 19 in favour of the Revenue and against the Assessee. (ITA No. 149 of 1996, dt. 31/07/2014.)

Sandvik Asia Ltd. .v. CIT (Bom.)(HC);www.itatonline.org

S. 37(4) : Business expenditure-Guest house expenses not allowed as business expenditure.

Guest House expenses not an allowable business expenditure in view of the decision of the Apex Court in case of Britannia Industries Ltd. .v. CIT (2005) 278 ITR 546(SC) (AY.1997-98).

CIT .v. Baghpat Co-operative Sugar Mills Ltd. (2014) 363 ITR 319 (All.)(HC)

S.38:Depreciation-Vehicle-Personal use-Hiring charges-The vehicle had been used for the purpose of earning money by way of hiring charges-Disallowance of any part of depreciation on account of directors' personal use was misconceived.[S.32]

The vehicle had been hired out. In other words, the vehicle was not used for the business of the assessee. The vehicle had been used for the purpose of earning money by way of hiring charges. In such a case, the order disallowing any part of the depreciation on account of personal use of the directors, u/s 38(2), did not appear to have been passed upon application of mind. The question of personal use might have arisen if the vehicle had been used for the business of the assessee. The vehicle had not been used for the business of the assessee at all. On the contrary, the vehicle had been hired out. The assessee, in return, was making profit. Therefore, the directors or any director of the assessee was not likely to get any opportunity to use the car. The car was in the use of the hirer. When the director had no opportunity to use the car, the question of disallowing any part of depreciation on account of directors' personal use was altogether misconceived.

Sri Saytasai Properties and Investment P. Ltd. .v. CIT (2014) 361 ITR 641/106 DTR 420/270 CTR 210(Cal.)(HC)

S. 40(a)(i) : Amounts not deductible - Deduction at source -Non-resident – Salary to foreign citizen as foreign ship crew-Salary was not taxable therefore no tax was deductible at source hence no disallowance can be made. [S.10(6)(viii), 192]

Assessee-employer paid certain sum on account of salary payable to foreigner-crew members without deducting any tax at source. Assessing Officer disallowed same on ground that it was part of fees for technical services on which no tax was deducted at source. The Tribunal, held that impugned payments were payment of salary and not technical fees. The Court held that since payment in instant case was neither royalty or fees for technical services or other sum chargeable under Act, section 40(a)(i) would not apply. Payments made to foreigner-crew member of ship who worked for a period of less than 90 days in India, were not income of employees in India liable to TDS as the said was exempt under section 10(6)(vii) of the Act.(AY. 2004-05)

DIT v. Dolphin Drilling Ltd. (2014) 97 DTR 227(Uttarakhand) (HC)

S. 40(a)(i) : Amounts not deductible - Deduction at source - Outside India -Non-resident - Fes for technical services –

The Assessing officer disallowed claim for depreciation under section 40(a)(i) of the Act on the ground that the payments made for technical know-how which had been capitalized, no tax deduction at source had been made thereon. The CIT(A) allowed the depreciation. The Tribunal held that the assessee had not claimed deduction for the amount paid, the provisions contained in section 40(a)(i) were not attracted. The tax deducted in respect of the payment was made over to the Government in the subsequent year and, therefore, depreciation could not be deducted on the capital expenditure

incurred by the assessee. The Tribunal confirmed the CIT(A). The High Court held that in the absence of any requirement of law for making deduction of tax, out of the expenditure on technical know-how which was capitalized, no amount was claimed as revenue expenditure and hence the deduction could not be disallowed under Section 40(*a*)(*i*) of the Act. (AY. 2003 – 04)
CIT .v. Mark Auto Industries Ltd. (2014) 220 Taxman 75 (Mag.)(P&H)(HC)

S. 40(a)(i): Amounts not deductible - Deduction at source –Royalty-Charter hire payment is not assessable as royalty, there is no obligation to deduct TDS and no disallowance can be made. [S.9(1)(vi), 195]
It is very clear that the payments made by the assessee company were in the nature of simple payments for chartering ships on hire for doing the business outside India. Therefore, the payments do not satisfy the test laid down in s.9 of the IT Act, 1961. When s. 9 is not satisfied, there cannot be a case that income is deemed to accrue or arise in India as a result of hire payments made by the assessee-company to foreign ships. The liability under s.195 is cast on the assessee only when the payment is made to a non-resident, which is chargeable under the provisions of the IT Act. Here, the payments made by the assessee do not fall under s.9 and the payments do not take the character of any sum chargeable to tax under this Act. Therefore, s.195 does not come into operation. When s.195 does not apply to the present case, there is no violation of that section and consequently invoking of s.40(a)(i) does not arise.(ITA No. 39/Coch/2014. Dt. 21.10.2014.) (AY. 2006-07)
Mathewsons Exports & Imports v. ACIT (Cochin)(Trib.); www.itatonline.org

S. 40(a)(i) : Amounts not deductible - Deduction at source -Non-resident – Disallowance of payment made to sub-contractors after deducting TDS at the instance of non-resident contractor.[S.194C,195]
The Tribunal held that the work was done by the Indian contractors and the TDS was deducted at source in accordance with section 194C and the work was not done by foreign contractor. Tribunal found that there is no finding by any of the lower authorities that the foreign contractor (M/s. Gulf Spic Eng. LLC, Dubai) had done any work for the assessee, for which assessee was obliged to make any payments. In such circumstances, assessee had reasonable grounds to have a bona fide belief that the payments effects to contractors did not attract section 195 of the Act. We are, therefore, of the opinion that assessee could not be held liable for any failure for non-deduction of tax at source. Disallowance under section 40(a)(i) of the Act. Therefore stands deleted.
Edac Engineering Ltd. .v. ACIT (2014) 159 TTJ 526 (Chennai)(Trib.)

S.40(a)(i): Amounts not deductible-Non–resident-Fees for technical services-Payments made to non resident for transmission of bulk SMS were not FTS and hence no liability to deduct tax at source-DTAA-India –South Africa.[S, 4, 5, 9(I)(vii), 195, Art 12]
Assessee availed the services of a telecom carrier in South Africa to transmit bulk SMS. The assessee made the payment without deduction of tax at source. AO held that the payment made by the assessee were FTS and accordingly liable to tax deduct at source . As the tax were not deducted he invoked the provisions of section 40(a)(ia) and disallowed the payments. On appeal the Tribunal held that collection fees for usage of standard facility does not result in payment for providing technical services. The services were rendered outside India. Section 195 should be read along with sections 4, 5, 9 as well as tax treaties and unless the income is chargeable to tax in India, withholding tax obligation does not arise. (AY. 2009-10)
DCIT .v. Velti India (P.) Ltd. (2014) 43 taxmann.com 425/105 DTR 213/163 TTJ 691 (Chennai)(Trib.)

S.40(a)(ia):Amounts not deductible-Deduction at source-Disallowance applies only to amounts "payable" as of 31st March and not to amounts already "paid" during the year-SLP of department was dismissed.
In CIT vs. Vector Shipping Services (P) Ltd (2013) 357 ITR 642(All)(HC) held that disallowance u/s 40(a)(ia) applies only to amounts "payable" as of 31st March and not to amounts already "paid" during the year. The majority judgement in Merilyn Shipping& Transports v. Add. CIT (2012) 136 ITD 23 (SB) was approved. The department filed a Special Leave Petition (SLP) in the Supreme

Court. The said SLP has been dismissed by the Supreme Court in limine.(SLP No. 8068/2014, dt. 02/07/52014)
CIT .v. Vector Shipping Service (P) Ltd. (SC),www.itatonline.org

S. 40(a)(ia) : Amount not deductible – Interest - Tax deducted at source deposited on or before due date specifies u/s.139(1). [S.139(1)]
The assessee deducted tax at source as required before 31st March 2006 but deposited on 30th May 2006. The revenue contended that deposit of the tax at source was beyond the prescribed time and therefore provisions of Section 40(a)(ia) will apply. The Tribunal ruled in favour of the assessee relying on the decision of H.S. Mohindra Traders 44 Sot 43 (Del)(URO) [later affirmed by the High Court]. The High Court in view of the decision of H.S. Mohindra Traders, dismissed the appeal of the revenue. (AY. 2006-07)
CIT .v. Royal Builders (2014) 220 Taxman 108 (Mag.) (Guj.)(HC)

S. 40(a)(ia) : Amounts not deductible -Freight charges vis-à-vis loan and applicability of second proviso to s. 40(a)(ia). [S. 201(1)]
In this case amount of freight charges was shown as a loan till the scrutiny and therefore it was held that disallowance under s. 40(a)(ia) was sustainable. Benefit of second proviso to s. 40(a)(ia) r/w proviso to s. 201(1) was not attracted for asst. yr. 2007-08 since the same was introduced w.e.f. 1st April, 2013. (AY. 2007-2008)**.**
Prudential Logistics & Transports .v. ITO (2014) 101 DTR 332 (Karn.)(HC)

S. 40(a)(ia): Amounts not deductible - Deduction at source – Amendment made in section 40(a)(ia) by Finance Act, 2010 was retrospective in nature. [S. 139(1)]
The assessee had deducted TDS and had deposited TDS after the end of the previous year but before the date of filing of the return under section 139. The AO disallowed the said expenditure under section 40(a)(ia) on ground that the assessee had failed to deposit TDS on or before 31-3-2008. On appeal, the Commissioner (Appeals) confirmed the order of the AO. On second appeal, the Tribunal held that amendment made to section 40(a)(ia) by the Finance Act, 2010 should be given retrospective effect according to which disallowance under said section would be attracted, if after deduction of tax it had not been paid on or before the due date of filing of return under section 139(1). On the Revenue's appeal, it was held by the High Court that the amendment of section 40(a)(ia) is procedural as the same did not impose a new tax but ensured collection of TDS and amendments had streamlined and corrected anomalies noticed in the said procedure by allowing deduction in the year when expenditure was incurred provided TDS was paid before the due date for filing of return.(AY.2008-09)
CIT .v.Naresh Kumar (2014) 221 Taxman 59 (Delhi)(HC)

S. 40(a)(ia): Amounts not deductible–Deduction at source-Payment to contractors-Amounts deposited with Central Government before last date for filing return-No disallowance can be made.[S.139(1)]
No disallowance could be made when tax was deducted at source before March 31 of the year and amounts were deposited with the Central Government before last date for filing return.
CIT .v. J.K. Construction Co. (2014) 361 ITR 181/225 Taxman 126(Mag.) (Guj.)(HC)

S. 40(a)(ia): Amounts not deductible–Transportation charges–Sub –contractor-Tax not deducted-No disallowance can be made.
Following the judgment in CIT v. Gujarat Narmada Valley Fertilizers Co Ltd (2014) 361 ITR 192(Guj.)(HC),no disallowance u/s 40(a)(ia) could be made for non-deduction of tax at source from transportation charges. Amendment in section 40(a)(ia) of the Income–tax Act by the Finance Act of 2010 has retrospective effect. Relationship between assessee and agent is that of principal and agent. (AY. 2005-2006)
CIT .v. B.M.S. Projects P. Ltd. (2014) 361 ITR 195 (Guj.)(HC)

S. 40(a)(ia): Amounts not deductible–Tax deducted in March-Deposited in April-Deduction is allowable-Finance Act, 2008 with retrospective effect from April 1, 2005 and Finance Act, 2010.[S.139(1)]

Payment for expenditure was actually made and tax deducted therefrom in March and deposited in April. Held, deduction was allowable. Section 40(a)(ia) of the Income-tax Act, 1961, and the proviso thereto, as amended by the Finance Act, 2008, with retrospective effect from April 1, 2005, acknowledged that where tax was deductible and was deducted during the last month of the previous year but was paid before the due date specified under sub-section (1) of section 139, deduction shall be allowed in the year. (AY. 2007-08)

CIT .v. Rajinder Kumar (2014) 362 ITR 241 (Delhi)(HC)

S. 40(a)(ia): Amounts not deductible–Payments by society to farmers–ONGC making payment to society-No disallowance could be made. [S. 40A(3)]

ONGC acquired lands from farmers and formed a society. The Society received amounts from ONGC and distributed the same to farmers. Held, that payments could not be said to have been expended by society. Hence, they would not come within meaning of expenditure either under section 40(a)(ia) or section 40A(3).No disallowance could be made.(AY. 2009-2010)

CIT v. AnkleshwarTaluka ONGC and Land Loser Travellers Co-op Society. (2014) 362 ITR 92 (Cal.)(HC)

S. 40(a)(ia): Amounts not deductible–Society not a sub-contractor- Payments by society to farmers–ONGC making payment to society-No disallowance could be made-Society need not deduct tax at source on payments made to each farmers. [S. 40A(3), 194C]

ONGC acquired lands from farmers and formed a society. The Society received amounts from ONGC and distributed the same to farmers. Held, that payments could not be said to have been expended by society. Hence, they would not come within meaning of expenditure either under section 40(a)(ia) or section 40A(3).No disallowance could be made.Society not a sub- contractor.Hence it need not deduct tax at source on payment made to each of farmers.(AY. 2005-2006)

ITO.v. AnkleshwarTaluka ONGC and Land Loser Travellers Co-op Society. (2014) 362 ITR 87 (Cal.)(HC)

S.40(a)(ia): Amounts not deductible-Deduction at source– Payment of tax before filing return-No disallowance can be made.

Amendment to the provisions of s. 40(a)(ia) by the Finance Act, 2010 is retrospective from 1.4.2005. As TDS was paid before the due date of filing return, disallowance u/s. 40(a)(ia) was not sustainable. (AY. 2007-08)

CIT .v. Jawahar Lal Agrawal (2014) 98 DTR 289 (MP.)(HC)

S. 40(a)(ia) : Amounts not deductible - Deduction at source -Interest –Amounts not debited to profit and loss account-No disallowance can be made.

When an expenditure is not debited to Profit and Loss Account, same cannot be disallowed by invoking provisions of s. 40(a)(ia). (AY. 2008-09)

Dy. CIT v. S.P. Real Estate Developers (P.) Ltd. (2014) 149 ITD 617 / 47 taxmann.com 281 (Hyd.)(Trib.)

S. 40(a)(ia): Amounts not deductible-Deduction at source- Second proviso to s. 40(a)(ia) inserted w.e.f. 1.4.2013 should be treated as retrospectively applicable from 1.4.2005 and no disallowance for want of TDS can be made if payee has paid tax thereon. Assessee must be given opportunity to file Form 26A; [S.44AB, Form 26A]

The undisputed fact is that the assessee has not deducted tax at source on the payments made to Uday Kumar Shetty. The fact that the payee has accounted for these payments in his books of account, financial statements and the same have been offered for tax in his return of income for the period relevant to AY 2005-06, has not been controverted by the authorities below. In our considered opinion, since the payee/ recipient has accounted for these payments in his books of account, audited u/s 44AB of the Act and has offered the same for tax in his return of income for the relevant period,

by virtue of the amendment, by way of insertion of the second proviso to section 40(a)(ia) of the Act w.e.f. 1/4/2013, the provisions of section 40(a)(ia) of the Act would not be attracted to the payments made by the assessee to Uday Kumar Shetty. In coming to this view, we draw support from the two above cited decisions of the co-ordinate benches of this Tribunal in the case of DCIT vs. Anand Marakala and S.M. Anand vs. ACIT wherein it was held that insertion of the second proviso to section 40(a)(ia) of the Act should be read retrospectively from 1/4/2005 and not prospectively from 1/4/2013. In this view of the matter, the provisions of section 40(a)(ia) of the Act is not attracted to the payments made by the assessee since the object of introduction of section 40(a)(ia) is achieved for the reason that the payee/recipient has accounted for, declared and offered for taxation the payments received from the assessee in his hands. Earlier, we have held that the second proviso to section 40(a)(ia) of the Act is retrospective in operation w.e.f. 1/4/2005. As per this newly inserted proviso, the assessee is required to file Form No.26A as per rule 31ACB of the IT Rules, 1962 so as not to be held as an assessee in default as per the proviso to section 201 of the Act. As held in the decision of the co-ordinate bench in the case of S.M.Anand vs. ACIT (supra), since the assessee in the period under consideration i.e. assessment year 2005-06, could not have contemplated that such a compliance was to be made, we also in the case on hand, remit the matter to the file of the Assessing Officer for affording the assessee adequate opportunity to file Form No.26A and verification of whether the said payee has reflected the payment/receipt in his books of account and offered the same to tax in the period under consideration. (ITA No. 1832/Bang/2013, dt. 10/10/2014) (AY.2005-06)

G. Shankar .v. ACIT (Bang.)(Trib.); www.itatonline.org

S. 40(a)(ia) : Amounts not deductible-Deduction at source-Non-resident-To avoid discrimination under Article 24(3) of the India-Japan DTAA, the benefit of no disallowance u/s 40(a)(ia) (in the cast of residents) for want of TDS if the recipient has paid the tax has to be extended to non-residents u/s 40(a)(i). DTAA-India-Japan. [S. Art 24(3)]

The onus of establishing that the recipient of an income has a PE in India, so as to invite its taxability in India, is on the revenue authorities. The existence of PE cannot be inferred on assumed on the basis of some vague and sweeping generalizations. It is wholly inappropriate to proceed on the basis of assumption that since the recipient entities were following certain business model, these entities must be having a PE in India. In any event, normal purchases from non-resident companies cannot give rise to taxability of income from such purchases, in the hands of the non-resident vendor, unless such non-resident companies have a permanent establishment in India;

As regards cases where the non-resident has filed a ROI, as s. 40(a)(i) does not have an exclusion clause similar to the second proviso to s. 40(a)(ia), payments made to non-residents, without deduction of tax at source will be disallowable even in a situation when the non-resident recipient has taken into account such payments in computation of his income, has paid taxes on the same and filed the income tax return. However, this creates discrimination in terms of Article 24(3) of the India Japan DTAA in the deductibility of payments made to resident entities vis-à-vis non-resident Japanese entities. Accordingly, the relaxation under second proviso to s. 40(a)(ia) is to be read into s. 40(a)(i) as well and it is required to be treated as retrospective in effect in the same manner as second proviso to s. 40(a)(i) has been treated. Such an interpretation will lead to the deduction parity as envisaged in Article 24(3) of Indo Japan DTAA. (ITA No. 5042/Del/2011, Dt. 21.10.2014.)(AY. 2007-08)

Mitsubhai Corporation India Pvt. Ltd. v. DCIT (Delhi)(Trib.); www.itatonline.org

S. 40(a)(ia) : Amounts not deductible - Deduction at source- Royalty - Reimbursement of cost-Data processing-DTAA-India-Belgium-Not liable to deduct tax at source. [S.9(1)(vi), Art 12(3)(a)]

The reimbursement of data processing cost to the head office does not fall within the audit of definition of Royalty under article 12(3)(a). The assessee has opted for the benefit of DTAA the definition and the scope of royalty as given in section 9(1)(vi) cannot be restored to consequently there was no requirement of deducting tax from the payment made by the branch to the head office and the provisions of 40(a)(i) are not applicable. (AY. 2004-05)

ADIT .v. Antwerp Diamond Bank NV (2014) 163 TTJ 175 (Mum.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source –Amount already paid –Payable-Verdict in Merilyn Shipping & Vector Shipping (All) HC) cannot be followed in view of Crescent Export Syndicate (Cal) HC), Sikandarkhan N. Tunvar (Guj.) (HC) & Rishti Stock & Shares.

Tribunal held that we have also carefully gone through the judgment of the Allahabad High Court in CIT vs. M/s Vector Shipping Services (P) Ltd. The Allahabad High Court, after reproducing the relevant paragraph from the order of CIT(A) and referring to the decision of the Special Bench of this Tribunal in Merilyin Shipping & Transports found that the Tribunal has not committed an error. It is obvious that there is no discussion about the correctness or otherwise of the decision rendered by the Special Bench of this Tribunal in Merilyn Shipping &Transports . However, we find that the Gujarat High Court in the case of CIT vs. Sikandarkhan N. Tunvar judgment dated 02-05-2013 considered the decision of the Special Bench of this Tribunal in Merilyn Shipping & Transports and specifically disagreed with the principles laid down by the Special of this Tribunal in Merilyn Shipping & Transports. The Calcutta High Court also in the case of Crescent Exports Syndicate & Another in ITAT 20 of 2013 and GA 190 of 2013 judgment dated 03-04-2013 considered elaborately the judgment of the Special Bench of this Tribunal in Merilyn Shipping & Transports and found that the decision rendered by the Special Bench of this Tribunal is not the correct law. It is well settled principles of law that when different High Courts expressed different opinions on a point of law, then, normally, the benefit of doubt under the taxation law would go to the assessee. It is also equally settled principles of law that the judgment which discusses the point in issue elaborately and gives an elaborate reasoning has to be preferred when compared to the judgment which has no reasoning and discussion. Admittedly, the Calcutta High Court and Gujarat High Court have discussed the issue elaborately and elaborate reasons have also been recorded as to why the Special Bench is not correct. Therefore, this Tribunal is of the considered opinion that the judgments of the Calcutta High Court in Crescent Exports Syndicate & Another and Gujarat High Court in Sikandarkhan N Tunvar have to be preferred when compared to the Allahabad High Court in M/s Vector Shipping Services (P) Ltd .

By following the judgments of the Calcutta High Court in Crescent Export Syndicate and the Gujarat High Court in Sikandarkhan N Tunvar , this Tribunal is of the considered opinion that the decision of the Special Bench of this Tribunal in the case of M/s Merilyn Shipping & Transports and the judgment of the Allahabad High Court in Vector Shipping Services (P) Ltd are not applicable to the facts of the case under consideration whereas the judgments of the Calcutta High Court in Crescent Export Syndicate and the Gujarat High Court in Sikandarkhan N Tunvar are squarely applicable to the facts of the case. The dismissal of SLP by Apex Court is not a declaration of law under Article 141 of the Constitution of India. Therefore, mere dismissal of SLP by Apex Court does not mean that the Apex Court declared any law on the subject. Moreover, the Mumbai Bench of the Tribunal in ACIT vs. Rishti Stock & Shares P Ltd in ITA No.112/Mum/2012 held the judgment of the Allahabad High Court in Vector Shipping Services (P) Ltd is obiter dicta.(ITA No. 802/Coch/2013. Dt. 24.09.2014.) (AY.2008-09)

Orchid marine .v. ITO (Cochin)(Trib.); www.itatonline.org

S.40(a)(ia): Amounts not deductible-Deduction at source-Amounts already paid during the year –No disallowance called for.

The assessee during the relevant previous year made payment towards transportation charges, export freight charges to the Indian agents of foreign shipping without deduction of tax at source. The AO disallowed the same invoking the provisions of section 40(a)(ia). On appeal the Tribunal held that provisions of section 40(a)(ia) is not attracted to the payments already made by the end of the previous year. (ITA no 509/Mum/2011 dt.26-02-2014 Bench "F'. (AY. 2007-08).

Vivel Exports P. Ltd .v. ITO (2014) The Chamber's Journal –April –P. 82 (Mum.)(Trib.)

S.40(a)(ia): Amounts not deductible-Deduction at source- No disallowance under section 40(a)(ia), for failure to deduct TDS on payment if payee has offered amount to tax. Second Proviso to s.40(a)(ia) inserted by Finance Act 2013 w.e.f. 1.4.2013 should be treated as curative and to have retrospective effect from 1.4.2005. [S. 194A, 201(1)]

Held that the insertion of 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 (ITA No. 337/Agra/2013, dt. 29.05.2013) (AY. 2006-07)
Rajeev Kumar Agarwal .v. ACIT(2014) 149 ITD 363/109 DTR 33(Agra)(Trib.)

S.40(a)(ia):Amounts not deductible-Deduction at source– Contractors-Tax deducted at source paid before due date of filing return, no disallowance can be made.[S.139(1),194C]
During the F.Y. 2008-09 the assessee had made certain contractual payments but deposited the same on 26.09.2009 i.e. before the due date of filing of return. The AO disallowed the payment u/s. 40(a)(ia) relying on the case of Bharati Shipyard Ltd. v. DCIT (2011) 132 ITD 53 (Mumbai) (SB). The CIT(A) deleted the addition following the decision of the Bangalore Bench of the Tribunal in the case of ACIT v. M.K. Gurumurthy (2012) 22 taxmann.com 72.
The Tribunal following the aforesaid decision of the Bangalore Bench of the Tribunal dismissed the departmental appeal by observing that the amendment to the provisions of section 40(a)(ia) by the Finance Act, 2010 is retrospective in nature. (AY. 2009-10)
ACIT .v. Ace Fire Services (2014) 29 ITR 73 /64 SOT 42 (URO)(Bang.)(Trib.)

S.40(a)(ia):Amounts not deductible-Deduction at source-Tax deducted before 31st March and paid before due date of filing return - amount deductible.[S.139(1), 263]
The CIT exercised revisionary powers u/s. 263 and disallowed the expense u/s. 40(a)(ia) as tax on the said amount was deducted before 31st March and paid before the due date of filing return instead of being deposited within 7 days of the following month.
On appeal, the Tribunal relying on the decision of the Hyderabad Bench of the Tribunal in the case of Madineni Mohan v. ITO (I.T.A. No. 762/Hyd/2012) and various other judgments held that amendment to provisions of s. 40(a)(ia) made by the Finance Act, 2010 is applicable retrospectively from 01.04.2005 and if the assessee has deposited TDS before the due date of filing return u/s. 139(1), no disallowance can be made u/s. 40(a)(ia). The Tribunal noted that there is no dispute by the AO or the CIT on the fact that tax was appropriately deducted at source and paid before the due date of filing the return, and hence it held that the revisionary powers exercised by the CIT is not justified. (AY. 2007-08)
R.V. Chakrapani .v. ACIT (2014) 29 ITR 342 (Hyd.)(Trib.)

S.40(a)(ia): Amounts not deductible– Deduction at source- Special Bench decision in the case of Merilyn Shipping and Transports not accepted.
The assessee was engaged in the business of civil construction. It had suo motu disallowed an amount u/s. 40 (a)(ia) of the Act in respect of payment to sub-contractors, labour charges, transport hiring charges, etc., on which no tax was deducted at source and this deduction continued in the assessment order. The assessee filed cross-objections before the Tribunal claiming that the disallowance made u/s. 40 (a) (ia) was not correct in lieu of the decision of the Special Bench in the case of Merilyn Shipping and Transports v. ACIT (2012) 16 ITR (Trib.) 1.
The Tribunal dismissing the cross objections filed by the assessee observed that the decision of the Special Bench was found not acceptable in several cases before the High Court and the decision was itself stayed, therefore the view taken by the Special Bench cannot be accepted. (AY. 2008-09)
ACIT .v. Raviraj Relempaadu (2014) 29 ITR 387 (Mum.)(Trib.)

S.40(a)(ia):Amounts not deductible- Deduction at source-Tax was deposited before due date of filing of return-Payments-Excess or unreasonable – Unable to prove that amounts paid are excessive or unreasonable – No disallowance can be made.[S.40A(2)(b)]
The assessee, engaged in share broking business claimed deduction of Rs.43 Lakhs as 'agents incentive'. The AO held that all three concerns to whom the incentive was being paid were related parties u/s. 40A(2)(b). These expenses were already disallowed u/s.40(a)(ia) for failure to deduct tax at source. The CIT(A) observed that tax was deposited before the due date of filing the return u/s. 139 of the Act and deleted the disallowance u/s. 40(a)(ia).
On appeal by the department, the Tribunal noted that since the AO was unable to prove that the parties to whom payments were made were related parties, and that payments made were unreasonable the disallowance u/s. 40A(2)(b) was deleted. (AY. 2008-09)

ITO .v. Anson Financial Holidays (2014) 29 ITR 620 (Cochin)(Trib.)

S.40(a)(ia):Amounts not deductible-Deduction at source- Amount paid or payable-Disallowance was held to be justified.

Disallowance under section 40(a)(ia) is to be made where there is non-compliance with the provision of TDS irrespective of the fact whether the amount has been already paid during the relevant year or the amount is outstanding at the end of the year.(AY.2008-09)

ACIT .v. Rishiti Stock & Shares (P) Ltd. (2014) 159 TTJ 300 (Mum.)(Trib.)

S.40(a)(ia):Amounts not deductible- Deduction at source-Transponder fee- Matter remanded-DTAA-India–Malaysia. [S.9(1), 90, 195, Art.12]

The assessee paid transponder fee to a Malaysian entity for usage of its satellite without deduction of tax at source. The A.O. disallowed the said payment under section 40(a)(ia) of the Act. The C.I.T. (A) deleted the addition without discussing the provisions of the applicable treaty.In view thereof the matter was remanded back to the A.O. Readjudication in light of applicable law and treaty.(AY. 2006-2007)

ACIT .v. Zee News Ltd. (2014) 61 SOT 59(Mum.)(Trib.)

S.40(a)(ia): Amounts not deductible - Deduction at source - Non-residents-Double taxation agreements-Protocol integral part of agreement-Fees for technical services-Design and development cost- Purchase goods-Development costs-DTAA-India- Spain-Italy,-Belgium, Ireland, Denmark, Australia-Precedent.[S. 90,Art 13, 15, 7, 12(3)(b), 14, 24]

Matter remanded to determine to consider whether the payments of design and development services, to an entity or an individual having a no permanent establishment in India , in which case payment would be independent professional services and not taxable .Payments for purchase of goods and recipients is not having permanent establishment in India there is no obligation on assessee to deduct tax at source. Supply of samples and sketches to assessee to enable it to seek information in respect of fashion trends in Europe .Professional services were rendered by individual having no fixed base in India, payments were not taxable as income under “Independent Personal services” hence no disallowance. Reimbursement of costs incurred by non resident in development of product range of assessee. As there was no income embedded in payment there was no obligation to deduct tax at source. Payment made to professionals services was liable to deduct tax at source , that entity to which payment was made owned by individual would not take payment outside ambit of fees for technical services. Liable to deduct tax at source .Payments of fees for technical services to residents of Ireland, Denmark and Australia. Provisions of deduction neutrality non discrimination attracted hence disallowance under section 40(a)(ia) is not permissible. Disallowance is attracted only when assessee had liability withhold tax , i.e. when income embedded in payment liable to tax in India. Protocol integral part of agreement to be given effect same manner as other substantive parts of agreement. Decision in context of one agreement not necessarily applicable for other agreements where differently worded.(AY. 2008-09)

DCIT .v. Gupta Overses(2014) 30 ITR 738 / (2014) 99 DTR 162 / 160 TTJ 257 (Agra)(Trib.)

S.40(a)(ia):Amounts not deductible - Deduction at source - Non-residents without-TDS violates ‘deduction neutrality non-discrimination‘ clause in DTAA as there is no similar bar for residents as per Merilyn Shipping (2012)136 ITD 23 (SB).

The Tribunal had to consider whether, in view of the non-discrimination clause under the tax treaties, the law laid down in Merilyn Shipping & Transport v. ACIT (2012) 136 ITD 23 (SB) and approved in Vector Shipping (All HC), in the context of s. 40(a)(ia), that the disallowance cannot be made for amounts already paid during the year, applies also to s. 40(a)(i)? HELD by the Tribunal:

(i) In Rajeev Sureshbhai Gajwani v. Asst. CIT (2011) 137 TTJ 1 (Ahd)(SB) it was held that differentiation simplicitor is enough to invoke the non-discrimination clause. Consequently, it will be contrary to the deduction neutrality clause in non-discrimination in the tax treaties if the provisions for deduction of payments to non-residents are more onerous than those applicable for payments to residents. The payments made to residents of Ireland, Denmark and Austria are protected by the deduction neutrality clauses and any pre-conditions for deductibility, which are harsher than payments

made to the residents are ineffective in law. However, payments to the residents of Belgium, UK, Italy and Spain will not be entitled to the same protection under the omnibus non-discrimination clause of Article 24(1) based on nationality (Herbalife International India (P) Ltd. (2006) 103 TTJ 78 (Del) referred);
(ii) On merits, it is a possible view that Merilyn Shipping (which has been suspended by the A. P. High Court & disapproved by the Gujarat High Court in CIT v. Sikandarkhan & Tanwar& Ors. (2013) 87 DTR 137) has not been approved by the jurisdictional High Court in Vector Shipping Services. However, as the CBDT has itself taken the view in Circular No. 10/DV/2013 dated 16.12. 2013 that the Allahabad High Court has affirmed Merilyn Shipping, the department is bound by it and no disallowance can be made u/s 40(a)(ia) for sums paid to non-residents without TDS.(ITA No. 257/Agr/2013. dt. 4/02/2014.)(AY.2008-09)
DCIT .v. Gupta Overses(2014) 30 ITR 738(Agra)(Trib.)

S.40(a)(ii):Amount not deductible- Deduction at source-Business loss-Taxes-TDS receivable-Unrecovered TDS amount could not be allowed as business loss. [S. 28(i)]
Assessee made a claim that certain parties made payments to the assessee after deduction of TDS, but failed to issue TDS certificates and hence the amount of TDS certificates not recovered should be allowed as deduction as business loss. Tribunal held that theamount represents TDS by the parties on behalf of the assessee, the same is in the nature of TDS receivable. It is settled position that tax payment is not a charge against but application of income. S. 40(a)(ii) clearly provides that any sum paid on account of taxes on the profits or gains of any business or profession, is not deductible. Unrecovered TDS amount could not be allowed as business loss. (AY. 2007-08)
Ricoh India Ltd. .v. Dy.CIT(2014)146 ITD 798 / (2013) 38 taxmann.com 264 (Mum.)(Trib.)

S. 40(a)(iii) : Amounts not deductible - Deduction at source – Salaries - Outside India - Non-Resident-Though recorded as salary not liable to deduct tax at source.[S.10(6)(viii), 40(a)(i), 192]
Assese entered into an agreement with a foreign concern. Apart from payment of fixed sum, took over foreign concern's personnel as its own employees and paid salary to them. The AO disallowed salary payment on the ground that the same was part of the fees for technical services, on which tax as was deductible at source u/s 40(a)(i) was not deducted . The CIT (A) confirmed the order of Tribunal and Tribunal reversed the order of CIT (A). On appeal in HC, HC dismissed revenue's appeal and held that S / 40 (a)(i) would not apply in this case inasmuch as , the payment was neither royalty or fees for technical services or other sum chargeable under the IT Act. What was relevant was words "chargeable" under the head "salaries" in S.40(a)(iii) are of significance. S.192 applied only when there was an income chargeable under the head "salaries" and the payment made by the assessee in this case was the income derived thereby by those, who received the same, was though regarded as salary chargeable under this Act, as the same was outside the purview of the provisions of IT Act by reason of S/10 (6)(iii) of Act. (AY.2004-05)
DIT v. Dolphin Drilling Ltd. (2014) 264 CTR 319 / 221 Taxman 489 (Uttarakhand)(HC)

S. 40A(2) : Expenses or payments not deductible - Excess or unreasonable –Discounts offered to sister concern
Assessee has sold a dictionary to its sister concern and had offered a discount of 3 per cent whereas it had offered a discount of 2.5 per cent to other whole sellers. Assessing Officer disallowed difference of 0.5 % u/s 40A(2). CIT(Appeals) allowed the appeal of assessee. On appeal by revenue to Tribunal, held that provisions of Section 40A(2)(a) of the Act would apply where any deduction is claimed towards excessive and unreasonable expenditure has been incurred by assessee but in this case neither any expenditure has been incurred nor any deduction has been claimed for the amount which has been charged less than that from other customers, thus provision would not apply. On further appeal to the High Court, view of Tribunal was affirmed. (AY 2004-05)
CIT .v. Bhargav Book Depot (2014) 220 Taxman 12 (Mag.) / (2013) 40 Taxmann.com 213 (All.)(HC)

S. 40A(2) : Expenses or payments not deductible-Excessive or unreasonable payments-Disallowance was not justified without giving a finding that excessive or unreasonable.

The Assessee Company had purchased yarn and finished fabric from a company 'P', and which was specified u/s. 40A(2)(b). AO disallowed certain payment made to 'P' by considering it as excessive and unreasonable. Tribunal held that AO has not given a finding that the payment made by the assessee is excessive or unreasonable having regard to the fair market value of the goods. Disallowance made by the AO. was not justified. (AY. 2009-10)

ITO .v. Axon Global (P.) Ltd. (2014) 146 ITD 473 / (2013) 38 taxmann.com 392 (Jodh.)(Trib.)

S.40A(2):Expenses or payments not deductible-Excessive or unreasonable-AO has not given finding-Disallowance was not justified.

Assessee-company purchased goods from a company 'P', which was specified u/s. 40A(2)(b). A.O. made an adhoc disallowance at the rate of 1%.Tribunal held that the A.O. has not given a finding that the payment made by the assessee is excessive or unreasonable having regard to the fair market value of the goods. Opinion has to be framed before invoking section 40A(2)(a) of the Act. Disallowance was held to be not justified.(AY. 2009-10)

ITO .v. Axon Global (P.)Ltd. (2014) 146 ITD 473 / (2013) 38 taxmann.com 392 (Jodh.)(Trib.)

S.40A(2):Expenses or payments not deductible-Excess or unreasonable-Disallowance was merely to cover possible deficiencies, 5% estimate of the CIT(A) was justified.

The assessee, engaged in share broking business had claimed certain expenses under the head 'Salary and allowances' and furnished details of employees to whom payments were made. AO observed that employees were drawing salary between Rs. 5,000/- to Rs. 12,000/-, were not registered under the PF Act and also vouchers were not stamped. Therefore AO disallowed 10% of the salary to cover possible deficiencies. On appeal by the assessee, the CIT(A) reduced the disallowance possible deficiencies from 10% to 5% of salary paid.

On appeal by the department, the Tribunal held that although AO pointed out deficiencies in the salary vouchers, he could not prove that the same were bogus. Since the disallowance was merely to cover possible deficiencies, 5% estimate of the CIT(A) was justified. (AY. 2008-09)

ITO .v. Anson Financial Holidays (2014) 29 ITR 620 (Cochin)(Trib.)

S. 40A(2)(a): Expenses or payments not deductible – Salary/ remuneration to directors – Point of view of businessman to be considered-Disallowance of part of expenditure was not justified.

The assessee had paid remuneration to its chairman-cum-managing director.AO disallowed the part of remuneration holding it as excessive. On appeal addition was deleted the Tribunal On appeal be the revenue dismissing the appeal the Court held that it was thebusinessman who would determine reasonableness of remuneration. No part of it could be disallowed.(AY. 2004-05)

CIT .v. Consulting Engineering Group Ltd. (2014) 365 ITR 284 (Raj.)(HC)

S. 40A(3):Expenses or payments not deductible - Cash payments exceeding prescribed limits – No disallowance to be made if AO cannot prove that the payment was made in cash.[S.28(i), 133A]

A survey u/s. 133A was conducted at the office of the assessee in consequence to the information received from the Economic Offence Wing, Crime Branch, Mumbai, where the assessee admitted that he was doing the business of bogus diamond billing on commission basis and he issued bills and got commission at 0.25 per cent on the amount of bills. The AO, on the basis of the books of accounts, found that the assessee had paid an amount of Rs. 18.22 crores in cash to six different parties and asked the assessee to explain the said amount. The assessee in response submitted that he had not made any single payment exceeding Rs. 20,000 to the aforesaid parties at a time. However, the AO was not satisfied with the explanation given by the assessee and hence disallowed 20% of the payment u/s. 40A(3). The CIT(A) and Tribunal deleted the addition made by the AO.

Dismissing the departmental appeal, the High Court held that it was neither established nor proven that the payment to the six parties were made in cash and when the AO did not choose to verify the parties who have alleged to have purchased the same from the assessee or tried to ascertain whether

the same are disclosed in the respective accounts, the AO was not justified in making the addition u/s. 40(A)(3).

CIT .v. Dineshkumar Chandmal Jain (2014) 221 Taxman 367 (Guj.)(HC)

S. 40A(3): Expenses or payments not deductible - Cash payments exceeding prescribed limits – Cash payment in excess of prescribed limits to person other than agent of the assessee is not allowable.[R.6DD(K)]

The assessee made payments towards lorry freight in cash and claimed the expenditure as a deduction. The AO disallowed the expenses on the ground that the payments were made through cash and the payments exceeded the limit prescribed u/s. 40A(3). The assessee filed affidavits before the CIT(A) from the lorry owners stating that they collected the lorry freight in cash through the driver of the lorry concerned, in which the goods were transported. The assessee contended that the cash payments for goods and services were made through agents, viz., the lorry drivers. Hence, cash payment for lorry freight paid to the lorry drivers cannot be disallowed. The CIT(A) however held that the claim of the assessee that the lorry drivers acted as agents of the assessee was farfetched and hence confirmed the disallowance. The Tribunal confirmed the findings of the CIT(A).

The High Court observed that there was hardly any material to prove that the lorry drivers acted as agents of the assessee. The High Court held that the assessee's only claim before the authorities was that the driver acted in dual capacity, for which there is no evidence and hence the payments made to the lorry drivers of the supplier were not payments to agent of assessee and hence rule 6DD(k) could not be invoked. (A.Y. 2008-2009)

P. K. Ramasamy Nadar & Bros. .v. ITO (2014) 221 Taxman 362 (Mad.)(HC)

S. 40A(3) : Expenses or payments not deductible - Cash payments exceeding prescribed limits – Purchase of land in auction.

The assessee had purchased a land for Rs. 3.5 crores in an open auction held by the High Court of Judicature at Bombay. The payment of the amount was made by M/s. Zoom Developers Private Limited on behalf of the Assessee. The Assessing Officer made an addition of Rs. 70,00,000/- being 20% of the total payment of Rs. 3.5 crores by holding that the payment was made in cash as the details of payment were not available in the conveyance deed and no details of payment nor the copies of the relevant bank accounts were furnished. The CIT(A) deleted the disallowance holding that from the record that the entire payment of Rs. 3.5 crores was made through Pay Orders and the Drafts prepared from bank accounts of M/s. Zoom Developers Private Limited on behalf of the assessee and considering the fact that the auction was conducted by the High Court. The Tribunal affirmed the CIT (A) order. The High Court confirmed the Tribunal order.

CIT .v. Magnificent Construction (P.) Ltd. (2014) 220 Taxman 107 (Mag.)(MP)(HC)

S. 40(A)(3) : Expenses or payments not deductible - Cash payments exceeding prescribed limits – Cash payment made due to 'exceptional or unavoidable circumstances' was not supported with any evidences, will attract provisions of Section 40A(3).

Assessee carried on the business of purchase and sale of suitcases. The assessee made cash payments cash exceeding Rs. 10000 for the purchases made during the year. The AO and the CIT(A) did not accepted the explanation given by the assessee and disallowed the same u/s 40A(3). Before the Tribunal the assessee contended that the situation falls under 'exceptional or unavoidable circumstances' and was entitled to benefit under Rule 6DD(j). The Tribunal held that suppliers of assessee, who were delivering goods to him invariably insisted on spot payment of cash to lorry drivers, and decided in favour of the assessee. The High Court held that there must be some evidence to corroborate the explanation furnished by the assessee. The submissions by the assessee were false and the Tribunal has decided purely on surmises and conjectures. Hence the question decided in favour of the revenue. (AY. 1995 – 96)

CIT .v. Singamsetty Subba Rao (2014) 357 ITR 529 / 220 Taxman 81 (Mag.) (AP)(HC)

S.40A(3):Expenses or payments not deductible - Cash payments exceeding prescribed limits - There is a difference between "crossed cheque" and "account payee cheque". Payment by crossed cheque attracts S. 40A(3) disallowance-Disallowance was held to be justified.

The expression earlier used in s. 40A(3)(a) was a "crossed cheque or a crossed bank draft". This was amended by the legislature to be replaced by the expression "an account payee cheque or account payee bank draft". This was done in the background of the experience that even crossed cheques were being endorsed in favour of a person other than the drawee making it difficult to trace the constituent of the money. To plug this possible loophole the requirement of section 40A(3) was made more stringent. If we accept the contention of counsel for the assessee that there was no distinction between a crossed cheque and an account payee cheque, we would be obliterating this amendment brought in the statute with specific purpose in mind. Accordingly, payment by a crossed cheque is subject to disallowance u/s 40A(3).(AY. 2007-08)

Rajmoti Industries .v. ACIT (2014)367 ITR 392/223 Taxman 428/268 CTR 130/103 DTR 113(Guj.)(HC)

S.40A(3):Expenses or payments not deductible - Cash payments exceeding prescribed limits-Nodisallowance for cash payments even if Rule 6DD(j) exception does not apply if there is no dispute as to genuineness of payment and business compulsion-Disallowance was deleted.[R.6DD(j]

Though there was no dispute regarding the genuineness of the payments made, the AO made a disallowance u/s 40A(3) on the ground that the exception in Rule 6DD did not apply.On facts, though the case of the assessee did not fall within the exclusion clause in Rule 6DD (j), s. 40A(3) will not apply because (a) there is no doubt as to the genuineness of the payment nor the identity of the payee, (b) the assessee was compelled to pay cash owing to the insistence of its principal and if it had not abided by the direction, the business would have suffered & (c) the exceptions in Rule 6DD are not exhaustive and the rule must be interpreted liberally. Purchase of recharge vouchers by cash was held to be allowable.(AY. 2006-07)

Anupam Tele Services .v. ITO(2014)366 ITR 122/ 100 DTR 411/268 CTR 121/222 Taxman 318(Guj.)(HC)

S. 40A(9) : Expenses or payments not deductible in certain circumstances - Contribution to employees welfare trust, etc. - Donation given wholly and exclusively for welfare of employees and also for carrying on business more efficiently by having contended labour force is deductible.

The AO disallowed the donations made by the assessee to an education society u/s. 40A(9). The CIT (A) confirmed the action of the AO, however, the Tribunal deleted the disallowance on the ground that the donations made were a welfare measure for the assessee's employees.

The High Court dismissing the departmental appeal observed that the donation given by the assessee was wholly and exclusively for the welfare of its employees and also for carrying on business of the assessee more efficiently by having contended labour force. Further, the High Court held that in applying the test of commercial expediency for determining whether an expenditure was wholly and exclusively laid out for the purpose of the assessee's business, reasonableness of the expenditure had to be judged from the point of view of businessman. (AYs. 1986-87, 1987-88, 1992-93)

CIT .v. Wipro Ltd. (2014) 222 Taxman 181 (Karn.)(HC)

S.40A(9): Expenses or payments not deductible-Donation to society running school in backward area where factory located could not be disallowed.

Donation to society running school in backward area where assessee's factory was situated could not be disallowed under s. 40A(9). (AYs. 1986-87, 1987-88, 1992-93)

CIT .v. Wipro Ltd. (No.2) (2014) 360 ITR 658 (Karn.)(HC)

S.40A(9):Expenses or payments not deductible-Contribution to MSWC Karmchari Welfare Fund as an employer was held to be allowable deduction.[S.37(1)]

The Assessee Company is an undertaking of the government of Maharashtra established for providing Warehousing Facilities. Assessee has contributed towards MSWC Karmachari welfare fund and claimed the same as business expenditure. AO disallowed the claim. On appeal Tribunal held that contribution is allowable as deduction.(AY. 2006-07)

Maharashtra State Warehousing Corporation .v. Dy. CIT (2014) 146 ITD 269 / (2013) 38 taxmann.com 328 (Pune)(Trib.)

S.41(1): Profits chargeable tax-Remission or cessation of trading liability- Premature payment of sales-tax deferral loan by paying an amount equal to the net present value of the deferred tax by which the entire liability to pay tax/loan stood discharged is not a "benefit" taxable u/s.41 (1).[S.43B]

As per an incentive scheme announced by the Government of Maharashtra, the assessee entered into an agreement to avail the benefits under deferral/1993 scheme which provides for deferment of payment of taxes. This agreement not only determined the eligibility of the assessee but also laid down the terms and conditions under which the agreement exists. The quantification of this deferment was made by Sicom Limited, a Government of Maharashtra Undertaking, which was an agent for the package scheme of incentives. Sicom quantified the entitlement of deferral of sales tax to the assessee. As against the total amount of Rs.20 crore collected by the assessee towards Bombay Sales Tax and Central Sales Tax, the maximum entitlement of sales tax incentives by way of deferment was determined at Rs.13.78 crore. The validity period of the deferral was determined as 1.4.2002 to 31.3.2017, thereby the assessee could retain the amount of sales tax collected to the extent of Rs.13.78 crore up to 31.3.2017. Consequent to the assessee opting for the scheme of deferment of sales tax, an amount of Rs.13.78 crore was deemed to have been paid for the purpose of s. 43B of the Act and the same was allowed as a deduction in AY 2003-04. The Maharashtra Government by way of Maharashtra Tax Laws (Levy and Amendment) Act, 2002 substituted the proviso to s. 38 of the Bombay Sales Tax Act, 1959 which came into effect from 1.5.2002. The proviso provided that notwithstanding anything to the contrary contained in the Act or in the Rules or in any of the package scheme of the incentives or in the Power Generation Promotion Policy 1998, the eligible unit to whom the entitlement certificate has been granted for availing of the incentives by way of deferment of sales tax, purchase tax, additional tax, turn over tax or surcharge as the case may be, may, in respect of any of the periods during which, the said certificate is valid, at its option, prematurely in place of the amount of tax deferred by it an amount, equal to the net present value of the deferred tax as may be prescribed and on making such payments, in the public interest, the deferred tax shall be deemed to have been paid. In view of the proviso to Section 38 of the Bombay Sales Tax Act, 1959, the net present value was determined at Rs.4.25 crore and the same was paid by the assessee. Consequent to the payment of the net present value, the the balance amount of sales-tax payable amounting to Rs. 9.52 crore was waived. The AO held that the said amount of Rs. 9.52 crore was taxable u/s 41(1). However, the Tribunal (presumably relying on Sulzer India Ltd vs. JCIT 138 ITD 137 (Mum) (SB) upheld the assessee's claim that the said amount was not chargeable. On appeal by the department to the High Court HELD by the High Court dismissing the appeal:

As per the scheme the assessee was allowed to retain the sales tax as determined by the competent authority and pay the same 15 years thereafter. The tax collected was deemed to have been paid and, therefore, the tax so collected cannot be construed as income in the hands of the assessee. The tax so retained by the assessee is in the nature of a loan given by the Government as an incentive for setting up the industrial unit in a rural area. The said loan had to be repaid after 15 years. Again it is an incentive. However, by a subsequent scheme, a provision was made for premature payment. When the assessee had the benefit of making the payment after 15 years, if he is making a premature payment, the said amount equal to the net present value of the deferred tax was determined at Rs. 4,25,79,684 and on such payment the entire liability to pay tax/loan stood discharged. Again it is not a benefit conferred on an assessee. Therefore, Section 41 (1) of the Act is not attracted to the facts of this case. Hence, the Tribunal was justified in holding that there is no liability to pay tax. (ITA No. 899/ 2008, dt. 02/09/2014)

CIT .v. McDowell & Co.Ltd. (Karn.)(HC);www.itatonline.org

S. 41(1) : Profits chargeable tax - Remission or cessation of trading liability – Addition made on the ground that trading liability is outstanding for more than three years is invalid.

The AO observed that the assessee had outstanding dues with respect to 14 creditors for more than three years and hence added the amount of dues as income u/s. 41(1). The CIT (A) and Tribunal deleted the addition made by the AO.

The High Court following the decision of the Supreme Court in the case of CIT v. Sugauli Sugar Works (P.) Ltd. (1999) 236 ITR 518 and its own decision in the case of CIT v. Nitin S. Garg (2012) 208 Taxman 16 held that the assessee had continued to show the admitted amounts as liabilities in the balance sheet and the same could not be treated as cessation of liabilities and since the addition was made solely on the basis of number of years the liability remained outstanding, the addition was not justified. (A.Y. 2009-2010)

CIT .v. Puridevi Mahendrakumar Chaudhary (2014) 221 Taxman 375 (Guj.)(HC)

S.41(1): Profits chargeable to tax- Remission or cessation of trading liability – Liability showed in the books-Merely because no response from creditors additions cannot be made.

The assessee showed the liability in the books . It was not proved by the AO as to how the so-called liabilities ceased or crystallised during the previous year. The courts observed that the entire amount has been offered to tax in the AY. 2006-07.

The courts held that merely because there was no response by the creditors, it does not prove that the liabilities ceased during the year. The Courts further observed that when the amount has been offered to tax in the subsequent years, it could not be taxed again in year under appeal. (AY. 2002-03)

CIT v. Narendra Mohan Mathur (2014) 97 DTR 428 (Raj.)(HC)

CIT v. Rita Mathur(Smt.) (2014) 97 DTR 428 (Raj.)(HC)

S.41(1): Profits chargeable tax-Remission or cessation of trading liability–Unexplained purchase-Addition was deleted.

Held, that the Assessing Officer added Rs. 47,00,771 as unexplained purchases. However, the appellate authorities held that the Assessing Officer without sufficient reason arrived at the finding that there was a cessation of liability to the extent of Rs.13,28,282 because the liability for the sum was not carried over in the following accounting year, whereas the fact was that the credit entry for the sum was the first entry in the ledger of the concerned party. As regards a sum of Rs.33,72,489, the Commissioner (Appeals) had given some particulars with which the Tribunal concurred in holding that the Assessing Officer ignored those figures. It was, in these circumstances, that the addition made by the Assessing Officer was deleted by the Commissioner (Appeals) and was approved by the Tribunal. The decision entirely was on facts. (AY.2006-07)

CIT .v. Nandadevi Sales Agency (2014) 362 ITR 5 (Cal.)(HC)

S.41(1): Profits chargeable tax-Remission or cessation of trading liability-Waiver of loan by bank was held to be not liable to tax.

Bank waived the principal amount of loan and interest. AO assessed the waiver of loan also as income of assessee. Tribunal held that as the assessee never claimed the principal amount of loan as deduction, AO was not justified assessing the said amount as income. On appeal by revenue the Court affirmed the view of Tribunal.(AY.2007-08)

CIT .v. Dholgiri Industries (P) Ltd. (2014) 99 DTR 359/266 CTR 111/225 Taxman 189(Mag.) (MP)(HC)

S.41(1): Profits chargeable tax - Remission or cessation of trading liability - Unclaimed liabilities (of earlier years), which are shown as payable in the accounts, are not taxable as income even if creditors untraceable & liabilities are non-genuine

In AY 2007-08 the assessee showed an amount of Rs. 37.52 lakhs as being due to various creditors. The AO issued summons to the creditors. Some of the creditors were not found at the given address and some stated that they had no concern with the assessee. The AO took the view that there was a "cessation" of the liabilities and assessed the said liabilities to tax u/s 41(1). The CIT(A) confirmed the addition though the Tribunal deleted it on the basis that as the liabilities had not been written back

in the accounts, s. 41(1) did not apply. On appeal by the department to the High Court HELD dismissing the appeal:
S.41(1) would apply in a case where there has been remission or cessation of liability during the year under consideration. In the present case, there was nothing on record to suggest there was remission or cessation of liability in the AY 2007-08. It is undoubtedly a curious case. Even the liability itself seems under serious doubt. The AO undertook the exercise to verify the records of the so-called creditors. Many of them were not found at all in the given address. Some of them stated that they had no dealing with the assessee. In one or two cases, the response was that they had no dealing with the assessee nor did they know him. Of course, these inquiries were made ex parte and in that view of the matter, the assessee would be allowed to contest such findings. Nevertheless, even if such facts were established through bi-parte inquiries, the liability as it stands perhaps holds that there was no cessation or remission of liability and that therefore, the amount in question cannot be added back as a deemed income u/s 41(1) of the Act. This is one of the strange cases where even if the debt itself is found to be non-genuine from the very inception, at least in terms of s. 41(1) of the Act there is no cure for it(Tax Appeal No. 588 of 2013, dt. 04/02/2014.) (AY.2007-08)
CIT .v. Bhogilal Ramjibhai Atara(2014)222 taxman 313 (Guj.)(HC)

S. 41(1) : Profits chargeable tax-Remission or cessation of trading liability-Unclaimed & unproven liabilities are deemed to have ceased and are assessable as income.
(i) When the liability continues to subsist year after year, for several years, serious and valid doubts as to its existence or as representing an existing liability, may arise. This is as in the very nature of the events, nobody would ordinarily, i.e., without justifiable reason, not claim his dues, representing his hard earned money or capital built up over years. Then, again, why would one not agitate the matter or take legal recourse to effect recovery. That is, the said presumption fails on the test of human probabilities in the facts and circumstances of the case.
(ii) The hon'ble Delhi high court per its recent decision in the case of CIT vs. Chipsoft Technology (P.) Ltd. [2012] 210 Taxman 173 (Del), examining the legal aspect of the matter, has clarified that the view that merely because a liability outstands in books, and that lapse of time bars the remedy but does not efface the liability, is an abstract and theoretical one which does not ground itself in reality. The interpretation of law, particularly fiscal and commercial legislation, is to be based on pragmatic realities. It would be indeed paradoxical, if not illogical, to allow the assessee-debtor to, while avoiding a liability on the basis that it is no longer enforceable in law, yet claim his status as a debtor, so that he was indeed liable for the amount reflected as a liability in accounts. …. The said decision by the Hon'ble court stands followed and adopted by the tribunal, as in ITO vs. Shailesh D. Shah and Yusuf R. Tanwar vs. ITO.
(iii) It could be argued that even where the assessee is unable to prove the existence of a trade liability as at the relevant year-end, which though continues to outstand in books, would yet not exhibit that the remission or cessation of the liability during the relevant year, and which is a prerequisite for the application of section 41(1). The argument, attractive at first sight, in-as-much as the same represents a primary ingredient of the relevant provision, fails on scrutiny. This is for the reason that the assessee reflecting the amount as a liability in his books for the immediately preceding year, has confirmed it as so as at the end of that year, i.e., 31.03.2008 in the present case. It does not therefore lie in his mouth or is not open for him to say or contend that it was not so, and that the amount was in fact not outstanding even on that date. The Revenue has merely proceeded by accepting the assessee's claims and books for that year. The principle of approbate and reprobate would therefore apply to estopp the assessee from taking such a stand, i.e., legally. The anomaly stands explained famously by the hon'ble apex court in Phool Chand Bajrang Lal vs. ITO [1993] 203 ITR 456 (SC) in the context of reopening of reassessment u/s.147, which requires the assessee to disclose all material facts fully and truly: 'You accepted my lie, now your hands are tied and you can do nothing.' It clarified that it would be a travesty of justice to allow the assessee that latitude.(ITA No. 7716/Mum/2012, DT. 28.05.2014.) (AY.2009-10)
ITO .v. Sajjan kumar Didwani (Mum)(Trib.); www.itatonline.org

S. 41(1):Profits chargeable tax - Remission or cessation of trading liability-Benefit under sales tax deferred scheme-Premature repayment at net present value, to avail benefit of such pre-

payment, could not be considered while computing the normal provisions of the Act.[Bombay Sales Tax Act.S.38]

The assessee had availed the benefit of sales tax scheme and pre-paid a part of the said liability at its Net Present Value (NPV). Assessee excluded the said amount from the normal provision of Income – tax .AO included the said amount as income. On appeal the Tribunal held that pre-payment, could not be considered while computing the normal provisions of the Act.(AY. 2004-05)

ACIT .v. Spicer India Ltd. (2014) 146 ITD 272/(2013) 38 taxmann.com 317 (Pune)(Trib.)

S.41(4A): Profits chargeable to tax-Bad debt–Deduction– Provisions of section 41(4A) are not invoked on the basis of balance sheet, wherein certain adjustments have been made by the assessee for the purpose of presenting it to the shareholders and the regulator.[S.36(1)(vii)]

The assessee was claiming deduction u/s. 36(1)(viii) in respect of special reserve created and maintained by it. During the year, it had reduced Rs. 53.96 crores from the special reserve account and an equivalent amount from the loans and advances account, as a contra item, for the purpose of preparation of financial statements only and not in the books of account. The assessee was required to create provision for bad debts as per the guidelines issued by Industrial Development Bank of India (IDBI). As per the said guidelines, the amount available in special reserve account created u/s. 36(1)(viii) can be treated as part of the provision for bad debts. The AO did not agree with the contentions of the assessee and treated Rs. 53.96 crores as income u/s. 41(4A) as utilisation of amount available in the special reserve account. The CIT(A) confirmed the addition.

On appeal, the Tribunal observed that the entries recorded in the books alone are not determinative factors for the purpose of computing true income of the assessee and that the tax authorities are required to determine the correct income of the assessee by considering the books of accounts, evidences, method of accounting, other surrounding factors, etc. The Tribunal observed that, in the instant case, there is no dispute that the assessee has maintained the special reserve account intact and the CIT(A) has given a categorical finding that there is no debit in this account, meaning thereby, the books of account of the assessee do not show any utilization of 'special reserve account', the assessee was required to do so only as per the directions issued by IDBI, which the assessee is required to comply with. The provision for bad and doubtful debts is created only to safeguard the financial institution against bad debts. Accordingly, the Tribunal directed the AO to delete the addition of Rs. 53.96 crores. (AY. 2008-09)

ACIT.v. Kerala State Industrial Development Corporation Ltd. (2014) 29 ITR 45/62 SOT 115(URO) (Cochin)(Trib.)

S.42:Business of prospecting-Business income-Clause for granting benefit under section 42 not mentioned in product sharing contracts – Assessee is not entitle to benefit under section 42 of the Act.

Where the production sharing contract entered into between the assessee with Ministry of Petroleum and Natural Gas did not incorporate clause for granting benefits under section 42 of the Act, it cannot be said the failure to incorporate the same in the contract was not inadvertently omitted and, therefore,assessee was not entitle for deduction under section 42 of the Act. (AYs. 2001–02 to 2005–06)

Joshi Technologies International Inc. v. UOI (2014) 102 DTR 51 (Delhi) (HC)

S. 43(1) :Actual cost -Goodwill - Actual cost does not cover goodwill as an asset and the amount of goodwill cannot be allocated to various fixed assets held for purpose of claiming depreciation. [S.32]

The High Court observed that goodwill was not covered for depreciation u/s. 32 of the Act and that the definition of actual cost under Section 43(1) of the Act cannot be read to cover goodwill as an asset for which the assessee had to pay and which can be termed as actual cost of the assets to the assessee. The High Court held that apportioning the cost of goodwill to various other assets acquired by the assessee for the purpose of claiming depreciation was not legally sustainable. (AY. 1986-87, 1987-88,1992-93)

CIT .v. Wipro Ltd. (2014) 222 Taxman 181 (Karn.)(HC)

S. 43(1) :Actual cost- Depreciation on increased cost of fixed assets due to fluctuation in foreign exchange rate allowable. [S. 43A]

During the year, the liability to pay foreign exchange for the machinery purchased by the assessee went up by Rs. 35,699/- on account of adverse exchange rate fluctuations. The assessee treated the same as a capital asset and claimed depreciation on the same. However the AO held that mere increase in the cost on account of adverse exchange rate fluctuations cannot be taken note of for the purpose of calculating depreciation and that the adjustment to the cost of the asset can be made only at the time of actual payment of the increased foreign exchange and not on notional basis. The CIT(A) and the Tribunal allowed the depreciation.

The High Court dismissing the departmental appeal followed the decision of the Supreme Court in the case of CIT .vs. Woodward Governor India (P.) Ltd. (2009) 312 ITR 254 and held that an assessee was entitled to depreciation on increased cost of fixed assets due to fluctuation in foreign exchange rate. (A.Y. 1997-1998)

CIT .v. Samsung India Electronics Ltd. (2014) 222 Taxman 21 (Mag.) (Delhi)(HC)

S. 43(5) :Speculative transaction- Loss on sale of shares by stock broker on his own behalf being 'jobbing' is not a speculative loss. [S. 28(i)]

The assessee was a member of the Stock Exchange and was registered as Stock Broker and carried on the purchase and sale of shares and securities. The AO found that a sum of Rs. 8,53,030/- was debited as loss incurred in respect of transactions done by the assessee for himself on the floor of stock exchange with other brokers and considered it as speculation loss. The CIT(A) confirmed the order of the AO. However, the Tribunal considering the claims of the assessee that the delivery had been effected at net basis as per the Stock Exchange guidelines held that the loss was not a speculation loss. On appeal by the department, the High Court observed that the allegation that the transactions were settled without actual delivery is not fully established by the revenue. There being specific case of the assessee noted before the AO that loss of Rs. 8,53,030 was suffered on account of non-delivery base transaction, the above observation of the Tribunal cannot be approved. The High Court also observed that the Tribunal had given a finding that the details of each and every transaction were disclosed by the assessee which were part of the paper book and that no discrepancy in any of the transactions was pointed out by the AO nor the bona fide of the transactions were doubted and hence the transactions carried out by the assessee were part of the 'jobbing' within the meaning of proviso (c) to section 43(5). Accordingly, the High Court dismissing the departmental appeal held that the losses suffered by the assessee cannot be termed to be speculative loss by virtue of proviso (c) to section 43(5). (AY. 1998-1999)

CIT .v. Ram Kishan Gupta (2014) 222 Taxman 164 (All.)(HC)

S. 43(5) : Speculative transaction-Where the assessee purchased units on 26-12-2003, which was a record date, and sold them on 26-3-2004, a period of three months reckoned from the date of purchase of units would expire on 26-3-2004 and, therefore, provisions of section 94(7) were fully applicable to the instant transaction. [S. 2(42B), 94(7)]

The assessee suffered loss on account of a sale of shares and claimed the same to be allowed. Further he had purchased units on 26-12-2003, which was the record date. He sold the said units on 26-3-2004 and incurred short-term capital loss thereon. He claimed the said short-term capital loss to be set off against the short-term capital gain. The AO treated the loss on shares to be speculative loss in view of the provisions of section 43(5) and disallowed the same. He also declined to set off the short-term capital loss against the short-term capital gain on the plea that the transaction was hit by the provisions of section 94(7). Both the Commissioner (Appeals) and the Tribunal upheld the order of the AO. On appeal to High Court, the assessee contended that (i) the loss on shares was to be treated as short-term capital loss in view of the proviso (d) to section 43(5), (ii) he had purchased the units on 26-12-2003, which was the record date, and the same were sold on 26- 3-2004, i.e., just after the expiry of three months and one day, and (iii) therefore, the period of three months after the said date as provided under section 94(7)(b) applied, whereby he was entitled to claim short-term capital loss on the sale of the units. The Hon'ble Court observed that the proviso (d) was inserted in section 43(5)

by the Finance Act, 2005, w.e.f. 1-4-2006 i.e. A.Y. 2006-07. and thus the loss on shares cannot be treated as short-term capital loss. On the second question, the High Court held that the period of three months reckoned from the date of purchase of the units would expire on 26-3-2004. Thus the lower authorities were right in holding that the provisions of section 94 (7)(b) were fully applicable.(AY. 2004-05)

Lachhmi Narain Gupta & Sons .v. CIT (2014) 221 Taxman 356 (P&H)(HC)

S. 43(5):Speculative transaction–Jobbing transaction–Non-delivery based share transactions-Covered by exception in clause (c) of proviso to section 43(5)-Loss is not speculative allowable as business loss .[S. 70, 73]

The assessee, a member of the U. P. Stock Exchange, was engaged in the business of purchase and sale of shares and securities. He declared an income of Rs. 81,050 against which he claimed a loss of Rs. 8,53,030 on account of non-delivery based transactions in purchase and sale of shares. the transactions carried on by the assessee for sale and purchase of shares were fully covered by the term "jobbing" and the assessee was entitled to the benefit of proviso (c) to s. 43(5) of the Act. The Tribunal having returned a finding that the details of each and every transaction were disclosed by the assessee, that no discrepancy in any of the transactions could be pointed out by the AO nor the bona fides of the transactions were doubted, the transactions thus carried out were part of the "jobbing" within the meaning of proviso (c) to s. 43(5). (AY. 1998-99)

CIT .v. Sri Ram Kishan Gupta (2014) 361 ITR 387/100 DTR 1 **(All.)(HC)**

S. 43(5) : Speculative transaction–Foreign currency forward contracts-Hedging loss-Loss on foreign currency forward contracts by a manufacturer / exporter is a "speculation loss" and not a "hedging loss".

Unless the assessee shows that there was some existing contract in respect of which he was likely to suffer a loss because of future price fluctuations and that it was to safeguard against such loss that he entered into the forward contracts of sale, he could not claim the benefit of clause (a) of the proviso to section 43(5).

From the principles laid down by above mentioned judgments one thing becomes clear that for hedging transaction commodity dealt should be the same. If the subject matter of the transactions is different it cannot be termed a hedging transaction.

In order that forward transactions in commodities may fall within proviso (a) to section 43(5) of the Act, it is necessary that the raw materials or merchandise in respect of which the forward transactions have been made by the assessee must have a direct connection with the goods manufactured or the merchandise sold by him. In other words raw material in respect of which the assessee has entered into forward transactions must be the same raw material which is used by him in his manufacturing business. We find that in the case under consideration assessee was not dealing in Foreign Exchange, therefore transactions entered into by it in Foreign Exchange cannot be held to be hedging transactions. As the assessee is dealing in diamonds and FC entered into only for diamonds would have been covered by the proviso (a) to the section 43(5) of the Act. (Contra view in Intergold (I) Ltd**,** Bombay Diamond Co. Ltd**,** Friends and Friends Shipping & Badridas Gauridu 261 ITR 256 (Bom) distinguished)

Araska Diamond Pvt. Ltd. .v. ACIT (Mum.)(Trib.); www.itatonline.org

S. 43A : Rate of exchange - Foreign currency-Matter reamnsded.[R.115]

The Assessee received income in foreign currency for contract work undertaken in foreign countries. The Assessing officer observed that credit figure was not credited to profit and loss account but instead same was taken to exchange variation reservation account in balance sheet directly, and thus, he made addition. The Assessee submitted that it had furnished details as per the direction of Tribunal regarding bifurcation of income and further it had already offered certain amount for taxation as per rule 115 but same was not examined by the authority. The matter remanded back to the Assessing officer for verification of the details filed and to decide as per the law. (AYs. 1982-83, 1983-84, 1985-86)

U. P. State Bridge Corpn. Ltd. .v. ITAT (2014) 220 Taxman 109(Mag.) (All.)(HC)

S.43B:Deductions on actual payment -Employees' contribution to PF etc. is allowable if deposited before due date of filing ROI.[S. 2(24)(x) , 28,36(1)(va)].

Section 43B made it mandatory for the department to grant deduction in computing the income under section 28 in the year in which tax, duty, cess, etc. is actually paid. However, Parliament took cognizance of the fact that the accounting year of a company did not always tally with the due dates under certain statutes and, therefore, by way of the first proviso, an incentive / relaxation was sought to be given in respect of tax, duty, cess or fee by explicitly stating that if such tax, duty, cess or fee is paid before the date of filing of the return under the Income Tax Act, the assessee would be entitled to deduction. It did not apply to contributions to labour welfare funds. The second proviso resulted in implementation problemswhich led to deletion of the second proviso in the Finance Act, 2003 and bringing about uniformity in the first proviso by equating tax, duty, cess and fee with contributions to welfare funds like employees' provident fund, superannuation fund and other welfare funds. The first proviso by Finance Act, 2003 was made applicable with effect from April 1, 2004 and the assessee would argue that it was curative in nature, clarificatory and, therefore, applied retrospectively from 1st April, 1988. The department argued thatapplied prospectively. The Supreme Court held that Finance Act, 2003 would be applicable retrospectively and defaulter who fails to pay the contribution to the welfare fund right upto April 1, 2004 and who pays the contribution after April 1, 2004, would get the benefit of deduction under section 43B of the I.T. Act. It washeld that the Finance Act, 2003 to the extent indicated above would be curative in nature and hence is retrospective. The reason being to be that the employers should not sit on the collected contributions and deprive the workmen of the rightful benefits under social welfare legislations by delaying payment of contributions to the welfare funds. We are of the view that the decision of the Supreme Court in CIT v. Alom Extrusions Ltd (2009) 319 ITR 306 (SC) applies to employees' contribution as well as employers' contribution (CIT vs. Hindustan Organics Chemicals Ltd (Bom HC) followed).(ITA No. 1002 of 2012 and 1034 of 2012 ,dt. 14/10/2014.)

CIT .v. Ghatge Patil Transport Ltd. (Bom.)(HC);www.itatonline.org

S. 43B: Deductions on actual payment–Excise duty–Interest-Mercantile system of accounting-Provision for excise duty and interest not deductible.[S.145]

Object of section 43B is to override mercantile system of accounting where statutory liability was not actually discharged, and provision for excise duty as well as for interest is allowable under section 43B only on actual payment basis. Thus provision is not allowable.(A. Y. 1990-91)

CIT .v. Simbhaoli Industries P. Ltd. (2014) 365 ITR 173 (All.)(HC)

S. 43B: Deductions on actual payment – Excise duty - Payment made after adjudication in assessment year 1984-85 and not during relevant year – Deductible.

The assessee incurred liability to pay the excise duty .The assessee disputed the valuation and the matter went to the adjudicatory authority. Once the demand was adjudicated, the assessee paid the amount adjudicated and claimed deduction thereof. The assessee made the payment after adjudication and not during the relevant year. The Tribunal held that the liability of earlier assessment years could not be allowed as a deduction out of the profit of the relevant assessment year 1984-85 in terms of section 43B.Allowing the appeal the Court held that for arriving at the total income of the previous year, only the expenditure pertaining to that previous year to be deducted. It was not open to the assessee to deduct the expenses of earlier years or subsequent years for arriving at the total income of that previous year. Payment was made after adjudication in assessment year 1984-85 and not during relevant year, the same is deductible.(AY. 1984-1985)

ITC Ltd..v. CIT (2014) 365 ITR 532 (Cal.)(HC)

S.43B: Deductions on actual payment-Excise duty-Mercantile system of accounting-Allowable in the year in which was paid.[S.37(1),145]

It was held that where assessee's liability to pay excise duty relating to earlier years was adjudicated during relevant assessment year, assessee could claim deduction of amount so paid in assessment year in question even though books of account were maintained on mercantile system of accounting.(AY.1984-1985)

ITC Ltd. .v. CIT(2014)365 ITR 532/101 DTR 358 / 44 Taxman.com 209 (Cal.)(HC)

S.43B: Deductions on actual payment –Provident fund-Employees State Insurance- Allowable if payment was made before due date of filing of return.[S.2(24((X), 36(1),139(1)]
Deduction is allowed u/s 36(1) r.w.s 24(x) while computing the income of the Assessee if the contribution toward PF & ESI were made on or before the due date of filing return u/s.139(1). [S.43B]
CIT v. Gujarat State Road Transport Corporation. (2014)366 ITR 170/ 265 CTR 64 / 223 Taxman 398 (Guj.)(HC)

S. 43B : Deductions on actual payment – Guarantee fee payable to scheduled bank.
High Court held that if the amount paid to the scheduled bank is only the guarantee fee then it would not attract Section 43B of the Act; but if it is interest, then it would be covered by provisions of section 43B. Matter was restored to the Assessing Officer to ascertain the facts for fresh determination.
CIT .v. Enchante Jewellery Ltd. (2014) 220 Taxman 8 (Mag.) / (2013) 40 Taxmann.com 216 (Delhi) (HC)

S. 43B : Deductions on actual payment – Payment to ESI and Provident Fund.
Assessee deposited employer and employee's contribution to ESI and Provident Fund prior to filing of return under section 139(1), it was entitled to deduction of amount so deposited and, thus, impugned disallowance made by assessing authority under section 43B in such a case was to be deleted. (AY. 2003 – 2004)
CIT .v. Mark Auto Industries Ltd. (2014) 220 Taxman 75(Mag.) (P&H)(HC)

S. 43B : Deductions on actual payment-Employer's contribution to ESI and PF contributions.
Subsequent to the income being assessed by the AO, the AO issued a notice under section 154/155 to the assessee and added back under section 43B the employer's contribution to Provident Fund and ESI amount deposited after expiry of relevant year but before filing the return of income. On appeal, both the Commissioner (Appeals) and the Tribunal upheld the additions made by the AO. Aggrieved, the assessee approached the High Court. The High Court following the Supreme Court decision of CIT .v. Alom Extrusions Ltd. [2009] 319 ITR 306held in favour of the assessee, that the amendment by Finance Act, 2003, whereby second proviso to section 43B was deleted, to be curative in nature and was operative from 1-4-1988 (when first proviso came to be inserted). Once that was so, the appellant was entitled to deduction on account of contributions made to ESI and PF fund before the filing of the income tax return. (A.Y. 1998-99)
Nuchem Ltd. .v. ITAT (2014) 220 Taxman 110 (Mag.) / (2013) 40 taxmann.com 371 (P & H)(HC)

S. 43B : Deductions on actual payment – Sales tax converted into loan.
During the year, assessee converted the sales tax liability into loan on March 24, 2003 which was within the relevant assessment year. The circular issued by the Central Board of Direct Taxes permits and allows sales tax liability, which is converted into a loan to be set off in the year in which the liability is so converted and the Government order is issued. In the present case, the order was passed on March 24, 2003, when the conversion was allowed. Therefore the High Court stated that the assessee could not be denied the benefit and the expenditure/ deduction was to be allowed under section 43B of the Income Tax Act, 1961 in the year in question.(AY. 2003 – 04)
CIT .v. Minda Wirelinks (P.) Ltd. (2014) 220 Taxman 81(Mag.) (Delhi)(HC)

S. 43B : Deductions on actual payment -Employee's contribution paid after due date but before filing return of income allowed as deduction-Amendment w.e.f has retrospective effect. [S.36(1)(va)]
Where PF and/or EPF, CPF, GPF, etc., was paid after due date under respective Acts but before filing of return of income under section 139(1), same could not be disallowed under section 43B or under

section 36(1)(va) .Amendment is curative in nature, hence it is retrospective in nature and would operate with effect from April1, 1988. (AYs. 2001-02, 2002-03, 2003-04 to 2006-07)

CIT .v.State Bank of Bikaner & Jaipur (2014) 363 ITR 70 / 265 CTR 471 (Raj.)(HC)

CIT .v. Jaipur Vidyut Vitaran Nigam Ltd. (2014) 363 ITR 70 / 265 CTR 471 (Raj.)(HC)

CIT .v. Rajasthan Rajya Vidyut Utpadan Nigam Ltd. (2014)363 ITR 307 / 265 CTR 471 (Raj.)(HC)

S. 43B : Deductions on actual payment-Employees contribution to Provident Fund & deduction is allowable if paid before due date for filing retrun of income. [S.36(1)(va), 139(1)]

On a plain reading of the second proviso to s. 43B, it is clear that the assessees – employers were entitled to deductions only if the contribution to any fund for the welfare of the employees stood credited on or before the due date given in the relevant Act. However, because the second proviso created difficulties for the assessees – employers, an amendment was inserted vide Finance Act, 2003 with effect from 1st April 2004 to delete the second proviso to s. 43B and to amend the first proviso to provide that the deduction would be allowed if the amount was paid on or before the due date for furnishing the return of income u/s 139(1). Therefore, the amendments introduced by the Finance Act, 2003 put on par the benefit of deductions of tax, duty, cess and fee on the one hand with contributions to various Employee's Welfare Funds on the other. In CIT .v. Alom Extrusions Ltd (2009) 319 ITR 306 (SC) it was held that the amendment to the s. 43B by the Finance Act, 2003 w.e.f. 01.04.2004 was retrospective in nature and would operate from 01.04.1988. Consequently, the ITAT rightly deleted the addition of Rs.1.82 cr on account of delayed payment of Provident Fund of employees' contribution. Even otherwise, we fail to understand how this deduction could have been disallowed to the Assessee. Admittedly, the AY in question is 2006-07. The second proviso to s. 43B was deleted w.e.f. 01.04.2004 and simultaneously the first proviso was also amended bringing about a uniformity in deductions claimed towards tax, duty, cess and fee on the one hand and contribution to the employees' provident fund, superannuation fund and other welfare funds on the other. These deductions being claimed in the return of income filed for AY 2006-07, the amendments to s. 43B which came into force w.e.f. 01.04.2004 clearly applied to the assessee's case.

CIT. .v. Hindustan Organics Chemicals Ltd(2014)366 ITR 1/ 107 DTR 105/270 CTR 478S(Bom)(HC)

S.43B:Deductions on actual payment-Employers'/Employees' contribution towards PF and ESI-Paid prior to filing of return-No disallowance can be made.[S.2(24)(x),36(1)(va),139(1)].

Assessee deposited employer's and employees' contributions to the PF and ESI prior to the filing of the return u/s. 139(1) though beyond due dates. Deductions could not be disallowed u/s. 43B. (AY. 2003-04)

CIT .v. Hemla Embroidery Mills (P.) Ltd. (2104) 366 ITR 167/ 98 DTR107/265 CTR 57 (P&H)(HC)

CIT .v. UT Star Com.Inc. (2104) 98 DTR107(P&H)(HC)

S.43B: Deductions on actual payment–Employees contribution-Provident fund-Eligible for deduction which was paid before due date of filing of return. [S. 2(24)(x), 36(1)(va), 139(1)]

Amendment of section 43B applies to employees's as well as employer's contribution towards Provident Fund and assessee was eligible to deduction for employees ' contribution which was paid before due date prescribed under section 139(1) of the Act.(AY. 2006-07)

CIT .v. Spectrum Consultants India (P) Ltd (2014) 100 DTR 129/266 CTR 241 (Karn.)(HC)

S.43B:Deductions on actual payment- Employees' PF/ ESI Contribution is also covered by s. 43B & allowable as a deduction if paid by "due date" of filing ROI.[S.2(24)(x) 36(1)(va),139(1)]

The assessee collected ESI & PF from its employees but did not pay the sum to the respective funds within the due date prescribed in relevant legislation. The amount was, however, paid before the due date u/s 139(1) for filing the ROI. The AO & CIT(A) disallowed the payment u/s 36(1)(va) read with s. 2(24)(x). Before the Tribunal, the department justified the disallowance by relying on Dy. CIT v. Ashika Stock Broking Ltd (2011) 139 TTJ 192 (Kol) (which in turn relied on Jt. CIT v. ITC Ltd (2008) 112 ITD 57 (Kol) (SB) where it was held that s. 43B does not apply to employees'

contribution). However, the Tribunal declined to follow that law and allowed the appeal by relying on CIT v. Sabari Enterprises (2008) 298 ITR 141 (Kar) and CIT v. P.M. Electronics Ltd (2008) 220 CTR 635 (Del) where it was held that s. 43B applied also to employees' contribution to ESI and PF and that if a payment was made within the due date u/s 139(1) of filing the ROI, the disallowance cannot be made. On appeal by the department to the High Court HELD dismissing the appeal:
The only issue involved in this appeal is as to whether the deletion of the addition by the AO on account of employees' contribution to ESI and PF by invoking the provision of s. 36(1)(va) read with s. 2(24)(x) of the Act was correct or not. In CIT vs. Alom Extrusion Ltd. (2009) 319 ITR 306 the Supreme Court has held that the amendment to the second proviso to s. 43B as introduced by Finance Act, 2003, was curative in nature and is required to be applied retrospectively with effect from 1st April, 1988. Such being the position, the deletion of the amount paid by the Assessee as Employees' Contribution beyond due date was deductible by invoking the aforesaid amended provisions of s.43B of the Act. We, therefore, find that no substantial question of law is involved in this appeal and consequently, we dismiss this appeal. (ITA No. 245 of 2011, dt. 6/09/2011)
CIT .v. Vijay Shree Ltd.(Cal.)(HC),www.itatonline.org
Editorial: Jt. CIT v. ITC Ltd (2008) 112 ITD 57 (Kol) (SB)(Trib) impliedly reversed.

S. 44AD : Civil construction–Assessing Officer rejected book results and estimated at 8% u/s.44AD. Additions also made u/s.68-Addition was held to be justified. [S.68, 144]
Assessment was made u/s 144 thereby rejecting book results wherein estimation of profit is made as provided in section 44AD and sundry creditors are treated as unexplained u/s 68 on account of non verification due to non submission of details. CIT(Appeals) and Tribunal held that once profit is estimated at 8% u/s 44AD no separate addition could be made. On appeal by revenue to High Court, held that where certain unexplained sundry creditors are found in the account books of the assessee, whose business income is determined on estimate basis and not on the basis of his returned income, the AO is not prevented from treating the unexplained sundry creditors standing in the books of account as income from undisclosed sources.
CIT .v. G. S. Tiwari & Co. (2013) 357 ITR 651/ (2014) 220 Taxman 111 (Mag.) / 41 Taxmann.com 17 (All.)(HC)

S.44AD: Civil construction–Computation–Net profit of 5% of contract receipt was held to be valid instead of 8% estimated by Tribunal.
The assessee was a civil contractor. In the absence of proper books of account maintained, the Assessing Officer estimated the assessee's income at 8 per cent of the gross contract receipts by invoking the provisions of Section 44AD. The CIT(A) held that net profit of assessee was to be assessed at 5 per cent of contractual receipts considering the margin of previous years. The Tribunal gave findings that the assessee had not filed profit and loss account or balance sheet for the relevant years and that the returns and the vouchers produced were defective in nature, and it accordingly confirmed the order of the Assessing Officer, thereby taking 8 per cent of the gross turnover as the income of the assessee. On appeal to the High Court, it was held that, since the assessee's gross contract receipts were in excess of Rs. 40 lakhs for the assessment years 2006-07 and 2007-08, Section 44AD had no relevance and thus assessee's income should not have been assessed at the high rate of 8 per cent. The CIT(A) was right in considering margin of 5 per cent of contractual receipts. (AYs. 2006-07, 2007-08)
K. Kannan .v.ACIT(2014) 220 Taxman 250/103 DTR 300 **(Mad).(HC)**

S.44B: Shipping business - Non-residents-International traffic-Charging freight from place outside India-Income from inland haulage- Part income derived from operation of ships- Not taxable in India-DTAA-India-Belgium[S.9(1)(i), 90,Art 8(2)(b)(ii)]
The asssessee was engaged in the business of operation of ships in international traffic. It was tax resident of Belgium. The assesse charged freight from the place inside India where the goods were picked up to the point of destination port or destination station. Assessee had collected in land hauling charges from its customers for international traffic. AO held that such in land haul charges were not within purview of section 44AB of the Act and charged as business profits. In appeal CIT (A) held that such inland haulage charges earned by the assesse were only part of the income derived from the

operation of ships and therefore were covered under article 8 of the DTAA between India and Belgium and consequently not taxable as business profits . On appeal Tribunal decided in favour of assesse. On appeal by revenue, dismissing the appeal the Court held that income from inland transport of cargo within India was covered under article 8(2)(ii) and (c) of the DTAA between India and Belgium and therefore not taxable in India .Article 8(2)(b)(ii) and (c) includes with in its ambit the activity of inland transport of cargo from various places within India.(AY.2006-07)

DIT(IT) .v. Safmarine Container Lines NV (2014) 367 ITR 209/225 Taxman 299/108 DTR 251 (Bom.)(HC)

S. 44B : Shipping business-Non-residents–Computation–Reimbursement of expenses-Provision was held to be not applicable.

Assessee is engaged in business of refining crude oil, entered in to contracts with non-resident for supply of equipment, designs and drawings and project management and supervision contract. Demurrage charges incurred by non-resident on behalf of assesse were reimbursed. The AO brought to tax the said reimbursement under section 44B of the Act. On appeal CIT(A) and Tribunal held that reimbursement of expenses incurred on behalf of assess cannot be brought with in section 44B(1) as the said special provision for computing the profits and gains of shipping business in the case of non-resident and the said section envisages the profits and gains of business of operation of ships. On appeal by revenue, dismissing the appeal the Court held that present case , both conditions envisaged by sub section (1) of section 44B were not fulfilled and thus section44B was not applicable. Order of Tribunal was confirmed.

CIT .v. Mangalore Refineries Petrochemicals Ltd (2014) 225 Taxman 58 (Bom.)(HC)

S. 44BB : Business of exploration –Fees for technical services[S. 9(1)(vii)]

In this case the AO treated part of the income as fees for technical services without pointing out which part relates to fee for technical services. The Tribunal held that it is settled proposition of law that when a contract consists of a number of terms and conditions, each condition does not form separate contract and the contract has to be read as whole and further held that the CIT(A) has rightly considered the entire income to be taxed under section 44BB. (AY. 2005-06)

Addl. DIT .v. Valentine Maritime (Gulf) LLC (2014) 159 TTJ 706 (Mum.)(Trib.)

S. 44C : Non-residents - Head office expenditure-Cost reimbursed does not fall within the ambit of head office expenses.

The Tribunal held that the cost which has been allocated to the branch and reimbursed by it does not fall within the ambit of head office expenses for the purpose of section 44C. Expenses as given in section 44C has to be necessarily in the nature of executive and general administrative expenses only. (AY. 2004-05)

ADIT .v. Antwerp Diamond Bank NV (2014) 163 TTJ 175 (Mum.)(Trib.)

S.45 : Capital gains-Firm-Partner-Stock in trade-Capital asset-Dissolution-Stock in trade of firm can be held as capital asset in the hands of partners after dissolution-Sale consideration received by partner is assessable as capital gains and not business income.

The correct test to be applied is whether the partnership assets were converted to capital assets of the partners at the time of dissolution. This we find, was provided for in the dissolution deed itself which records in clause (3) that the parties have agreed to take over the plots of land as co-owners and as capital assets and they shall have co-ownership and as a test of conversion if applied, the assessee has indeed provided for conversion. Hence we have no difficulty in concluding that the property does not seem to be stock-in-trade by the execution of the dissolution deed. In our view, there is no mode which provides for conversion of stock-in-trade into capital assets except by agreement of parties.

In the instant case, the deed of dissolution achieves that objective. In the case of Khatau Valabhdas, the Court was concerned with the division of stock-in-trade i.e. grocery products. In the present case, the business of the partnership was of builders / contractors and not of buying and selling the land and the partners at the material time were not engaged in any construction activity and no such construction was being carried out on the land. A building was to be put up on the land purchased by

the erstwhile partnership firm but the land remained vacant and nothing is done on the land or to the land so as to show it as stock-in-trade and not treat it as capital assets share of the assessee.
In the circumstances, we answer both the questions in the negative and hold in favour of the assessee and against the revenue. We hold that the Tribunal had no material to come to the conclusion that the land sold by the applicant / assessee was stock-in-trade and the Tribunal was not justified to treat the same as business income. However, we leave open the question whether the amount in the hands of the applicant / assessee is to be treated as long term capital gains or short term capital gains to be decided by the department.(AY.1998-99)
Arvind Shamji Chheda .v. CIT (Bom.)(HC);www.itatonline.org

S. 45:Capital gains- Business income or short term capital gains- Sale of shares – Assessable as capital gains. [S.28(i)]
The assessee invested its shareholder's funds in shares/units of mutual funds in terms of the decision of its management from time to time. Whilst the investments were not demarcated and sourced through separate accounts, equally the fact remains that the objects of the company permitted such transactions. What is more, there were only 11 sale and purchase of scrips - these did not indicate any great volume or frequency of share/purchase transactions. Keeping in mind the ruling in CIT v. Associated Industrial Development Co. (P.) Ltd. [1971] 82 ITR 586 (SC) as well as other decisions that undue emphasis cannot be given on one indicating factor alone, the findings of fact arrived at by the Commissioner (Appeals) and confirmed by the ITAT, in the impugned order, do not disclose any error so as to call for interference. Held, the Assessing Officer was considerably influenced by the profit in respect of sale of shares, which, according to him, on analysis of the facts, was business income. One of the primary reasons for his conclusion was the short duration to the extent of the holding period of 10 days. The assessee counters the revenue's submissions here arguing that the shares had been purchased out of its own funds; the activity was duly authorized by its Memorandum & Articles of Association. As regards the volume of share transactions, the assessee points out that it had dealt in only nine scrips during the entire year, which included 17 share purchase transactions and 22 sale transactions during the year, totalling to 40 transactions in all during the entire year, i.e., one transaction in 10 days. This was not a very high frequency of transactions. The assessee also received dividend on the shares held by it; and its infrastructure was small whereas the business activity required a much larger infrastructure. Hence, income from sale of shares was assessable as capital gains. (AYs. 2006-07 & 2007-08)
CIT v. Devasan Investment P. Ltd. (2014) 365 ITR 452 (Delhi)(HC)

S. 45: Capital gains–Shares-Frequent purchase and sale of shares and magnitude of some transactions being high are not conditions to consider income from sale of shares as business income.[S.2(29A), 28(i)]
The assessee treated purchase of shares as investment and hence considered sale of shares as long term capital gains. The AO treated the income from sale as business income on the ground that the assessee indulged in frequent purchase and sale of shares and the magnitude of some transactions was very high. The CIT(A) and the Tribunal directed the AO to consider the income as long term capital gains.

The High Court observed that a similar issue in the assessee's own case had come up for hearing in respect of an earlier assessment year wherein the High Court had confirmed that the income was to be considered as capital gains. The High Court following its own judgement in the assessee's own case for the previous assessment year dismissed the appeal and treated the income as capital gains.(AY. 2009-2010)
CIT .v. Nita M. Patel (2014) 221 Taxman 416 (Guj.)(HC)

S. 45 : Capital gains –Income from sale of shares held as investment in companies which were formed with object to promote agro/horticulture based industry is capital gain and not business income.[S.28(i)]
The assessee was a Punjab Government Undertaking and its principal object was to promote agro/horticulture based industry in State of Punjab. The assessee made investments in shares of

companies which were jointly promoted by assessee along with private entrepreneurs with basic object of promoting agro/horticulture based industry in State of Punjab. The AO held that the surplus/ loss resulting to the assessee on sale of the shares was to be considered as a business income/loss since the investments made in shares amounted to a business activity whereas the assessee had declared surplus/loss on the shares as capital gain/loss. The CIT (A) partly upheld the Assessment Order and ITAT upheld the order of the CIT (A) and dismissed the appeal holding that the sale of investments of shares by the assessee was exigible to tax under the head capital gain instead of business income.

On appeal by the department, the High Court observed that income in a particular case falls under the head of capital gains or business depending upon the nature of business of the assessee and attending circumstances. It further observed that the dividing line for deciding the head of income may be very thin and a transaction was not necessarily in the nature of trade because the purchase was made with the intention of resale. The High court following its own decisions in case of Saroj Kumar Mazumdar v. CIT (1959) 37 ITR 242 and Janki Ram Bhadur Ram v. CIT (1965) 57 ITR 21 held that a capital investment and resale do not lose their capital nature merely because the resale was foreseen and contemplated when the investment was made and hence the same could be considered as a capital gain/loss. (A.Y. 2005-2006)

CIT .v. Punjab Agro Industries Corporation Ltd. (2014) 221 Taxman 419 / 103 DTR 332 (P&H)(HC)

S. 45 : Capital gains - Business income – Share dealing – Assessee was a salaried employee – Income derived from purchase and sale of share was held to be capital gain. [S. 28(i)]

The assessee a salaried person filed a return of income which included income from salary and receipt from trading of the share and long term capital gain. The AO held that the assessee was trading in shares and taxed the entire income as business income. On appeal the CIT(A) and Tribunal held that the assessee cannot be stated in the business of trading in shares. On further appeal by the revenue the High Court observed that the assessee sold small amount of shares under short term capital gains as against the bulk of the shares inviting long term capital gain and upheld the view of the Tribunal. (AY. 2006-07)

CIT .v. Saurah Rameshchandra Lavti (2014) 220 Taxman 14(Mag.) (Guj.)(HC)

S. 45 : Capital gains – Business income - Dealer in shares as broker, trader and investor – Shares were shown as capital balance in the return of income of previous year, sale of such shares would be long/ short term capital gain. [S. 28(i)]

The assessee was dealing in shares as broker, trader and investor and was registered with U.P. stock exchange. The assessee filed return of income showing total income from business, long term capital gains and short term capital gains. The AO held that the assessee was a share broker and the main business was purchase and sale of shares and had used the investment portfolio as a colorable device to avoid payment of tax. The CIT(A) and the Tribunal directed to show the amount as capital gains and not business income. On appeal by the revenue, the High Court held that the shares were shown as capital balance in return of previous years and on sale of such shares the sale proceed would be long/short term capital gain of the assessee and not the income from the business.(AY. 2006-07)

CIT .v. Sunil Kumar Gupta (2014) 220 Taxman 14 (Mag.) (All.)(HC)

S. 45 : Capital gains - Business income – Investment in shares- Assessee was a salaried employee – Income derived from purchase and sale of share was held to be capital gain. [S.28(i)]

Assessee, a salaried employee, earned Short Term Capital Gain of Rs.83,712/- and Long Term Capital Gain of Rs. 53,84,239/-. After considering relevant factors including the amount of shareholding of the assessee, the volume and the frequency of the purchase and sale of shares etc. held that it cannot be concluded that the assessee was a trader in share particularly in view of the fact that Short Term Capital Gains were very less as compared to the Long Term Capital Gains. (AY. 2006-07)

CIT .v. Mitesh Nathulal Lavti. (2014) 220 Taxman 13 (Mag.) (Guj.)(HC.)

S. 45 : Capital gains - Time of transfer – Long term capital gains- When possession given of the immovable property on receiving part payment from the builder. [S.2(47(v),11(IA), Transfer of Property Act, 1882, S. 53A]

When the assessee by an agreement dated 14/4/2003 handed over the possession of the land to the builder and received part of the consideration and the builder was also given power of attorney to sell the portions of land, transfer has taken place in April, 2003 (AY.2004-05)

CIT .v. Cochin Stock Exchanges Ltd (2014) 363 ITR 382 /226 Taxman 161(Ker.)(HC)

S. 45: Capital gains – Income arising from sale of land taxable capital gains. [S.28(i)]

The assessee returned his share of gains on sale of land as long term capital gain. The AO, however, held that the receipts are taxable as business income of the assessee and taxed the same accordingly. The CIT(A) and Tribunal rejected the stand taken by the AO.

On appeal by the Revenue, the High Court observed thatthe Tribunal has noted that except for the present assessee and his brother, the AO has not made such addition in case of any other co-owners of the land. The High Court also noted that there was no allegation suggesting that the assessee was engaged in the business of buying and selling land. Accordingly, the High Court dismissed the departmental appeal.

CIT .v. Natwarlal C. Bhandari (2014) 222 Taxman 57(Mag.) (Guj.)(HC)

S. 45 : Capital gains-Long-term capital gains - Conversion of rights of lessee in property from lease hold right into freehold only results in improvement of his/her rights over property and it would not have any effect on taxability of gain from such property, which is related to the period over which property is held. [S.2(29B)]

The assessee purchased a property on leasehold basis in year 1984. She converted the property into freehold property in year 2004 and thereupon sold it within three months. The capital gain arising from sale of said property was declared as long-term capital gain. The AO treated the capital gain as short-term since the property was acquired by converting the leasehold right into freehold and was sold within three months. On an appeal before the Commissioner (Appeals), he held that the conversion of leasehold into freehold property was nothing but an improvement of the title over the property, as the fact remained that the assessee was the owner even prior to conversion. He, thus, concluded that capital gain arising from the sale of property was to be taxed as long-term. The Tribunal upheld the order of the Commissioner (Appeals). On an appeal by the department, the High Court, upholding the order of the Tribunal, held that the difference between short-term and long-term capital assets is the period over which the property has been held by the assessee and not the nature of title over the property. The lessee of the property has rights as owner of the property subject to covenants of the lease, for all purposes. The conversion of the rights of the lessee in the property from having leasehold right into freehold is only by way of improvement of his rights over the property and it would not have any effect on the taxability of gain from such property, which is related to the period over which the property is held. (AY. 2004-05)

CIT .v. Rama Rani Kalia (Smt.) (2014) 221 Taxman 72 (All.)(HC)

S. 45:Capital gains–Business income-Sale and purchase of shares-maintaining two separate portfolio-Short term and long term gains out of investment account is assessable as capital gains and not as business income.[S.28(i)]

Held that the assessee's separate activities in shares were further supported and endorsed by the fact that separate dematerialised accounts, bank accounts were being maintained and separate trading and investment accounts were maintained in the books. Thus, the assessee was dealing in different activities of trading and investment. Assessment as short term and long term capital gain was held to be justified.(AY. 2007-08)

CIT .v. Avinash Jain (2014) 362 ITR 441/(2013) 214 Taxman 260 (Delhi)(HC)

S.45: Capital gains-Business income-Portfolio Management Scheme (PMS)-Investment in shares-Gains arising from PMS transactions are capital gains & not business profits. [S.28(i)]

On facts, the source of funds of the assessee were its own surplus funds and not borrowed funds. About 71% of the total shares have been held for a period longer than 6 months, and have resulted in an accrual of about 81% of the total gains to the assessee. Only 18% of the total shares are held for a period less than 90 days, resulting in the accrual of only 4% of the total profits. This shows that a large volume of the shares purchased were, as reflected from the holding period, intended towards the end of investment. The fact that an average of 4-5 transactions were made daily, and that only eight transactions resulted in a holding period longer than one year is not relevant because the number of transactions per day, as determined by an average, cannot be an accurate reflection of the holding period/frequency of transactions. Moreover, even if only a small number of transactions resulted in a holding for a period longer than a year, the number becomes irrelevant when it is clear that a significant volume of shares was sold/ purchased in those transactions.(AY.2006-07)

Radials International .v. ACIT (2014) 367 ITR 1/103 DTR 316(Delhi)(HC)

Editorial: Matter referred to special bench in the case of – was withdrawn.

S.45: Capital gains–Technical knowhow–Capital asset-Amount received on transfer of technical knowhow is assessable as capital gains.

Technical know-how acquired on or after 1-4-1998 is a capital asset and amount received on transfer of such asset assessable as capital gains. (AY.2001-02)

CIT .v. Wintac Ltd. (2014) 360 ITR 614 (Karn.)(HC)

S.45:Capital gains-Capital loss-Set off-Capital asset–Transfer-Write-off of irrecoverable advances is not a "transfer" and the loss cannot be claimed as a capital loss u/s 45-Not allowed to be carried forward to subsequent year.[S.2(14), 2(47)]

Having regard to the definitions of terms "capital asset" and "transfer" in sections 2(14) and 2(47), in order to be eligible for carry forward of capital loss, the capital asset should be of the nature defined in s. 2(14) and should be transferred in the manner defined in s. 2(47). Equally, it should be subjected to tax as per s. 45(1) of the Income-tax Act. The advances given to the said two parties and written off are not the capital assets nor there is any transfer. Therefore, they were not allowed to be carried forward to subsequent years. It is a capital loss and should be ignored.(AY. 2002-03)

Crompton greaves Limited .v. DCIT(2014)364 ITR 244/104 DTR 129 (Bom.)(HC)

S. 45 : Capital gains–Transfer- Development agreements-Developer had right to sale some flats on account of additional FSI by virtue of loading TDR, grant of development right to that extent in said plot of land was to be treated as transfer. [S. 2(47)]

Assessee had entered into development agreement under which developer had constructed a building on property of assessee and handed over major part of premises to assesse. Developer was entitled to sell remaining flats. Capital gain arose on account of grant of development rights by assesse. It was contended that since possession of property had never been parted by him, there was no transfer as envisaged in provisions of capital gains. since developer had no right to sell said flats on account of additional FSI by virtue of loading TDR, to that extent rights, title and interest in said plot of land had been transferred. (AY. 2005-06)

Dy.CIT .v. Jai Trikanand Rao (2014) 149 ITD 112 / 41 taxmann.com 453 (Mum.)(Trib.)

S. 45 : Capital gains-Transfer-Possession-Registration-Transfer takes place in year of execution of sale deed, handing over of possession & receipt of sale consideration & is not deferred to year of registration. Verdict in Suraj Lamp and Industries 340 ITR 1 (SC) explained.[S.2(47, Transfer of Property Act, S.53A)

The Tribunal had to consider whether capital gains are assessable in AY 2008-09, being the year when the sale deed was executed and possession handed over and most of the sale consideration was received or in AY 2009-10 when the sale deed was registered. Held by the Tribunal:

The transaction relates to the date when the sale-deed was executed, sale consideration was paid and the possession was handed over but not on the date when the document was presented before the Registrar for registration of the sale-deed. Moreover, the issue whether the transaction would relate to the date when the assessee has received sale consideration, handed over the possession and executed

sale agreement or the date when the sale agreement is presented before the concerned Registrar for registration of the document was not before the Apex Court in Suraj Lamp and Industries Pvt. Ltd. vs. State of Haryana(2012) 340 ITR 1 (SC). Also, the judgement in Suraj Lamp and Industries was delivered on 11.10.2011, but the sale agreement in the present case was executed on 31.03.2008. The Apex Court has observed that "It is also submitted that this decision should be made applicable prospectively to avoid hardship. We have merely drawn attention to and reiterated the well-settled legal position that SA/GPA/WILL transactions are not "transfers" or "sales" and that such transactions cannot be treated as completed transfers or conveyances. They can continue to be treated as existing agreement of sale. Nothing prevents affected parties from getting registered deeds of conveyance to complete their title. The said "SA/GPA/WILL transactions" may also be used to obtain specific performance or to defend possession under section 53A of the Transfer of Property Act. If they are entered before this day, they may be relied upon to apply for regularization of allotments/leases by development authorities. We make it clear that if the documents relating to "SA/GPA/WILL transactions" has been accepted acted upon by the DDA or other developmental authorities or by the Municipal or Revenue authorities to effect mutation, they need not be disturbed, merely on account of this decision." In the case in hand, the agreement to sell dated 31/03/2008 had already been acted upon by the parties by delivery of possession and registering sale-deed. Therefore, for this reason also, the judgement of the Apex Court in the case of Suraj Lamp and Industries Pvt. Ltd. vs. State of Haryana and Another (supra), would not help the Revenue. (ITA no. 1281/Ahd/2013 dt. 30/10/2014.) (AY.2009-10)

Amitkumar Amblal Shah .v. ITO (Ahd.)(Trib.); www.itatonline.org

S. 45 : Capital gains-Dissolution-Firm-Capital gains on transfer of capital assets on dissolution of firm has to be worked out on the basis of the fair market value of the capital asset on the date of transfer. [S. 2(14),2(47), 45(4), 47(ii), Indian Partnership Act, S.40]

Capital gains on transfer of capital assets on dissolution of firm has to be worked out on the basis of the fair market value of the capital asset on the date of transfer. On the facts the AO has adopted the fair value on the basis of report of inspector. Tribunal held that Inspector of Income-tax is not technical person to determine the fair market value .Matter was set a side to the AO to refer the matter to DVO and decide accordingly. (ITA No.159 /Coch/2014 dt 19-09-2014) (AY.2007-08)

M. Ahammedkutty .v. ITO (Cochin)(Trib.); www.itatonline.org

S. 45 : Capital gains-Transfer- No transfer merely because development agreement is entered into. [S.2(47)(v)]

As can be seen from the observations made by CIT(A), he has given specific finding of fact that development agreement has not been acted upon by the developer till date. Therefore, he has concluded that as there is no willingness or part performance of contract by the developer, which has resulted in filing of civil suit seeking cancellation of the development agreement, it cannot be said that there is transfer of capital asset as envisaged u/s 2(47(v) read with section 53A of the Act. This finding of fact arrived at by CIT(A) has not been controverted by the department by bringing on record documentary evidence or through any other mode to prove that development activity under the development agreement has been started by developer. In the aforesaid factual position, since there is failure on the part of the developer to perform his part of the contract, it cannot be said that there is transfer of capital asset merely because assessee has entered into development agreement with the developer.

ACIT .v. P. Venkatateswara Rao (Hyd.)(Trib.); www.itatonline.org

S.45:Capital gains-Business income-Transaction of derivatives-Assessable as capital gains.[S.28(i)]

Tribunal following the order passed by the Tribunal in assesses own case relating to earlier year,(Platinum Asset Management Ltd. v. Dy. DIT(IT)(2014) 61 SOT 119(Mum.)(Trib.), income arising from transactions on derivatives to assesse a FII could not be treated as business profit rather same had to be assessed under the head capital gains.(AY.2006-07)

Platinum Asset Management Ltd. v. Dy. DIT(IT)(2014)65 SOT 66 (URO)(Mum.)(Trib.)

S. 45 : Capital gains-Business income-Share dealings-brought forward holding from preceding years-Assessable as capital gains.[S.28(i)]

Most of shares were from brought forward holding from preceding years which had been accepted as investment in earlier years and further assessee was maintaining separate account for investment as well as stock in trade of shares, sale proceeds of such shares were to be treated as capital gains and not business income.(AYs.2008-09 & 2009-10)

Dy.CIT .v.Emerging Securities (P.) Ltd. (2014) 146 ITD 736 / (2013) 39 taxmann.com 169 (Delhi)(Trib.)

S.45: Capital gains-Business Income -Share dealings-Intention to be seen-Most of the shares sold were carried forward from earlier years-Assessable as capital gains and not as business income. [S.28(i)]

The assessee is engaged in the investment and trading in shares through portfolio management scheme. Assessee making investments in shares and also doing trading in shares out of stock-in-trade carried forward from earlier years. Certain shares standing in investment account was sold by assessee and surplus arising thereof was claimed as short term capital gain and long term capital gain. The AO treated said surplus on sale of shares as business income. Most of the shares were from brought forward holding from preceding years which had been accepted as investment in earlier years and further assessee was maintaining separate account for investment as well as stock in trade of shares, surplus received on sale and purchase of shares to be treated as capital gains and not business income. Period of holding of shares and non-receipt of dividend income is not a decisive factor for treatment of particular transactions as investment or trading transaction, one has to see intention of person, who is doing purchase and sale of shares. (AYs. 2008-09, 2009-10)

Dy.CIT .v. Emerging Securities (P.) Ltd. (2014) 146 ITD 736 / (2013) 39 taxmann.com 169 (Delhi)(Trib.)

S.45: Capital gains-Business income – Purchase and sale of shares through portfolio management services assessable as capital gains.[S.28(i)]

Income earned by assessee on sale/purchase of shares and securities through PMS is to be assessed as capital gains and not business income. (AY. 2007-08)

Nalin Pravin Shah .v. ACIT (2014) 98 DTR 420(Mum.)(Trib.)

S.45: Capital gains-Business income–Purchase and sale of shares –Assessee had not borrowed any funds-Accepted as investment in earlier years-Assessable as capital gains.[S.28(i)]

Assessee used his own funds for transacting in shares and did not indulge in any transaction for a holding period of less than 15 days or in repeated sale/purchase of same scrip. Held that the shares were purchased by assessee for investment more so when similar kind of transactions have been considered by AO as investment activity in the preceding years. (AY. 2007-08)

Nalin Pravin Shah .v. ACIT (2014) 98 DTR 420 (Mum.)(Trib.)

S.45: Capital gains –Business income- Share dealing - Business of manufacture and export of electrical goods -Income derived from purchase and sale of shares was held to be Capital gain. [S. 28(i)]

Assessee was a partner in firms which were engaged in the business of manufacture and export of electrical goods and electrical contractors he had shown income derived from sale and purchase of shares as short-term capital gain. AO taxed the said income as business income. Tribunal held that the gain from such investments has also been assessed as capital gain, even though such assessments have been completed under section 143(1) but the same have not been disturbed. From these facts, it can be gathered that the assessee's intention in the purchase of shares was mostly for investment purpose and to have maximum gain. The details of purchase and sale of shares, it is seen that the maximum gain has been on those shares, which have been held for period of 91 to 180 days and 181 to 365 days. If all these factors are considered in totality, it cannot be held that the assessee was engaged in organized and systematic activity of trading of shares. In case of purchase of shares for the purpose of investment, motive is maximizing gain only. Therefore, income from purchase and sale of

shares is to be assessed under the head "capital gain" and not under the head "business income". (AY. 2005-06)

Bipin Ram Chainani .v. Add.CIT (2014) 146 ITD 257 / (2013) 38 taxmann.com 245 (Mum)(Trib.)

S.45: Capital loss-Sale of shares to subsidiary company to avoid stringent action by financial institution-Sale being genuine-Loss is allowable as capital loss.

In order to avoid the stringent action being taken by the financial institution, the assessee sold the shares to its subsidiary company in order to stabilise its financial position. No document had been produced by the Revenue to show that the transaction between the assessee and its subsidiary company was a colourable device. The long-term and short-term capital losses were deductible. (AY. 2001-02)

CIT .v. Wintac Ltd. (2014) 360 ITR 614 (Karn.)(HC)

S.45(5):Capital gains-Compulsory acquisition of land-Accrual-Enhanced compensation-Interest- Taxable in the year of receipt and not to be spread over.[S.2(31),Land Acquisition Act, 1894, S.28]

The assessee were brothers .Their father died leaving land to the assesse and two others who relinquished their rights in the assesee's favour. Bequeathed land was acquired by the State Government and compensation was paid to the assessee. AO brought to tax the compensation in the status of Association of persons and taxed the interest in the year of receipt. On appeal High Court held that assessee were to be assessed as individuals and not an association of persons and that the interest was to be spread over from the year of dispossession of land, that is, the assessment year 1987-88, till the year of actual payment, which was the assessment year 1999-2000. On appeal by the revenue and assessee the Court held that land inherited by the brothers by operation of law hence assessable as individuals and not association of persons .Interest is taxable in the year of receipt and not spread over.

CIT .v. Govindbhai Mamaiya (2014) 367 ITR 498 /271 CTR 31/109 DTR 65 (SC)

Editorial: Judgment of Gujarat High Court in ITA no 8103 of 2009 dt 16-11-2006 was partly affirmed and partly reversed.

S.47A(4):Capital gains-Withdrawal of exemption-Limited liability partnership- Giving of interest-free loans to partners of the LLP does not contravene Proviso (c), though it contravenes Proviso (f), to s. 47(xiiib)-Capital gains have to be computed on the book value of assets transferred & not on market value.[**S.47(xiiib)]**

A private limited company namely Aravali Polymers Pvt. Ltd was converted into a Limited Liability Partnership (LLP) u/s 56 of the Companies Act and the assessee, Aravali Polymers LLP, came into existence. As per s. 58(4) of the Companies Act, the whole of the undertaking of the company stood transferred to and vested in the LLP and the company was deemed to be dissolved. One of the main assets in the company was shares of East India Hotels Ltd. The assessee also received Reserves and Surplus of Rs.3 crore of the company. The assessee gave an amount of Rs.50 crores as interest- free loan to the partners of the LLP in the same proportion as their shareholding in the company on the date of conversion. After the conversion of the company into the LLP, the said shares were sold. The resultant capital gains were offered to tax as long-term capital gains. The assessee claimed that the transfer of the assets by the company to the LLP was exempt u/s 47(xiiib). The AO held that by giving interest-free loans to the partners in the same proportion as their shareholding in the company on the date of conversion, the assessee had contravened proviso (c) & (f) to s. 47(xiiib) and that the exemption granted by s. 47(xiiib) was not available. He held that u/s.47A(4), the transfer of the said shares of EIH by the company to the LLP on conversion was assessable to tax on the basis of the market value of the shares on the date of conversion into the LLP. This was upheld by the CIT(A). On appeal by the assessee to the Tribunal HELD.

(i) Proviso (c) to s. 47 (xiiib) bars the shareholders of the company from receiving any consideration or benefit in any form or manner other than by way of a share in the profit and capital contribution in the LLP. This means that both the company and the LLP must exist for the shareholders of the company to receive any consideration. As, in the present case, the company does not exist after conversion, the question of a violation of Proviso (c) to s. 47(xiiib) does not arise;

(ii) As regards proviso (f) to s. 47(xiiib), it bars payment either directly or indirectly to any partner out of the accumulated profit standing in the accounts of the company on the date of conversion for a period of three years from the date of conversion. Here, the loans given by the assessee to its partners has been paid out of the Reserves and Surplus of the erstwhile Company. This is a clear violation of proviso (f) to s. 47(xiiib). The result is that exemption in s. 47(xiiib) is not available;
(iii) However, the AO's action of invoking s. 47A(4) and of computing capital gains by adopting the market value of the shares on the date of conversion is not correct. S. 47A(4) applies to a case where the exemption u/s 47(xiiib) is available and the conditions laid down in the proviso are not complied with. However, as in the present case, the AY under appeal is the year on which the conversion took place and in that year itself, the conditions prescribed for the benefit of s. 47(xiiib) were not complied with and consequently the provisions of s. 47(xiiib) were not available to the assessee, s. 47A(4) is not attracted. Under s. 45, the market value of the asset transferred cannot be deemed to be the 'consideration'. As the shares were transferred at the book value, the capital gains have to be computed on the basis that the book value is the consideration received for the transfer by way of conversion. (ITA No. 718/Kol/2014, AY. 2011-2012, dt.27.06.2014.)
Aravali Polymers LLP .v. JCIT (Kol.)(Trib.),www.itatonline.org

S. 48 : Capital gains– Cost of acquisition- Indexation –Capital asset inherited- Originally acquired prior to 1.4.81-Base cost inflation index to be taken of FY 1981-92 i.e 100.
Assessee inherited property in AY 07-08. This property was acquired in the year 1979. Held cost inflation index base year to be taken as 1981. Followed Bombay High Court in CIT vs. Manjula J. Shah (355 ITR 474) (AY. 2007-08)
CIT .v. Nita Kamlesh Tanna (Smt). (2014) 220 Taxman 165 (Mag.) (Bom.)(HC.)

S.48: Capital gains-Cost of construction-Local PWD rates should be relied upon rather than Central PWD rates in order to arrive at valuation of renovation and construction of residential property. [S.45]
The assessee incurred expenditure towards extension and renovation of its residential house. The Revenue estimated the cost of renovation and construction over and above the cost claimed by the assessee on the basis of a valuation of the property by a District Valuation Officer and made an addition to the income of the assessee. The addition was upheld by all the three authorities on the ground that the assessee did not point out any flaw in the valuation report. On appeal, the assessee submitted that there was no need for the Revenue to secure the information from the DVO who proceeded to value renovation and cost of construction based on Central Public Works Department rates and not based on State Public Works Department rates, whereas, the Revenue submitted that the assessee had not raised the issue before any authority and, therefore, could not raise it before the High Court. The High Court held that in the orders of all three authorities, the consistent stand of the Revenue was that the assessee was unable to point out any flaw in the valuation report; therefore, the valuation report had to be relied upon. What rate should be used as the basis for arriving at the valuation of the renovation and additional construction definitely was a question of law; therefore, even if such issue was not raised earlier before any authority, it could be entertained before this Court. Further, it held that the cost of labour and the cost of construction could vary from State to State and, therefore, it was just and proper to place reliance on the local PWD rates rather than Central PWD rates in order to arrive at the valuation of the property. In view of the above the matter was remanded back to the AO to apply the local PWD rates. (AY. 2006-2007)
C.S. Daniel .v. DCIT, Central Circle (2014) 220 Taxman 336 (Ker.)(HC)

S. 48: Capital gains–Computation -Legal fees- As no evidence was provided legal fees was held not to be considered as cost of new asset. [S.54]
In the present case deduction of Rs. 1.65 lakhs was claimed to have been paid to builder for legal fees toward purchase of new asset. It was not clarified as to what legal services were provided except merely producing receipt. Further sale agreements were entered into pre-determined standardized formats as crystallized by builder-seller, as builders would not allow buyers to disturb their specimen arguments. As there was no evidence with regard to the actual work undertaken, legal fees could not

be said to be forming part of cost of purchase in respect of legal service of new asset and therefore would not be entitled to deduction under section 54. (AY. 2006 - 2007)
Achyut Ramchandra Samant .v. ACIT (2014) 61 SOT 271(Mum.)(Trib.)

S.49: Capital gains-Previous owner-Cost of acquisition-Family arrangement-A transfer of shares under a family arrangement is for a determinable "consideration" & is not "voluntary". Consequently, the shares are not received under a "gift" & the transferee cannot claim benefit of cost, and holding period, of the transferor [S. 2(42A)(b), 45]
The members of the Bilakhia family entered into a deed of family arrangement with a view to consolidate and equalize values of the assets held by each of the parties. Pursuance to the said family arrangement, the family members transferred the shares of Nestle India Ltd and Hindustan Lever Ltd held by them as investment to the assessee, an investment company in which the individual members of the family had equal interest. The assessee sold the shares and claimed that as it had acquired the shares vide a "gift", in computing the capital gain, the cost of acquisition of the shares to, and the period of holding by, the transferors, had to be considered. The AO rejected the claim though the CIT(A) accepted it. On appeal by the department to the Tribunal HELD allowing the appeal:
(i) On the issue as to whether the shares received on family arrangement is pursuant to a "gift", s. 122 of the Transfer of Property Act 1882 provides that a transfer of moveable or immovable property can be treated as a gift only if the same is made voluntarily and without any consideration. It cannot be said that a family arrangement is "without consideration". In CWT vs. H.H. Vijayaba, Dowgner Maharani Saheb of Bhavnagar Palace **(**1979)117 ITR 784 (SC) it was held that a family settlement or family arrangement which is to buy peace is for good consideration and creates an enforceable agreement between the parties. Consequently it cannot be said that a family arrangement is without consideration and a "gift";
(ii) On the issue as to whether this consideration can be measured in money or monies worth, the purpose of the family arrangement was to equalize the holdings between the respective families of three brothers. Therefore, it cannot be said that consideration for transfer of shares cannot be measured in terms of money or monies worth. The equalization of wealth has only monetary connotation. To avoid disputes cannot be said to be without monetary consideration as it is common knowledge that family disputes ruin the family financially. The family disputes are being settled in monetary terms by resorting to arbitration and in case such settlements is not done, matter travels to the court and the family suffers heavily not only mentally but also financially. Thus, it cannot be said that the consideration for transfer of shares was not for monetary consideration;
(iii) On the issue as to whether the receipt of shares under the family arrangement was "voluntary" or not, the term "voluntary" is defined to mean "free choice; done with free will; without any compulsion ..". The family arrangement cannot be said to be voluntary because it was enforceable and binding on the parties and with the purpose of equalization of wealth of the family members, which had monetary connotation. (ITA No. 981 to 985/Ahd/2009., dt. 30/05/2014. ,(AYs. 2001-02 to 2004-05, 2006-07)
ACIT .v. Bilakhia Holdings P. Ltd. (2014) 65 SOT 195 (Ahd.)(Trib.)

S.50:Capital gains-Depreciable assets-Block of assets-Though gains on depreciable assets held for more than 3 years have to be treated as STCG u/s.50, the gains have to be taxed at the rate applicable to a LTCG.[S.2(11),112]
The assessee sold a flat at Khar for Rs. 35 lakhs. Since the flat was a business asset and had been shown as part of the block of assets, the assessee computed capital gains u/s 50 at Rs. 12.52 lakhs after deducting the WDV of block of assets from the sale price. AO held that as the stamp value of the flats sold was Rs. 59 lakhs, s. 50C should be applied and the said value had to be substituted for the consideration received. The CIT(A) upheld the AO's stand. Before the Tribunal, the assessee claimed that (ii) s. 50C did not apply to depreciable assets and (ii) for the purpose of application of tax rate, the capital gain has to be assessed as long-term capital gain as the flat had been held for more than three years. HELD by the Tribunal:
The assessee's stand that s. 50C does not apply to depreciable assets is not acceptable in view of ITO .v. United Marine Academy(2011) 130 ITD 113(Mum) (SB). As regards the rate of tax, s. 50, which deems the capital gains as short-term capital gain is only for the purposes of sections 48 and 49 which

relate to computation of capital gain. The deeming provisions have to be restricted only to computation of capital gain and for the purpose of other provisions of the Act the capital gain has to be treated as long-term capital gain. Consequently, though for the purpose of computation of capital gain, the flat has to be treated as short-term capital gain u/s.50, for the purpose of applicability of tax rate it has to be treated as long-term capital gain if held for more than three years.(ITA No. 4004/Mum/2011, AY. 2006-07, dt. 17.07.2013)
Smita Conductors Ltd. .v. DCIT (Mum.)(Trib.),www.itatonline.org

S. 50B : Capital gains–Slump sale–Consideration received on sale of business as a going concern is capital receipt and not in the nature of non-compete fee.[S.28(va), 55(2)(a)]
The assessee received consideration on takeover of her proprietary concern and considered the same as capital gains. The AO however considered the same as business receipt since it represented compensation for not carrying out any activity in relation to the business or profession. The CIT(A) and the Tribunal following the decision of the High Court in the case of CIT v. Mediaworld Publications (P.) Ltd. 2011 200 Taxman 1 held that the right to carry on any business had been recognized by the Legislature as a capital asset, taxable u/s. 55 (2)(a) and not u/s. 28(va).

The High Court observed that the agreements entered into for sale had nowhere mentioned that the assessee wanted to continue to carry on the same business and had hence received the consideration as a non-compete fee. The High Court held that the assessee had parted with her controlling interest in the business and had received consideration for the same and hence the same was to be considered as a capital receipt.
CIT v. Sangeeta Wig (2014) 221 Taxman 159(Mag.) (Delhi) (HC)

S.50B: Capital gains–Slump sale–Section applies only to a "sale" for a "monetary consideration" and not to a case of "exchange" of the undertaking for shares under a s. 391/394 scheme of arrangement-No monetary consideration for transfer-Exchange and not a sale-Not a slump sale. [S.2(42C),2(47), Companies Act, S.391, 394]
The assessee transferred its Lift Division to Tiger Elevators Pvt. Ltd under a scheme of arrangement u/s 391 & 394 of the Companies Act, 1956. The transfer of the undertaking took place in exchange of preference shares and bonds issued by Tiger Elevators as per a valuation report. The assessee claimed that the transfer was not liable to tax on capital gains on the basis that there was no "cost of acquisition" of the undertaking. The AO held that the transaction was a "slump sale" as defined in s. 2(42C) and that the gains had to be computed u/s 50B. This was upheld by the CIT (A). On appeal by the assessee to the Tribunal, the Tribunal Bharat Bijilee Ltd. .v. Add. CIT (2012) 54 SOT 571(Mum) accepted the claim of the assessee. On appeal by the department to the High Court HELD dismissing the appeal:

The definition of the term "slump sale" in s. 2(42C) means the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sale. In CIT v. Motors & General Stores (P) Ltd (1967) 66 ITR 692 (SC) it was held that a "sale" meant a transfer for a monetary consideration and that an "exchange" would not amount to a "sale". On facts, scheme of arrangement shows that the transfer of the undertaking took place in exchange for issue of preference shares and bonds. Merely because there was quantification when bonds/preference shares were issued, does not mean that monetary consideration was determined and its discharge was only by way of issue of bonds/preference shares. In other words, this is not a case where the consideration was determined and decided by parties in terms of money but its disbursement was to be in terms of allotment or issue of bonds/preference shares. All the clauses read together and the entire Scheme of Arrangement envisages transfer of the Lift Division not for any monetary consideration. The Scheme does not refer to any monetary consideration for the transfer. The parties were agreed that the assessee was to transfer the undertaking and take bonds/preference shares as consideration. Thus, it was a case of exchange and not a sale. Therefore, s. 2(42C) of the Act was inapplicable. If that was not applicable and was not attracted, then, s. 50B was also inapplicable.(AY. 2005-06)

CIT .v. Bharat Bijlee Ltd.(2014) 365 ITR 258/224 Taxman 282/107 DTR 249/270 CTR 579(Bom.)(HC)

S. 50C : Capital gains – Stamp Valuation – The deeming fiction created by Section 50C applicable only to seller and not buyer.[S.45]

The assessee made an investment in the land. The AO made addition on the difference in value of the land by treating same as unexplained investment. The Tribunal noted that Section 50C will apply to seller only and not the purchaser, thereby deleting the addition made. On appeal by the revenue the High Court held that Section 50C is a deeming fiction applicable only in case of seller and affirmed the view of the Tribunal.

CIT .v. Sarjan Realities Ltd. (2014) 220 Taxman 112 (Mag.) (Guj.)(HC)

S. 50C : Capital gains- Full value of consideration - Stamp valuation-For the purpose of section 50C, land and buildings are not to be considered as separate assets and their joint valuation is to be adopted.[S.45]

The Commissioner (Appeals) adopted the valuation of the land by one authority or method and that of the building by another authority or method. The Tribunal reversed the position holding that the asset in question being land and buildings, had to be valued together. On appeal to the High Court, the latter observed by analysing section 50C that there is scope for accepting the valuation of land in case of the vacant land alone and the valuation of the building in case of the building only, or in case of land and building both. Thus, the valuation has to be adopted in case of transfers of land and building jointly and not separately. (AY.2007-08)

J. Anjaneya Sharma .v.CIT (2014) 221 Taxman 148 (AP)(HC)

S. 50C: Capital gains-Full value of consideration-Stamp valuation- If the stamp duty valuation is higher than the consideration received, the AO must refer the valuation to the DVO even if there is no request by the assessee.[S.45,54EC]

The assessee sold a piece of land for Rs.10 lakhs and offered capital gains. However, the AO, CIT(A) & Tribunal held that as the market value of the land was assessed by the District Sub Registrar at Rs.35 lakhs for stamp duty purposes, which was duly paid by the buyer, the consideration had to be taken at that figure u/s 50C. On appeal by the assessee to the High Court HELD allowing the appeal:

No inference can be made that the assessee has accepted the price fixed by the District Sub Registrar for stamp duty purposes as the fair market value of the property because the assessee has nothing to do in the matter. Stamp duty is payable by the purchaser & it is for the purchaser to either accept it or dispute it. The assessee could not, on the basis of the price fixed by the Sub-Registrar, have claimed anything more than the agreed consideration of a sum of Rs.10 lakhs which, according to the assessee, was the highest prevailing market price. It would follow automatically that his case was that the fair market value of the property could not be Rs.35 lakhs as assessed by the District Sub Registrar. In a case of this nature the AO should, in fairness, have given an option to the assessee to have the valuation made by the Departmental Valuation Officer (DVO) contemplated u/s 50C. As a matter of course, in all such cases the AO should give an option to the assessee to have the valuation made by the DVO. The valuation by the DVO is required to avoid miscarriage of justice. The legislature did not intend that the capital gain should be fixed merely on the basis of the valuation to be made by the District Sub Registrar for the purpose of stamp duty. The legislature has taken care to provide adequate machinery to give a fair treatment to the citizen/taxpayer. There is no reason why the machinery provided by the legislature should not be used and the benefit thereof should be refused. Even in a case where no such prayer was made the AO, discharging a quasi judicial function, has the bounden duty to act fairly and to give a fair treatment by giving him an option to follow the course provided by law.(ITA No. 221 of 2013,dt.13.03.2014.)

Sunil Kumar Agarwal .v. CIT(2014)225 Taxman 211 (Cal.)(HC)

S. 50C : Capital gains-Full value of consideration - Stamp valuation- AO cannot straightaway adopt stamp duty value as consideration for capital gains but must offer assessee benefit of reference to DVO for valuation.

It is difficult to accept the proposition that the assessee had accepted that the price fixed by the District Sub Registrar was the fair market value of the property. No such inference canbe made as against the assessee because he had nothing to do in the matter. Stamp duty was payable by the purchaser. It was for the purchaser to either accept it or dispute it. The assessee could not, on the basis of the price fixed by the Sub-Registrar, have claimed anything more than the agreed consideration which, according to the assessee, was the highest prevailing market price. It would follow automatically that his case was that the fair market value of the property could not be the value as assessed by the District Sub Registrar. In a case of this nature the assessing officer should, in fairness, have given an option to the assessee to have the valuation made by the departmental valuation officer contemplated under Section 50C. As a matter of course, in all such cases the assessing officer should give an option to the assessee to have the valuation made by the departmental valuation officer to avoid miscarriage of justice. The legislature did not intend that the capital gain should be fixed merely on the basis of the valuation to be made by the District Sub Registrar for the purpose of stamp duty. The legislature has taken care to provide adequate machinery to give a fair treatment to the citizen/taxpayer. There is no reason why the machinery provided by the legislature should not be used and the benefit thereof should be refused. Even in a case where no such prayer is made by the assessee, who may not have been properly instructed in law, the assessing officer, discharging a quasi-judicial function, has the bounden duty to act fairly and to give a fair treatment by giving him an option to follow the course provided by law . (ITA No. 1065/kol/2011,dt. 27.10.2014.) (AY.2006-07)
ITO .v. Onkarnal kajaria family Trust (Kol.)(Trib.) (www.itat.nic.in)

S. 50C : Capital gains - Full value of consideration - Stamp valuation-Reference to DVO cannot be made if assessee has challenged the valuation by the stamp authorities and even if the said challenge is dismissed on ground that as purchaser paid the duty, assessee had no locus standi to challenge stamp valuation.[S.45]
The mandate of section 50C is clear and the sale consideration shall be deemed to be the value adopted or assessed by the Stamp Valuation Authority. The only exception provided is that firstly the assessee should claim before AO that such value adopted or assessed by the Stamp Valuation Authority exceed fair market value and secondly the assessee should not have disputed such valuation adopted in any appeal or revision and no reference is made before any other authority, court or High Court challenging the value adopted by the Stamp Valuation Authority. In the light of aforementioned facts it can be said that the value adopted and assessed by the Stamp Valuation Authority under sub-section (1) was disputed by the assessee in the appeal, revision and even before Hon'ble High Court. If it is so, then according to the provisions of section 50C the assessee cannot obtain the benefit as provided in sub-section(2) of section 50C as neither of the conditions described in sub-section(2) has been fulfilled by the assessee. In this view of the situation, neither the AO nor Ld. CIT(A) could adopt sale consideration of the property any amount less than the value adopted or assessed by the Stamp Valuation Authority as section 50C does not recognize such curtailment of the sale consideration in any manner. (ITA No. 2835/Mum/2013, dt. 31.10.2014.) (AY. 2009-10)
Seksaria Industries Pvt. Ltd. .v. ITO (Mum.)(Trib.); www.itatonline.org

S. 50C : Capital gains - Full value of consideration - Stamp valuation- – Addition made to assessee's business income. [S.43CA]
Tribunal held that the assessee is engaged in the business of selling of flats after construction, the income from which is chargeable under the head profits and gains of business and profession, the provisions of section 43CA (applicable w.e.f. A.Y. 2014-15) cannot apply to substitute the actual sale consideration with the stamp value in the previous year relevant to AY. 2009-10 under consideration. Therefore, the conclusion drawn by the learned CIT(A) in invoking the provisions of section 50C for sustaining the addition has no legal stand. (AY. 2009-10)
Neelkamal Realtors & Erectors India (P) Ltd. .v. Dy. CIT (2014) 159 TTJ 471 (Mum.)(Trib.)

S.50C: Capital gains-Full value of consideration-Stamp valuation– Assessee objected to the stamp duty valuation - valuation should be referred to the Valuation Cell.
The assessee had recorded STCG on sale of property in which it had one third share. The AO noticed that the market price of the property was Rs. 7,79,635 as against Rs. 6,00,000 recorded by the

assessee and thus made an addition to the capital gain of the assessee. The CIT(A) confirmed the addition as there was not much difference between the sale price adopted by the assessee and the sale price determined by the stamp duty authority.
On appeal by the assessee, the Tribunal held that if the assessee was not satisfied with the stamp duty valuation adopted by the AO, the AO ought to refer the valuation of the property to the Valuation Cell and then decide the matter. The case was thus remanded back to the AO for fresh consideration. (AY. 2006-07)
Mansukhlal Ghelabhai Doshi .v. ACIT (2014) 29 ITR 628 (Rajkot)(Trib.)
Nilesh Mansukhlal Doshi.v. ACIT (2014) 29 ITR 628 (Rajkot)(Trib.)
Nilay Masukhlal Doshi .v. ACIT (2014) 29 ITR 628 (Rajkot)(Trib.)

S.54 : Capital gains- Transfer-Profit on sale of property used for residence-If an agreement to sell is entered into within the prescribed period, there is a transfer of some rights in favour of the vendee. Fact that sale deed could not be executed within the time limit owing to supervening problem is not a bar for s. 54 exemption-Entitled exemption. [S.2(47), 45]
Consequences of execution of the agreement to sell are very clear and they are to the effect that the appellants could not have sold the property to someone else. In practical life, there are events when a person, even after executing an agreement to sell an immoveable property in favour of one person, tries to sell the property to another. In our opinion, such an act would not be in accordance with law because once an agreement to sell is executed in favour of one person, the said person gets a right to get the property transferred in his favour by filing a suit for specific performance and therefore, without hesitation we can say that some right, in respect of the said property, belonging to the appellants had been extinguished and some right had been created in favour of the vendee/transferee, when the agreement to sell had been executed. A right in respect of the capital asset, viz. the property in question had been transferred by the appellants in favour of the vendee/transferee on 27.12.2002. The sale deed could not be executed for the reason that the appellants had been prevented from dealing with the residential house by an order of a competent court, which they could not have violated. As held in Oxford University Press vs. CIT [(2001) 3 SCC 359] a purposive interpretation of the provisions of the Act should be given while considering a claim for exemption from tax and one can very well interpret the provisions of Section 54 read with Section 2(47) of the Act, i.e. definition of "transfer", which would enable the appellants to get the benefit under Section 54 of the Act.(AY. 2005-06)
SanjeevLal .v. CIT(2014) 105 DTR 305/365 ITR 389/269 CTR 1/225 Taxman 239(SC)
Shail Motilal (Smt).v. CIT(2014) 105 DTR 305/365 ITR 389(SC)

S. 54 : Capital gains-Profit on sale of property used for residence-Two flats, even though acquired under different agreements & from different sellers, are one residential unit if there is a common kitchen-Entitled exemption.[S.54F]
The department's argument, that the law laid down by the Tribunal in ITO v/s Sushila M. Jhaveri (2007) 107 ITD 327 (Mum)(SB) and confirmed by this Court in CIT v/s Raman Kumar Suri (Income Tax Appeal No.6962 of 2010, decided on 27.11. 2012) on the availability of exemption u/s 54 is applicable only when the house purchased is a single unit and not where two flats, one acquired in the assessee's name and another jointly in the names of the assessee and his wife but under two distinct agreements and from different sellers have been taken into consideration, is not acceptable. Though these flats were acquired under two distinct agreements and from different sellers, the map of the general layout plan as well as internal layout plan in regard to flat Nos.103 and 104 indicate that there is only one common kitchen for both the flats. The flats were constructed in such a way that adjacent units or flats can be combined into one. The admitted fact is that the flats were converted into one unit and for the purpose of residence of the assessee. Thus, though the acquisition of the flats may have been done independently but eventually they are a single unit and house for the purpose of residence. (AY.2007-08)
CIT .v. DevedasNaik (2014) 366 ITR 12(Bom.)(HC)

S. 54 : Capital gains - Investment in a residential house –Cost of construction made in flats on different floors –Entitled to exemption in respect of all flats.

Assessee claimed exemption u/s. 54 on account of investment/cost of construction made in flats on different floors which were in his possession as his residential house. Assessee was entitled to exemption in respect of all flats. (AY. 2005-06)

Dy. CIT .v. Jai Trikanand Rao (2014) 149 ITD 112 / 41 taxmann.com 453 (Mum.)(Trib.)

S. 54: Capital gains - Profit on sale of property used for residence -Expenditure on improvement / renovation for making it habitable it would be eligible as investment in new asset. [S.54F]

Assessee claimed cost of renovation as part of cost of acquisition of new residential house for purpose of deduction under S. 54 of the Act. The AO disallowed cost of renovation holding that renovation was not in connection with any structural damage to house and was only in respect of plastering and renovating of wires which cannot be treated as making house habitable. CIT (A) confirmed disallowance made by AO. The Tribunal held that the residential house for purpose of section(s) 54 and 54F means a habitable house and Investment made up to stage of making house as habitable to be considered as investment in purchase of house. Assessee chose to purchase a house and incurred bonafide expenditure on improvement/renovation for making it habitable it would be eligible as investment in new asset for section 54 of the IT Act.(AY. 2009-10)

Meher R. Surti .v. ITO (2014) 61 SOT 5 (URO.)(Mum.)(Trib.)

S.54: Capital gains - Profit on sale of property used for residence-Income from building is chargeable to income tax under the head income from house property it is not necessary that the assessee must earn income from such property-Exemption was allowed.

The assessee was owner of a land on which a residential building was constructed with funds of assessee's husband. The assessee sold said property and invested sale consideration in purchasing a new residential house property and claimed exemption under section 54. Exemption was denied to assessee on the ground that assessee was not owner of the house property and no income had been assessed relating to the said property in hands of assessee under head 'House property' Tribunal held that the requirement of s. 54 is that the income of the building which is being sold should be chargeable under the head "income from house property". The requirement of section is not that the assessee must earn income from said property. If there was a tenant then the income from the property was chargeable to tax. Therefore, exemption also cannot be denied to the assessee on the ground that assessee did not show any income chargeable under the head "income from house property. There cannot be any dispute on the fact that the new residential property purchased by the assessee and her husband is fulfilling the criteria for exemption u/s. 54, as the revenue itself has granted such exemption to the husband of the assessee for his 50% share. Exemption u/s. 54 has wrongly been denied in the case of assessee.(AY. 2004–05)

Sheela Bhagwandas Nichlani(Mrs.) .v. ITO (2014) 146 ITD 244 / (2013) 38 taxmann.com 289 /161 TTJ 496/100 DTR 370(Mum.)(Trib.)

S. 54B : Capital gains- Land used for agricultural purposes –Distance to be measured from approachable road.[S.2(14)(iii)(b)]

For the purpose of determining capital gain on the sale of Agricultural land, the existence of the Agricultural land should be measured from the approachable road. Not as per sec. 2(14)(iii)(b) stipulations.(AY. 2007-2008)

CIT .v.Shabbir Hussain Pithawala (2014)265 CTR 606(MP)(HC)

S. 54EC: Capital gains-Investment in bonds-Exemption available even in case of gains arising from sale of depreciable assets.[S.50]

The assessee sold two properties and purchased REC bonds to claim deduction u/s. 54EC. The AO did not grant deduction u/s. 54EC in respect of capital gain arising out of one of the property. The CIT(A) relying on decisions of the Bombay High Court and Gauhati High Court allowed the deduction u/s. 54EC on the sale of depreciable assets, which according to him was held by the assessee for more than 36 months. The Tribunal confirmed the order of CIT(A).The High Court

following its own decision in the case of CIT v. Aditya MedisalesLtd. (2013) 38 taxman.com 244 held that the deeming fiction u/s.50 cannotrestrict the application of section 54EC if the assessee makes investments in thespecified assets and hence the deduction u/s. 54EC was available in case ofcapital gains arising out of transfer of depreciable assets.

CIT .v. Polestar Industries (2014) 221 Taxman 423 (Guj.)(HC)

S.54EC: Capital gains – Short term or long term - Investment in bonds - Date of allotment of plot to be considered for purpose of capital gains. [S. 45]

Assessee was allotted the plot on 3/08/1999 and 96% of the of the amount was paid by 3/10/99. Possession of the property acquired on 12/12/2005 and the same was sold on 9/1/2008. Date of allotment of plot to be taken for the purpose of computing long term capital gains.

CIT .v. K. Ramakrishnan (2014)363 ITR 59 (Delhi)(HC)

S. 54EC : Capital gains - Investment in bonds -The deeming fiction of long-term capital gain to be treated as short-term capital gain is restricted only to section 50 and would have no application to other provisions such as section 54EC. [S. 50]

The assessee sold its factory shed and had earned long-term capital gain of Rs.1.31 crores. However, as the asset sold was depreciable asset, the gains were computed in terms of Section 50 of the Income Tax Act, 1961. The respondent - assessee invested the capital gains arising from the transfer of a long term asset as specified under Section 54EC of the Act to claim deduction from tax. The assessing officer disallowed the claim on the ground that the gain is a short-term gain in view of Section 50 of the Act. The Commissioner (appeals) upheld the order of the AO. The Tribunal reversed the order of the Commissioner (Appeals). On an appeal by the Department, the High Court, following the order of the Ace Builders (P) Limited (281 ITR 210) (Bom) held that the deeming fiction of a long term capital gain to be treated as a short term capital gain is restricted only to Section 50 of the Act and would have no application to other provisions such as Section 54E of the Act. The above rationale would be equally applicable to the claim of deduction under Section 54EC of the Act. (AY. 2008-09)

CIT .v. United Paper Industries (2014) 221 Taxman 158 (Bom)(HC)

S.54EC: Capital gains-Investment in Bonds- Short term or long term-Assessee has acquired beneficial interest to the property on paying 96% of the amount-Entitled to exemption as long term. [S.2(29B, 2(42A), 2(42B), 45]

Assessee had paid 96% of the consideration on 3rd October 1999 for purchase of plot of land. The assessee got the possession of the land on 12-12-2005 . The assessee sold the land on 9-01-2008 and invested in capital bonds and claimed exemption under section 54EC.AO held that the capital gain is short term capital gain and disallowed the claim under section 54EC. Tribunal allowed the claim of assessee. On appeal by revenue the court up held the view of the Tribunal by observing that the assessee had acquired the beneficial interest to the property at least 96% of the amount on payment by 3rd October 1999.Order of Tribunal was up held.(AY. 2008-09)

CIT .v. K. Ramakrishnan (2014) 363 ITR 59/225 Taxman 123 (Delhi)(HC)

S.54EC:Capital gains-Investment in bonds-The term "month" in S.54E, 54EA, 54EB & 54EC does not mean "30 days" but the "calendar month". The expression "within a month" means "before the end of the calendar month".

The term 'month' is not defined in the Income-tax Act. Therefore, its meaning has to be understood as per the General Clauses Act, 1897 which defines the word "month" to mean a month reckoned according to the British calendar. In CIT v. Munnalal Shri Kishan (1987) 167 ITR 415 (All) it was held in the context of limitation u/s 256(2) that the word 'month' refers to a period of 30 days and, therefore, the reference to "six months" in s. 256(2) is to "six calendar months" and not "180 days". On some occasions, the Legislature had not used the term "Month" but has used the number of days to prescribe a specific period. For example, the First Proviso to s. 254(2A) provides that the Tribunal may pass an order granting stay but for a period not exceeding 180 days. This is an important distinction made in the statute while subscribing the limitation/ period. This distinction thus resolves the present controversy by itself. .)

Alkaben B. Patel .v. ITO(2014)148 ITD 31/101 DTR 251/161 TTJ 417/31 ITR 231(SB)(Ahd.)(Trib.)

S. 54F : Capital gains-Investment in a residential house–Acquisition of five flats in a multi storeyed building having single door no was held to be eligible to exemption-Prior to amendment Act 2014, w.e.f. 1 ST April 2005.[S.45]

Assessee having entered in to an agreement with a developer of her land whereby she was entitled to receive 43.75 percent of the built up area which was eventually translated in to five flats having common door no was held to be eligible exemption in respect of all the five flats .Prior to the amendment of section 54F by Finance (No 2) Act, 2014, which came in to effect from 1st April , 2015.(AY.2007-08)

CIT .v. V.R. Karpagam (2014) 109 DTR 504 (Mad.)(HC)

S. 54F : Capital gains- Investment in a residential house - Extent of construction of residential building and facilities provided in such building are not relevant.

In the return filed, the assessee claimed exemption u/s. 54F of capital gains earned during the year. The AO held that the assessee had not purchased any residential property within the prescribed time period and hence disallowed the exemption. The CIT(A) confirmed the Order of the AO. The Tribunal, however, held that the residential property was actually purchased based on the material on record.

On appeal by the department, the High Court observed that the Act does not provide as to what should be the extent of construction of residential building or what facilities should be provided in such constructions to be eligible for the exemption. Accordingly, the High Court held that all that the Authorities have to look into is, whether what is purchased is a residential construction or not ? if the material on record shows that prior to sale, the vendor lived there with his family and he has sold the site along with the residential construction, merely because the property is not suitable to the assessee and construction material are kept there, is not a ground to deny exemption under Section 54F of the Act"

CIT. .v. R. Balaji (Dr.) (2014) 222 Taxman 305 (Karn.)(HC)

S. 54F : Capital gains - Investment in a residential house - Benefit cannot be denied on ground that construction of house had commenced before sale of shares 'original asset'.

The assessee, an individual, had sold shares and the sale proceeds were invested in construction of house property and an exemption was claimed u/s. 54F of the Act.The AO rejected the claim for benefit u/s. 54F on the ground that the construction of the house had commenced before the date of sale of shares. The CIT(A) and the Tribunal both allowed the assessee benefit u/s. 54F.

The High Court dismissing the departmental appeal held that it is not stipulated or indicated in the section that the construction must begin after the date of sale of the original/old asset. There is no condition or reason for ambiguity and confusion which requires moderation or reading the words of the said sub-section in a different manner.Section 54F is a beneficial provision and is applicable to an assessee when the old capital asset is replaced by a new capital asset in the form of a residential house. Once an assessee falls within the ambit of a beneficial provision, then the said provision should be liberally interpreted. (A.Y. 2009-2010)

CIT .v. Bharti Mishra (2014) 222 Taxman 2 / 265 CTR 374/98 DTR 1 (Delhi)(HC)

S.54F: Capital gains–Investment in a residential house -Construction of house–Purchase and demolition of old house-Construction having beenccariied out with in three years from the date of sale of capital asset qualifies for exemption.[S.45]

The word "construction" for the purposes of s. 54F has to be given a realistic, practical and pragmatic meaning keeping in mind the object and purpose of the provision. The assessee, an individual, sold a property and declared capital gains of Rs. 51,71,994. He purchased a fully built up property, demolished it and rebuilt it. The money spent on construction as declared by the assessee was Rs. 59,98,451. The assessee claimed exemption under s. 54F. The AO denied the exemption. The AO held that there was neither the need for the assessee to reconstruct nor renovate the purchased

property as it was already fully constructed. Held, Assessee was entitled to exemption as construction was carried out within the outer limit of three years.(AY. 2007-08)

CIT .v. Ashok Kumar Ralhan (2014) 360 ITR 575/224 Taxman 137(Mag)/109 DTR 150(Delhi)(HC)

S. 54G : Capital gains – Shifting of industrial undertaking from urban area –Eligible exemption.[S.45]

The assessee had sold its land located at City belt area and set up an industrial undertaking at Koppur village and claimed the exemption under section 54G. The Tribunal held that the object of enacting section 54G was to deurbanize and remove industries from populated area and promote industrialization in underdeveloped areas. Section 54G is a provision intended for promoting inclusive growth of the country. In such a situation, giving a very narrow interpretation to the said section will defeat the very purpose thereof. Thusthe assessee was eligible for claiming exemption under section 54G.

Edac Engineering Ltd. .v. ACIT (2014) 159 TTJ 526 /149 ITD 341**(Chennai)(Trib.)**

S. 55: Capital gains - Cost of improvement - Cost of acquisition - Fair Market Value-The fair market value for purpose of computing capital gain tax is the price which property would fetch on sale in the open market on a relevant date - The guideline value prescribed for the purpose of stamp duty registration or net wealth value under the Wealth Tax Act could not be the guiding factor for determining fair market value. [S.2(22B]

The assessee had purchased land and buildings in 1960s. She sold the said property on 4-11-2000. For the purpose of computation of the capital gain, the assessee took the value of the property as on 1-4-1981. The AO required the assessee to file the valuation report of the property as on 1-4-1981. The assesse did not furnish such report but filed the computation of net wealth as on 31-3-1992, showing the value of the property as on 31-3-1992 for the purpose of wealth tax. In absence of any valuation report, the AO obtained the details from the office of the sub-registrar and accordingly, capital gains payable was assessed on that basis. The Commissioner (Appeals) dismissed the appeal. On appeal, the Tribunal held that though the guideline value for registration may not be adopted as conclusive evidence for ascertaining the value of the property, the value of the property written by the assessee in wealth tax return could be taken into consideration. The Hon'ble Court held that the 'fair market value' had been defined under section 2(22B), specifically in relation to the capital asset to calculate the capital gain tax which made it clear that fair market value was the price that the capital asset would ordinarily fetch on sale in the open market on the relevant date and the guideline value prescribed for the purpose of stamp duty and registration under the Karnataka Stamp Act and the Indian Registration Act or the net wealth value arrived at under the provisions of the Wealth Tax Act could not be a guiding factor to determine fair market value. (AY.2001-02)

Krishna Bajaj (Smt.) .v. ACIT (2014) 221 Taxman 431 (Karn.)(HC)

S.55:Capital gains-Cost of acquisition-AO could not substitute valuation of registered valuer-Order of Tribunal was confirmed.[S.260A]

Memorandum of understanding reflected higher sale price but agreement to sell and sale deed recorded a lower figure. Held, there was no material to suggest excess consideration was actually paid. Also, limited use of land was allowed to the purchaser of land. There was no evidence other than memorandum of understanding to controvert evidence. Held, without further evidence, Assessing Officer could not substitute valuation of registered valuer. In light of concurrent factual finding of Commissioner (Appeals) and Tribunal, held no question of law arose for consideration.

CIT .v. HirabenGovindbhai Patel (2014) 362 ITR 59 (Guj.)(HC)

S.55A:Capital gains–Cost of acquisition–FMV as on 1.4.1981-Reference to DVO-Amendment of s. 55A(a) by the Finance Act, 2012 is effective from 1.7.2012 and is not retrospective in nature.[S.45)]

Assessee adopted the value of the property at Rs. 35.99 lakhs as on 1—4-1981 ,which was much more than FMV of Rs. 6.68 lakhs as determined by the DVO. Therefore, s. 55A(a) could not be invoked. Amendment of s. 55A(a) by the Finance Act, 2012 is effective from 1.7.2012 and is not retrospective in nature.Decision in CIT v.Daulat Mohta (HUF) ITA no 1031 of 2008 dt 22-9-2008 was followed(2014) 360 ITR 680(Bom)(HC) Order of Tribunal was affirmed. (AY. 2006-07)
CIT .v. Puja Prints (2014) 98 DTR 177/360 ITR 697/265 CTR 124/224 Taxman 22(Bom.)(HC)

S.55A: Capital gains – Reference to Valuation Officer - Value of the capital asset shown by the assessee more than its fair market value.
Reference to the Departmental Valuation Officer can only be made in cases where the value of the capital asset shown by the assessee is less than its fair market value as on April 1, 1981. Where the value of the capital asset shown by the assessee on the basis of the approved valuer's report was more than its fair market value, reference under s. 55A was not valid.
CIT .v. Daulal Mohta (HUF) (2014) 360 ITR 680 (Bom.)(HC)

S. 55A : Capital gains - Reference to Valuation Officer-Land-Reference to valuation Officer was held to be valid- Valuation in case of land should be arrived at by taking into account adverse factors attached to land [S. 50C ,131(1)(d)]
Assessee sold an agricultural land to his family member for a consideration of Rs. 2.96 crore and declared capital gain. AO made reference to DVO who valued said land at Rs. 3.65 crore. AO issued commission under section 131(1)(d) to DVA for ascertaining fair value under section 55A. AO taking market value as determined by DVO, made addition. Before Tribunal the assesse contended that reference made by the AO under section 131(1)(d) was illegal as there was a separate provision for reference to valuation Officer under section 55A of the Act. Tribunal held that AO was justified in issuing commission under section 131(1)(d) to DVD for ascertain fair market value under section 55A of the Act. Assessee also contended that while making valuation of land DVO had not considered that transaction was more of family settlement rather than actual sale; that saleable area was much less since road was proposed by IDA which was going through land in question; and that construction made was of no use since road was proposed on said land and, thus, it had to be demolished sooner or later. Keeping into account factors pointed out by assessee which were going to adversely affect fair market value of land, AO. should reduce valuation arrived at by DVO by 20 per cent and re compute capital gain accordingly.(AY.2008-09)
Jai Kumar Chawla .v. ITO (2014) 149 ITD 38 / (2013) 39 taxmann.com 188 (Indore)(Trib.)

S. 56 : Income from other sources – Corporation formed after division of the states to pay tax in the specified ratio.
The Assessee, UP State Forest Corporation purchased FDRs from undivided funds in undivided State of UP and same was kept in commercial bank to earn interest. On formation of new State of Uttaranchal after division of UP State, notification was passed whereby fund was divided in ratio of 46:54 percent respectively in favour of old and new State Forest Corporations. The department taxed the entire income in the hands of the assessee. The assessee contended that the state was divided in the ratio of 46:54 and accordingly FDR should also be divided. The High Court observed that the FDRs were purchased from the undivided funds and consequently by virtue of the notification the state was divided in the ratio of 46:54%. Accordingly the High Court held that interest income has to be divided an only 46% to be taxable in the hands of the assessee and the rest 54% to be taxable in the hands of Uttaranchal Forest Development Corporation. (AY. 2002-03 to 2004-05)
CIT .v. UP Forest Corporation (2014) 220 Taxman 15 (Mag.) (All.)(HC)

S.56(2)(vii):Income from other sources-Section does not apply to bonus & rights shares offered on a proportionate basis even if the offer price is less than the FMV of the shares.[Companies Act, 1956, S.81]
The assessee held 15,000 shares in Dorf Ketal Chemicals Pvt. Ltd representing 4.98% of the share capital. Pursuant to a further issue, it was allotted 1,94,000 shares at the face value rate of Rs.100 each, on a proportionate basis. The AO held that as the book value of the shares was Rs.1,538 per share, computed under Rules 11U & 11UA), the difference of Rs.1,438 per share (aggregating Rs.

27.89 crore) was "inadequate consideration" and assessable to tax u/s 56(2)(vii)(c). This was upheld by the CIT(A). On appeal by the assessee to the Tribunal HELD allowing the appeal:
S.56(2)(vii)(c)(ii) provides that where an individual or a HUF receives any property for a consideration which is less than the FMV of the property, the difference shall be assessed as income of the recipient. S. 56(2)(vii) does not apply to the issue of bonus shares because there is a mere capitalization of profit by the issuing-company and there is neither any increase nor decrease in the wealth of the shareholder as his percentage holding remains constant. The same argument applies pari materia to the issue of additional shares to the extent it is proportional to the existing share-holding because to the extent the value of the property in the additional shares is derived from that of the existing shareholding, on the basis of which the same are allotted, no additional property can be said to have been received by the shareholder. The fall in the value of the existing holding has to be taken into account. As long as there is no disproportionate allotment, i.e., shares are allotted pro-rata to the shareholders, based on their existing holdings, there is no scope for any property being received by them on the said allotment of shares; there being only an apportionment of the value of their existing holding over a larger number of shares. There is, accordingly, no question of s. 56(2)(vii)(c) getting attracted in such a case. A higher than proportionate or a non-uniform allotment though would attract the rigor of the provision to the extent of the disproportionate allotment and by suitably factoring in the decline in the value of the existing holding (AY. 2010-11)
Sudhir Menon HUF .v.ACIT(2014) 148 ITD 260/103 DTR 145/162 TTJ 425(Mum.)(Trib.)

S. 57(iii):Income from other sources- Interest-Borrowed fund not utilsed for the purpose of business-Interest not allowable as deduction.
When the borrowed funds were not utilized in the course of business to earn profit, the interest paid on the borrowed funds were not allowable as deduction u/s 57(iii).(AY. 1995-96 to1997-98)
CIT v. Subrata Roy (2014) 265 CTR 481 (All.)(HC)
CIT v. Srivastava, O.P. (2014) 265 CTR 481 (All.)(HC)

S. 57(iii):Income from other sources-Interest-Borrowed-Shares-Tribunal was justified in sending the matter back.
It is not justified to allow the deduction by the Tribunal without examining the facts when the Assessing Officer noticed that the assessee is borrowing funds to buy shares of a closely held company to reduce his tax liability. The matter was rightly remanded back.(AY.1994-95)
CIT v. Srivastava, O. P. (2014) 265 CTR 505 (Delhi)(HC)

S. 57(iii):Income from other sources-Interest on funds borrowed for investment in shares is allowable expenditure,though no dividend is received.[S.37(1),56]
Interest on funds borrowed for investment in shares is allowable expenditure,though no dividend is received.
Sri Saytasai Properties and Investment P. Ltd. .v. CIT (2014) 361 ITR 641/106 DTR 420/270 CTR 210(Cal.)(HC)

S. 57(iii) : Income from other sources-Interest paid on a loan taken to avoid premature encashment of a fixed deposit is deductible against the interest earned on the fixed deposit. [S.36(1)(iii)]
The assessee placed a fixed deposit of Rs 1 crore with ICICI Bank on which she earned interest of Rs 11.77 lakhs. The assessee took a loan of Rs. 75 lakhs on the security of the said fixed deposit and paid interest of Rs. 4.36 lakhs thereon. The assessee claimed that the loan was taken to avoid premature encashment of the fixed deposit and the interest paid on the loan had to be deducted against the interest earned on the fixed deposit u/s 57(iii). The AO & CIT(A) rejected the claim. On appeal by the assessee to the Tribunal HELD allowing the appeal:
S. 57(iii) allows a deduction of "any…expenditure (not being in the nature of capital expenditure) laid out or expended wholly and exclusively for the purpose of making or earning such income". Thuseven in a situation in which proximate or immediate cause of an expenditure was an event unconnected to earning of the income, in the sense that the expenditure was not triggered by the objective to earn that income, but the expenditure was, nonetheless, wholly and exclusively to earn or

protect that income, it will not cease to be deductible in nature. It is also important to bear in mind the fact that a borrowing against fixed deposit cannot be considered in isolation of a fixed deposit itself inasmuch as, going by the admitted facts of this case, the interest chargeable on the fixed deposit itself is linked to the interest accruing and arising from the fixed deposit. On these facts, in order to protect the interest earnings from fixed deposits and to meet her financial needs, when an assessee raises a loan against the fixed deposits, so as to keep the source of earning intact, the expenditure so incurred in wholly and exclusively to earn the fixed deposit interest income. The authorities below were apparently swayed by the fact that the borrowings were triggered by assessee's financial needs for personal purposes and, by that logic, the borrowing cannot be said to be wholly and exclusively for the purposes of earning interest income, but what this approach overlooks is whether the expenditure is incurred for directly contributing to the beginning of or triggering the source of income or whether the expenditure is for protecting, and thus keeping alive, that source of income, in either case it is expenditure incurred wholly and exclusively for the purpose of earning that income.The assessee could have gone for premature encashment of bank deposits, and thus ended the source of income itself, as well, but instead of doing so, she resorted to borrowings against the fixed deposit and thus preserved the source of earning. The expenditure so incurred is an expenditure incurred wholly and exclusively for earning from interest on fixed deposits. We are alive to the fact that in the case of a business assessee, and in a situation in which the borrowings against fixed deposits were resorted to for use in business, consideration for end use of funds so borrowed would be relevant because the interest deduction is claimed as a business deduction u/s 36(1)(iii). That aspect of the matter, however, is academic in the present context.(ITA No. 176/Agra/2013, AY. 2008-09, dt. 18/07/2014.)

Raj Kumari Agarwal .v. DCIT 150 ITD 597 (Agra)(Trib.)

S. 68: Cash credits –Gifts-Burden of proof on assessee-Explanation not satisfactory-Addition was held to be justified.

Court held that the Tribunal had considered the materials on record and come to conclusions which were purely factual in nature. The Tribunal considered several factors to come to the conclusion that the transactions were not genuine and the so-called donors did not have the capacity to give such large gifts. In that view of the matter, though the identity of the donors was established, two other important elements, namely, that of the genuineness of the transactions and the creditworthiness of the donors were not established. The Tribunal had assessed the facts in the proper perspective and come to a conclusion which could not be stated to be perverse. The amounts were assessable as income of the assessee. (AY. 2005-2006)

Kaushal H. Patel .v. ITO (2014) 365 ITR 383 (Guj.)(HC)

S. 68 : Cash credits–Identity, creditworthiness and genuineness of transaction not established merely by filing bank account details.

During the course of the assessment proceedings, the assessee claimed that adequate materials were produced by it to establish that the transaction vis-à-vis creditors was genuine. It produced bank account details of the creditors which was sufficient to prove the identity and genuineness of those parties and transactions. The AO however contended that the bank statements were not conclusive proof of identity and creditworthiness of the creditors and since the assessee had failed to produce confirmation from their parties and prove their identity, the same was added to the income of the assessee. The CIT(A) held that the information provided by the assessee was sufficient and therefore reversed the Assessment Order. The Tribunal disapproved the order of the CIT(A) and passed an order in favour of the revenue.

The High Court dismissing the appeal filed by the assessee observed that the proof of genuineness had to be produced and established by the assessee at the first instance. The High Court following its own decision in the case of R B Mittal v. CIT (2000) 246 ITR 283 held that by merely filing bank account details of the alleged creditors,was not enough to hold that the assessee had satisfied the conditions of Section 68. (AY. 2005-2006)

Gayathri Associates .v. ITO (2014) 221 Taxman 143(Mag.) (AP)(HC)

S. 68 : Cash credits–Gifts-Gift received from family friends is to be treated as undisclosed income when relationship or occasion to receive the gift cannot be established.

The assessee received certain sums as gifts from family friends who lived in a foreign country. The AO found that the donors were not related to the assessee by blood and there was no specific occasion on account of which the alleged gifts were received by the assessee thereby treating the gifts as undisclosed income.
The CIT(A) deleted the addition, however, the ITAT restored the addition.
The High Court dismissing the appeal filed by the assessee, observed that the gifts had been made by the donors who were neither related to the assessee nor was there any specific occasion on which the alleged gifts could have been given to the assessee. The High Court held that even when the donor had the means to make the gifts there was no circumstance to show that the gifts were made out of natural love and affection of the donor for the donee and hence the same were to be considered as undisclosed income. (AY. 1990-1991)
Hanuman Dass .v. CIT (2014) 221 Taxman 137 (P&H)(HC)

S. 68 : Cash credits –Share transactions – Concurrent find recorded by the Appellate authorities that the transactions of purchase and sale of share transactions are genuine – No substantial question of law arises from such findings.[S.260A]
The Appellate authorities after examining the documents placed on record by the assessee namely, broker note, contract note, cash book, copies of share certificate demat statements, etc, finding the documents / details not to be false or fabricated, such concurrent finding of fact recorded by the authorities could not give rise to any substantial question of law. (AY. 2006 – 07)
CIT v. Sumitra Devi (Smt.) (2014) 102 DTR 342 (Raj.)(HC)

S. 68 :Cash credits-Share Application money –Bank accounts were fabricated- Addition was held to be justified.
The addition was made u/s 68 with respect to share application money received by the assesse. The AO held that assesse had failed to discharge the onus to prove the creditworthiness of the said investors in terms of S/68 as the extracts of bank statements furnished by assesse was fabricated and further held that assesse had filed to discharge the onus in proving the identity of the creditors/ subscribers, genuineness of the transactions and held that even if the transaction were not required to be fulfilled in respect of share application money / share capital once identity is established . On appeal in Tribunal, Tribunal confirmed the finding of the CIT (A) relying on CIT V. Lovely Exports(P)Ltd. 216 CTR (SC) 195. On further appeal in HC, the court reversed the order of Tribunal & held that bank statements of the investors furnished by the assesse during the original assessment proceedings were fabricated and misleading. They omitted to show that there was deposit of cash immediately prior to issuance of cheques for preparation to pay orders or DDs in favour of the assesse regarding subscription of its share capital. Court further held that false evidence had been adduced by the assesse during the original proceedings to get undue advantage of giving colour of genuineness to bogus entries through the bank accounts and the deposits were mostly by cash, the AO was justified in making addition u/s 68. (AY. 2001-02)
CIT v. N. Tarika Properties Investment (P) Ltd (2014) 264 CTR 472 / 221 Taxman 14 (Delhi)(HC)

S.68:Cash credits-Share capital-Appreciation of Evidence – No Question of law arises-Order of Tribunal was confirmed.[S.260A]
The AO made certain additions on account of unexplained share capital contribution on account of unexplained share capital contribution on the basis of unexplained unsecured loans. Exparte order was passed by AO while making an addition. On appeal before CIT(A), CIT (A) deleted the additions . On appeal by revenue in Tribunal, Tribunal confirmed the view taken by CIT(A). On further appeal in High Court, revenue contended that CIT (A) & Tribunal had not verified the genuineness, creditworthiness & identity of those creditors could not be verified for want of requisite details, the AO had not committed error in making the additions. Dismissing the revenue's appeal, High Court held that as points sought to be raised by the revenue were all matters relating to appreciation of evidence. All the share capital contributions were Income Tax assesses were assessed to tax. Further court held that whether the source of investment or of credit has been satisfactorily explained or not

remains within the realm of appreciation of evidence and such a matter did not give rise to any substantial question of law. Departmental appeal was dismissed. (AY.2006-07)
CIT v. Morani Automotives (P) Ltd (2014)264 CTR 86(Raj)(HC)

S. 68:Cash credits-Gifts from NRI-Neither any relationship was established nor any circumstance was shown to justify that gift was out of natural love and affection of donor for assesse-Addition was held to be justified. [S.69]
Assessee had received a certain sum as gift from his family friends outside India who had means to make gifts. Neither any relationship was established nor any circumstance was shown to justify that gift was out of natural love and affection of donor for assessee. Moreover there was no occasion to make such gifts to assesse, addition was held to be justified.(AY. 1990-91)
Hanuman Dass v. CIT (2014)365 ITR 131/ 97 DTR 10(P&H)(HC)

S. 68:Cash credits-Share capital-Identity,creditworthiness of all share holders were not established-Matter was remanded to the Tribunal to deal with fresh,including the issue of summoning of share holders, directors or principal officers.
The court observed that identity credit worthiness of the shareholders and genuineness of the transaction in all cases was not established by only showing that the transaction was through banking channels or account payee instrument may not be sufficient; surrounding and corroborative factual details are equally important, all these aspects were required to be gone into by the Tribunal in detail. Matter was remanded to the Tribunal to deal with fresh ,including the issue of summoning of shareholders, directors or principal officers. (AY. 2006-07)
CIT v. Globus Securities & Finance (P.) Ltd. (2014) 97 DTR 201 (Delhi) (HC)

S. 68: Cash credits-Purchases cannot be treated as "bogus" only on the ground that the suppliers are not traceable.
The AO held that as the parties from whom the purchases were allegedly made by the assessee could not be located, they were bogus and an addition had to be made u/s 68 in the hands of the assessee. The CIT(A) and Tribunal deleted the addition on the basis that the purchases could not be held to be bogus as corresponding sales had been effected by the assessee and similar purchases in the earlier and subsequent years were not questioned by the AO. On appeal by the department to the High Court HELD dismissing the appeal:
The Tribunal has found that the purchases are genuine because they are supported by bills, entries in the books of account, payment by cheque and quantitative details. The AO did not find any inflation in purchase price or inflation in consumption or suppression the production. The addition had been made only on the ground that the parties are not traceable. The assessee had made payment through crossed cheques and AO did not find that payment made came back to assessee. The ratio of creditors to purchases is normal considering the past records of the assessee. The creditors were outstanding owing to liquidity as assessee is also required to get credit in respect of sales also. Even otherwise, section 68 is not attracted to amounts representing purchases made on credit. This is a finding of fact which does not give rise to a question of law.(Tax Appeal No. 689 of 2010, dt. 22/04/2013)
CIT v. Nangalia Fabrics Pvt. Ltd.(Guj.)(HC) www.itatonlin.org

S. 68 : Cash credits – No explanation provided by Assessee – Assessee failed to discharge its onus
Assessing Officer made addition on account of cash deposit made in the bank account and investment made in shares. CIT (Appeals) and Tribunal upheld the order passed by Assessing Officer. High Court upheld the order passed by Tribunal on the basis that assessee failed to prove the sources of cash deposit and investment in shares. Assessee did not discharge its onus despite of several opportunities provided, not only by the Assessing Officer but even by the Commissioner (Appeals). (AY. 1994 - 95)
Bhairavnath Agrofin (P.) Ltd. .v. CIT(2013) 354 ITR 276/259 CTR 51 / 40 Taxmann.com 241 / (2014) 220 Taxman 1 (Mag.) (Raj.) (HC)

S. 68 : Cash credits –Loan in the name of partner-Corresponding loan appearing in the return of the partner- No addition can be made.

Unsecured loan appearing in the books of the assessee firm in the name of the partner. Partner also declared unsecured loan in his independent return. Held, unsecured loan could not added to the income of the firm u/s.68. (AY. 2003-04)

CIT .v. Nisuki Farms (2014) 220 Taxman 17 (Mag.) (Guj.)(HC.)

S. 68 : Cash credits – Gains from sale of shares.

The Assessing Officer treated Rs.36,71,882/- as unexplained cash credit under section 68 of the Act as against capital gain on sale of long term share declared by the assessee. The CIT (A) allowed the appeal. The Tribunal, held that the assessee had explained that the purchase transactions were made on the "Online Trading System" and these transactions were genuine and was further proved by the contract notes for sale and purchase, the bank statement of the broker, the Demat Account showing transfer in and out of shares, as also abstract of transactions furnished by the CSE. The High Court held that the revenue was not in a position to show the Tribunal had placed reliance upon any irrelevant material. Hence the appeal was dismissed. (AY. 2006 – 2007)

CIT .v. Maheshchandra G. Vakil (2014) 220 Taxman 166 (Mag.) (Guj.)(HC)

S. 68: Cash credits - Share application money-Addition was held to be not justified.

Assessee issued preferential warrants and received share application money as part of debt recovery process under scheme of compromise and arrangement with its lenders and shareholders. AO made addition as unexplained share application money. Held that the assessee furnished complete details of receipt of share application money with share application forms, names, addresses, PAN and other details of share applicants, identity of share applicants, genuineness of transaction and their creditworthiness was proved, and addition under section 68 was unjustified (AY. 2005-06)

CIT .v. Shree Ram Multi Tech Ltd. (2014) 220 Taxman 76(Mag.) (Guj.)(HC)

S. 68 : Cash credits – Bogus purchases – payment made by cheques- -Sales accepted-Purchases cannot be held to be bogus.

The Assessee had made certain purchases. On account of unverifiable purchases, the Assessing Officer made additions to the tune of Rs. 1.27 crores. He was of the opinion that none of the parties could be located and therefore, such purchases were held to be bogus. When it was challenged before the CIT(A), the CIT(A) was of the opinion that they could not be held bogus as the corresponding sales had been effected by the respondent in the next year. In subsequent year also and in the past, such purchases were made which were never questioned. When challenged before the Tribunal on the basis of the facts presented before us, it held that these purchases could not be held bogus. The High court held that the issue is essentially based on facts. The Tribunal, having been satisfied by genuineness of the purchases as also specially considering the payments made through the cheques, was of the opinion that such addition could not be sustained. Issue, essentially and pre-dominantly based on facts, requires no consideration as no question of law arises.

CIT .v. Nangalia Fabrics P. Ltd. (2014) 220 Taxman 17 (Mag.)(Guj)(HC.)

S. 68 : Cash credits – Share application money-Notice u/s.133(6) returned unserved.

AO noticed that assessee received share application money from nine applicants. Notices issued to five out of nine share applicants under section 133(6) were returned unserved. Returns of income of share applicants furnished by assessee disclosed that applicants had very meager income. Accordingly the AO added amount of share application money under section 68. The CIT(A) and the ITAT ruled in favour of the assessee as the assessee had discharged its onus by furnishing documentary evidence such as PAN numbers, addresses, audited accounts and bank statements of share applicants etc., which sufficiently proved identity and creditworthiness of share applicants. The High Court held that, the information the assessee furnishes would have to be credible and at the same time verifiable. In view of fact that notices to five share applicants returned unserved and still assessee was able to secure documents such as their income tax returns as well as bank account particulars, would itself give rise to a circumstance in which Assessing Officer rightly proceeded to draw adverse inference

and that and Tribunal fell into error in holding that Assessing Officer could not have added back said amount under section 68. (AY. 2007-08)

CIT .v. Ultra Modern Exports (P.) Ltd. (2014) 220 Taxman 165 (Mag.) (Delhi)(HC)

S. 68 : Cash credits – Gift-Only affidavit was filed-Addition was held to be justified.

Assessee had received sizable amount by way of gift from one particular source. Assessing Officer did not accept validity of gift so made and added said amount to assessee's taxable income. Tribunal noted that in order to prove genuineness of gift, assessee had only filed an affidavit and copies of cheques and pay orders but did not file any of documents such as copy of proof of income of donor, copy of bank account of donor from where withdrawals were made along with proof of identity. Further, relationship between donor and assessee and reasons for gift were also not proved. Tribunal, thus, upheld addition made by Assessing Officer. The Court held that Tribunal had taken into account entire relevant material on record before confirming impugned addition, no substantial question of law arose from Tribunal's order. (AY. 2004 – 2005)

Seema Anil Modani .v. ITO (2014) 220 Taxman 167 (Mag.) (Guj.)(HC)

S. 68 : Cash credits –Charitable Trust-Opportunity to cross examination was not given-Matter remanded. [S.10(22)]

The Assessee, a charitable trust running various educational institutions, claimed exemption u/s 10(22). Assessee claimed to have received certain sum as loan from three parties. Assessing officer made addition of said loan applying section 68 relying upon statement of one creditors that he had not granted any loan to the Assessee. The Assessee contented that Assessee as an educational institution, existing solely for educational purposes and not for the purpose of profit, within the ambit of Section 10(22) of the Act., is entitled to exemption. The disallowance under section 68 is erroneous. It was further contended that production of confirmation letters from persons lent money was sufficient proof and assessee ought to have been given an opportunity to examine such creditor, who denied having given any such money to assessee. The High Court held that Assessee would not have expected one of the contributor, to have denied the factum of contribution. When there is unexpected change of facts/situation/circumstances, the party taken by surprise should not be deprived of the opportunity to cross-examine the witness branded as assessee's witness. Evidence Act also permits a party to cross examine his own witness under stated circumstances therein. From the overall facts and circumstances of the case, it is evident that unless it is proved that the income derived is covered under section 10(22), it cannot be decided to as to whether addition of the same under section 68, is possible or not. Hence, the matter was remanded for fresh consideration and also to provide the assessee to cross examine the witnesses, whose evidence the Assessing officer rely upon. (A.Y. 1997-98 to 2000-01)

Sri Krishna Educational & Social Trust .v. ITO (2014) 220 Taxman 16 (Mag.) (Mad.)(HC)

S. 68 : Cash credits – Sale consideration from sale of agricultural land-Deposited in to bank Rs 1.20 crores-Deed recorded only Rs 22.22. lakhs –Addition as undisclosed income was not justified-CBDT was directed to take action against AO.

The assessee sold his agricultural land and deposited sale consideration of Rs. 1.20 Crs in his bank account. However, the purchasers stated that they had purchased the land for Rs. 22.2 lakhs only. Sale deed also reflected sale value at Rs. 22.2 lakhs. The assessee produced witness to sale deed and the bank manager, who confirmed submission of the assessee and he had also produced the report of Tehsildar to justify valuation of the property. Assessee had also filed complaint before stamp valuing authority about deficiency in stamp duty in sale deed but sale consideration in sale deed was not adjudicated in favour of assessee. The Assessing Officer did not disbelieve the evidence that the amount was received by sale consideration. He, however, relying only on the report of the Stamp Valuing Authority, treated the amount to be undisclosed income of assessee. The CIT(A) dismissed the appeal. The Tribunal held that whatever the assessee had explained about the source of the deposit could not be doubted especially in absence of contrary material on record and deleted the addition. The High Court held that the assessee as an honest citizen not only made a complaint to the registering authority that the sale deed had been registered at a value much below the amount, which he has actually received, he deposited the entire amount in the bank and voluntarily filed return. There

was no material whatsoever or any circumstance, which could have suggested that this amount was received by him from any other source. The deposition of witness of the sale deed, the bank manager and the evidence filed with regard to valuation of the property was more than sufficient to discharge the burden, which the Assessing Officer had unreasonably placed on the assessee. The Assessing Officer in disbelieving the evidence has not given any reasons whatsoever to discard the statement of the witnesses, deposit of the entire sale consideration in bank and the deposition of the bank manager. The High Court held that the Income Tax Officer did not act in bonafide manner. Overwhelming evidence led by him was discarded without giving any reasons at all. The assessment was framed only on the ipse dixit of the A.O., which gives reason to believe that he had exceeded his authority with some ill will or with ulterior motive. Therefore, it HC directed the Registrar General of the Court to forward a copy of this judgment to the Chairman of the Central Board of Direct Taxes to cause an enquiry into the conduct and motives of Income Tax Officer, in framing the assessment and raising demand of income tax against the petitioner. (AY.2008 – 09)

CIT .v. Intezar Ali (2014) 99 DTR 201 / 220 Taxman 72 (Mag.) (All.)(HC)

S. 68 : Cash credits-Account payee cheque-Bank statement-Assessed to tax-Burden discharged.

Once the amount was advanced by the creditors by account payee cheque from their respective bank accounts and the said creditors were being assessed to income tax, then capacity of the creditors and genuineness of the transactions stood proved and in the absence of any evidence to prove that money actually belonged to the assessee himself, addition under s. 68 was not sustainable.(AY. 2006-07)

CIT . .v. Jai Kumar Bakliwal (2014)366 ITR 217/ 101 DTR 377 / 224 Taxman 87 / 267 CTR 396 (Raj.)(HC)

S. 68 : Cash credits-Share capital - Identity disclosed – Deletion was held to be justified.

Once the identity and other relevant particulars of shareholders are disclosed, it is for those shareholders to explain the source of their funds and not for the assessee company to show wherefrom these shareholders obtained funds. It was held that Tribunal was justified in deleting addition in the hands of assessee company.

CIT .v. Nishan Indo Commerce Ltd. (2014) 101 DTR 413 (Cal.)(HC)

S. 68 : Cash credits -Share application money – Cash was deposited on same day-Addition was justified.

Where deposits in accounts having been made in cash on same day and share applicants lacked resources, it was held that the assessees position vis-à-vis share amounts received and its commercial condition, all pointed to the amount received by it falling within the mischief of s. 68 as unexplained amounts.(AY. 2007-08)

Onassis Axles (P) .v. CIT (2014) 101 DTR 49 / 224 Taxman 80 (Mag.) / 364 ITR 53 (Delhi)(HC)

S. 68 : Cash credits – Gifts - Gift received from brother without any evidence is to be assessed.

The assessee showed a receipt of Rs. 7,50,000/- from his brother. The AO asked the assessee to prove the genuineness of the transaction by producing statement of affairs, cash flow statement, return of income with computation of the said brother. However, the assessee failed to produce the cash flow statement to show the genuineness of the gift and hence the AO assessed the gift u/s. 68. The CIT(A) and the Tribunal confirmed the action of the AO.

The High Court dismissing the assessees appeal at the admission stage held that since there was no substantial question of law arising out of the appeal, the action of the lower authorities was confirmed. (AY. 2008-2009)

K. Sivakumar .v. ACIT (2014) 222 Taxman 59 (Mag.)(Mad.)(HC)

S. 68 : Cash credits –Share application money-No addition shall be made in the hands of the assessee where transactions related to the receipt of share application money are genuine and are fully recorded by the share applicants.

The assessee had received share application money from 11 different companies. The AO proposed an addition on the ground that the assessee could not discharge the onus and prove the genuineness of the receipt. The first appellate authority observed that the assessee had placed on record various

documents in support of the share application money received. The Tribunal restored the matter to the AO since it was not evident that the impugned amounts were assessed in the hands of share applicants, in which case they could not be assessed in the hands of the assessee and vice versa. The High Court upheld Tribunal's order clarifying that the AO should objectively examine the whole issue and in case he found that the transactions were genuine and fully recorded by the share applicants, no addition would be made in the hands of the respondent assessee. In other words, the two conditions had to be satisfied. First the transaction should be genuine, true and not a camouflaged, and secondly the transaction should be duly recorded in the books of the share applicants. In case any of the two conditions were not satisfied, it would be open to the AO to act in accordance with the law and make appropriate additions if justified and mandated by Statute.(AY. 2001-02)

CIT .v.Kansal Fincap Ltd. (2014) 221 Taxman 151 (Mag.) (Delhi)(HC)

S. 68:Cash credits-Unexplained investment-Assessee discharging initial burden-Deletion of addition was justified.

Appellate authorities foundthat director of assessee had ample availability of funds from which he could have advanced loan to assessee. Assessee discharged initial burden to establish identity, creditworthiness and genuineness for allotment of shares. Held, deletion of addition was justified. (AY. 2006-07)

CIT .v. Nipuan Auto P. Ltd. (2014) 361 ITR 155 (Delhi)(HC)

S. 68: Cash credits–Mercantile system of accounting–Advances received offered as income upon distribution of films-Addition as cash credit was not justified.[S.145]

The assessee was an individual in the business of production and distribution of films. During the financial year 2005-06, he received a sum of Rs. 50 lakhs from K and treated such receipt as advance and accounted for it under the liabilities side in his balance-sheet, as the distribution process of the film had not started during the assessment year 2006-07. The receipt was offered as income in the subsequent year, when the distribution of film was executed. When the AO directed the assessee to confirm the source of such receipt, the assessee produced a confirmation letter from K. The assessee reported that the sum of Rs. 50 lakhs received by the assessee recorded in its cash book had been offered as income in the subsequent year and the assessee had also provided confirmation letter in this regard. Held, amount was not taxable in AY 2006-07. (AY. 2006-2007)

CIT .v.K.E.Gnanavelraja (2014) 361 ITR 446/107 DTR 38 (Mad.)(HC)

S. 68: Cash credits–Firm-Partners-Capital introduced by partners- No material showing partners had no capacity to introduce such capital-The sums could not be taxed in the firm's hands.

There was no material showing partners had no capacity to introduce capital in the firm. Also, assessment orders of partners showed capital introduced by partners represented their agricultural income. Held, the sum could not be assessed in the hands of the firm. (AY. 2007-08)

CIT .v. Odedara Construction (2014) 362 ITR 338 (Guj.)(HC)

S. 68: Cash credits–Identity and creditworthiness was proved-Assessee need not prove source of funds of creditor-Deletion of addition was held to be justified.[S.2(24)]

Assessee must prove identity of creditor, genuineness of transaction and creditworthiness of creditor. Assessee need not prove source of funds of creditor. In all cases in which a receipt is sought to be taxed as income, the burden lies on the revenue to prove that it is within the taxing provisions; but once that burden is discharged, the burden of proving that it is not taxable because it falls within exemption provision under the Act, lies on the assessee.When assessee has filed income tax return, balance sheet etc, the identity of the creditor and the genuineness of transaction have been proved. The burden thereafter shifted to the AO to prove the contrary.On facts the AO has failed to show either directly or with the help of circumstantial evidence that the said amount belonged to the assessee.In the absence of evidence, deletion of addition was held to be justified. (AY. 2001-02)

CIT .v. SanghamitraBharali (Smt.) (2014) 361 ITR 481 /97 DTR 345(Gauhati)(HC)

S. 68: Cash credits–Share application money-Accommodation entries-Failure by assessee to discharge initial onus to establish identity, creditworthiness of share applicants and genuineness of transaction-Addition made by the AOwas held to be justified-Finding of Tribunal was reversed.

When an assessee does not produce evidence or tries to avoid appearance before the AO, it necessarily creates difficulties and prevents ascertainment of the true and correct facts as the AO is denied the advantage of the contention or factual assertion by the assessee before him. If an assessee deliberately and intentionally fails to produce evidence before the AO with the desire to prevent inquiry or investigation, an adverse inference should be drawn.Theassessee had not discharged the initial onus to establish the identity, creditworthiness of the share applicants and the genuineness of the transaction. The additions made by the AO were justified and sustainable. Various judgments referred by the assessee was distinguished on the ground that assessee is a private limited company. Appeal was allowed with cost of Rs20000.(AY. 2002-03)

CIT.v. MAF Academy P. Ltd. (2014) 361 ITR 258 /224 Taxman 212 (Mag)(Delhi)(HC)

S. 68: Cash credits–Share application money-Source was explained and identities of the applicants-Deletion of addition was held to be justified.[S. 69]

Since the assessee explained the source of money and identities of applicants and their creditworthiness was established, burden of proof can be said to have been discharged by assessee and the onus shifted on the Department. Since there was no evidence to show transactions were not genuine, s.68 and 69 were not applicable.

CIT .v. Kamdhenu Steel and Alloys Ltd. (2014) 361 ITR 220 (Delhi)(HC)

S. 68: Cash credits–Share application–Genuine applications.

The assessee had furnished material which included income-tax returns, balance-sheets, Registrar of Companies particulars and bank account statements. On the basis of these, the Commissioner (Appeals) held that the share application money or the source of the share application money had been satisfactorily explained. The Tribunal was of the opinion that no interference was warranted having regard to the facts of this case. This was a pure finding of fact. S. 68 was not applicable. (AY. 2000-2001)

CIT .v. Expo Globe India Ltd. (2014) 361 ITR 147 (Delhi)(HC)

S.68: Cash credits–Credit in capital account of partner-Gift from NRI-Addition was confirmed as undisclosed income.

A partner of the firm allegedly received gift of Rs. 1 lac from a distant NRI relative which was credited in the capital account of the partner in the books of the firm. The gift was held not be genuine as there was no connection between the partner and alleged donor except a vey distant relationship and there was no occasion to make such git. As partners had not maintained their own books of account, such non-genuine credit was to be treated as income of the firm u/s. 68. (AY. 1989-90)

CIT .v. Udham Singh & Sons (2104)365 ITR 137/98 DTR 273/222 Taxman 155 (Mag.)/266 CTR 218(P&H)(HC)

S.68: Cash credits-Sundry creditors-Merely because some creditors had not confirmed receipts, additions could not be made to assessee's income when creditworthiness had been proved beyond doubt.

The assessee was a manufacturer of fabrics. The Assessing Officer doubted the genuineness of the sundry creditors in the return of income. Accordingly, notices were sent by the Assessing Officer to those creditors, but the notices were received back unserved. In view of the above, the Assessing Officer made an addition to the assessee's income on account of cash credit u/s 68 of the Act. The CIT(A) deleted the addition. However, the Tribunal confirmed the same. On further appeal, the High Court held that the identity, creditworthiness and genuineness of the creditors had been proved beyond doubt, as had been observed by the first appellate authority and hence the addition was deleted. (AY. 2004-2005)

CIT .v. Jagdish Prasad Tewari (2014) 220 Taxman 141 (All.)(HC)

S.68: Cash credits –Unsecured loan-No additions on account of unsecured loan when identity and creditworthiness of the party is proved, more so amount received through proven banking channels.

The AO. made an addition of Rs.10 lacs pertaining to the loan received from M/s L.N. Seth, HUF. This was upheld by the first appellate authority. However, the second appellate authority deleted the addition. Being aggrieved, the department filed an appeal. The High Court dismissed the appeal by stating that money had come at all levels through banking channels and the creditworthiness and identity of the donors/creditors had been proved. All the three conditions (proven identity, proven creditworthiness, and proven banking transactions) had been satisfied in the instant case and accordingly upheld the order of the Tribunal. (AY. 2005-2006)

CIT .v. Shalimar Buildwell Pvt. Ltd (2014) 220 Taxman 138 (All.)(HC)

S.68: Cash credits-Burden of proof-Non-examination of creditworthiness of persons or genuineness of transactions by the appellate authorities – Matter restored for verification.

The assessee was engaged in trading of consumable goods. During the year, the assessee had given certain loans to various person. The AO doubted the creditworthiness of persons / genuineness of transactions and made an addition u/s. 68 of the Act. The CIT(A) and the Tribunal deleted the addition. On appeal by the department, the High Court remanded the matter back to Tribunal for fresh adjudication to verify certain facts. (AY. 2004-2005)

CIT .v. Prem Lata Sethi (Smt.) (2014) 220 Taxman 333 (All.)(HC)

S.68: Cash credits-loan-Additions deleted as there was sufficient evidence available to prove the source.[R.46A]

The Assessee, in the return of income filed, had shown several loan credits for different amounts. The Assessing Officer treated the loan credits of Rs. 11.91 lakhs as unproved cash credits in absence of any evidence filed in these respects. The CIT(A), after considering the explanation given by the assessee, deleted the addition made by the AO. The Tribunal upheld the CIT(A) order. On an appeal by the Department, the High Court held that the issue was considered by the fact finding authorities in detail and does not require any reconsideration. (AY. 1995-1996)

CIT .v. E.S. Jose (2014) 220 Taxman 32 (Ker.)(HC)

S. 68 : Cash credits-Share application-Rejection of explanation without examination of parties and without verifying from the respective AOs who are assessing the parties who have deposited by the respective parties was held to be not justified.

The only issue here is the addition of Rs.60 lacs made by the Assessing Officer as unexplained credit on account of the share application money. On going through the facts of the case, we notice that assessee has filed the relevant details which it could have filed in support of its contention of having received the share application money from each of these shareholder companies. The Assessing Officer has issued summons to the directors of these shareholder companies. In response there to, the directors have not attended. Assessing Officer has not conducted any further inquiry for non-attendance of the persons. Non-attendance on issuing summons itself, cannot be a ground for rejecting all the relevant documents furnished by the assessee company. Summons issued by Assessing Officer have not been received back as unserved. Therefore, it cannot be said that these companies were not in existence at the given addresses. The documents filed with the Registrar of Companies show that these companies were active during the relevant period. Assessing Officer has not verified any of the relevant documents submitted by Assessee for discharging onus u/s 68 of the Act. We also note that the Assessing Officer has not referred nor discussed about the so-called alleged statement of entry providers against the assessee company. It is also not known whether assessee's name figured in that statement. The contention of the assessee has been rejected without examination and verification of the documents submitted by the assessee. The information received by him from the Investigation department has been made the basis of addition without any further investigation in this regard. Even the process of examination of the directors by issue of summons has not been taken to the logical end as after the failure of the directors to attend in response to the summons issued to them no further steps were taken. The Assessing Officer could have done cross verification about the status of these

companies with the respective Assessing Officer of these shareholder companies.(ITA no. 2821/Del/2011. Dt. 16/11/2014.) (AY. 2003-04)

ITO .v. Rakam Money Matters P. Ltd. (Delhi)(Trib.); www.itatonline.org

S. 68:Cash credits-Bogus purchases-Hawala dealer-Fact that alleged supplier is not traceable and has been termed a "hawala dealer" by the VAT authorities is not sufficient to treat the purchases as "bogus".[S.133(6)]

The assessee claimed to have made purchases from certain parties. In support of the genuineness of the purchases, he produced bills from the parties and proof of payment by cheque. However, the AO treated the purchases as "bogus" purchases u/s 68 on the ground that the notices u/s 133(6) sent to the alleged suppliers at the address stated in their bills were returned un-served. Further, the said suppliers were termed as 'Hawala Dealers' (i.e. person who issued a bill for purchase of goods without delivery) by the Maharashtra VAT department. On appeal, the CIT(A) deleted the addition. On appeal by the department to the Tribunal HELD dismissing the appeal:

The fact that the supplier is declared as a "Hawala dealer" by the VAT department is a good starting point for making further investigation and taking it to its logical end. However, suspicion of highest degree cannot take place of evidence. The AO ought to have called for details of the bank accounts of the suppliers to find out as whether there was any immediate cash withdrawal from their account. No such exercise was done. There is nothing in the order of the AO about the cash trail. Transportation of good to the site is one of the deciding factor to be considered for resolving the issue. Proof of movement of goods is not in doubt. In the absence of sufficient evidence, the purchases cannot be treated as bogus.(ITA No. 6727/Mum/2012, A. Y. 2009-10, dt. 20.08.2014.)(AY.2009-10)

DCIT .v. Rajeev G. Kalathi (Mum.)(Trib.)www.itatonline.org.

S. 68 : Cash credits – Share application money-No independent enquiry-Addition was deleted.

Tribunal held that no addition is called for as the amount was received by the assessee through banking channel and the company was assessed to tax, the CIT has found that the assessee has furnished complete details to the AO and the AO has not conducted any independent enquiry in the matter. (AY. 2001-02)

ITO .v. Anmol Marmo Grani (P.) Ltd. (2014) 159 TTJ 5(UO) (Jodh.)(Trib.)

S. 68 : Cash credits –Share application-Primary burden is on AO to show that share application money is assessable as unexplained cash credit. AO cannot sit back with folded hands & simply reject assessee's evidences

(i) Even if the reopening is sustained, the primary burden that income has escaped assessment is on the shoulder of the AO and after discharging this burden only, the onus shifts to the shoulder of the assessee. There are two types of cases. One in which the AO carries out the exercise which is required in law and the other in which the AO 'sits back with folded hands' till the assessee exhausts all the evidence or material in his possession and then comes forward to merely reject the same on the presumptions. On facts, nothing has been brought on record by the AO to substantiate his serious allegation that these two entries are accommodation entries which was the sole ground and basis for reopening;

(ii) The assessee produced the necessary documents before the authorities below and discharged the obligation to explain the transaction with it. If the AO was still not satisfied with the aforesaid documents & explanation of the assessee, he should have resorted to s. 131 and other provisions in the Act to investigate and check the veracity of the documents. A cloud of suspicion and doubt can be raised by stating that a lot of cash was deposited in the accounts of M/s Gupta and Gupta and immediately thereafter cheque transaction could be evident from the side of M/s Gupta and Gupta to some other person/ legal entity. However, a judicially trained mind will search from the said cloud brought before it, relevant admissible evidences if any from the records before it, to see whether the said evidence support the transaction as alleged by the AO which is under consideration before it, and not get swayed by other irrelevant materials which comes on record. Suspicion howsoever cannot take the place of evidence or proof (ITA No. 1078/Del/2013,dt. 23.05.2014.) (AY. 2002-03)

Mithaila Credit Services Ltd. .v. ITO (Delhi)(Trib.), www.itatonline.org

S.68:Cash credits-Income from other sources–Share premium– 'Income of every kind'–Capital receipt-Nether assessable as cash credits or as income from other sources.[S.4,56(1)]

Share premium, received by the assessee company on issue of shares, is a capital receipt and therefore, it could not be taxed u/s. 56(1). As assessee company is holding 99.88 per cent of shares in its subsidiaries and several PSUs are contributors in IDFC PE Fund-II which is holding 98 per cent shares of the assessee company, the receipt of share premium could not be said to be a sham transaction. S. 68 is not attracted in these facts. (AY. 2009-10)

Green Infra Ltd. .v. ITO (2014) 98 DTR 187(Mum.)(Trib.)

S.68: Cash credits-Fund manger for other people-Benefit of telescoping–Peak credit-May be allowed.

Assessee was held to be a fund manager for other people for which purpose moneys were frequently withdrawn or deposited. Therefore, assessee was entitled to work out a peak credit and avail the benefits of telescoping. (AYs. 2001-02 to 2003-04)

Chetan Gupta .v. ACIT (2014) 98 DTR 209 (Delhi)(Trib.)

S. 69 : Unexplained investments–Purchasers not traceable –Profit element embedded in purchases.

Assessee is engaged in the business of trading in finished fabrics. Assessing Officer disallowed the purchases on account that parties from whom purchases were made are not found at the addresses given. CIT(Appeals) confirmed the assessment order. Tribunal held that purchases were made from bogus parties, but the purchases themselves were not bogus as entire quantity of opening stock, purchases and the quantity manufactured during the year under consideration were sold by the assessee. Therefore, Tribunal held that additions should not be the entire amount, but the profit margin embedded on such purchases would be subjected to tax. On appeal by revenue to High Court, Tribunal's order was upheld. (AY 2005 - 06)

CIT .v. Bholanath Poly Fab (P.) Ltd. (2013) 355 ITR 290 /40 Taxmann.com 494 / (2014) 220 Taxman 82 (Mag.) (Guj.)(HC)

S. 69 : Unexplained investments – Search at place of third party showed that assessee had purchased plot by paying cash consideration - No evidence that those documents belonged to assessee - Documents at best shows projected purchase consideration- Addition was deleted.

Certain documents were found during search at the place of third party which indicated that assessee purchase certain plot of land by paying cash consideration. AO made additions u/s 69. The Court held that there was no evidence that the documents belong to the assessee. Further, it was held that documents, at best, only showed projected consideration. Accordingly, it was held that the evidences could not be treated as conclusive evidence of money transaction and therefore, addition was deleted.

CIT .v. Prem Prakash Nagpal (2014) 220 Taxman 168(Mag.) (Delhi)(HC.)

S. 69: Unexplained investments-Gifts-Ornaments and cash-Deletion was held to be justified.

The assessee, a doctor, was the only daughter and her father belonged to a reputed family of jewellers for more than three generations who were also jewellers to the royal family of Gaikwad, the erstwhile rulers of the Baroda State. She received a sum of Rs. 53.21 lakhs under the will of her father, out of which Rs.35.21 lakhs was by way of ornaments and the remaining amount by way of cash. The report of the valuer was also furnished and a copy of the will was submitted as well. Her father was staying in the USA and, hence, she was asked to furnish the channel through which the cash and jewellery had been received. The capacity of the father was also examined. His income-tax returns filed in the USA for the period 1994 to 1997 were also furnished along with other necessary proof establishing his capabilities. The certificate furnished by the advocate and that of the notary in whose presence the will was executed were on record.

The Tribunal noted that the maximum sum that could have been transferred by the father if considered by each trip from the USA was Rs. 10 lakhs and, accordingly, the Tribunal sustained a sum of Rs. 8 lakhs out of Rs. 18 lakhs. (AY. 2006-07)

CIT .v. Diptiben D. Patel (2014) 362 ITR 325 (Guj.)(HC)

S.69:Unexplained investments-Amounts of investments not fully disclosed in books of account– Agreements claimed to be cancelled – No evidence of on-money-Addition was not justified.

Agreements found during the search were claimed to be cancelled by executors. There was no evidence to show that assessee paid on-money for purchase of land. There was nothing on record to show that agreements were acted upon and no trace of cash payment in excess of amount shown in registered documents. Held, addition on basis of agreements was not sustainable. (AYs. 2006-2007, 2007-2008, 2008-2009, 2009-2010)

CIT .v. Fairdeal Textile Park P. Ltd. (2014) 362 ITR 497 (Guj.)(HC)

S.69:Unexplained investments-Excess investment –Money for carrying out construction was arranged by assessee-Company has no income during the year-Excess investment was assessable in the hands of assessee.

The assesse, a member of a Hindu undivided family was engaged in the construction of a building on a plot which belonged to the Hindu undivided family.The assessee floated a company with the object of carrying of hoteling.The amount of construction was borrowed by the assessee from the HUF. AO found that there was excess investment in the company.Company having no income during the period of construction of Hotel. AO held that it was the assesse who was arranging for the funds for construction and it was assesse who had held responsible for such unaccounted investment hence taxed in the hand of assesse. Addition was confirmed by CIT(A).Tribunal deleted the addition.On reference the Court held that money for carrying out construction arranged by assessee in terms of agreement, excess amount assessable in hands of assesse.(AYs. 1975-76 to 1977-78)

CIT .v. D.P.Kanodia(2014) 362 ITR 163 /226 Taxman 67 (Mag.)(All.)(HC)

S.69:Unexplained investments-Sale of shares-Purchase and sale of shares was held to be non genuine transaction–Amount claimed to be capital gains held to be not justified-Order of AO was confirmed.[S.45]

Court held that although the assessee had produced documentary evidence to show that shares were sold at a price prevailing in the stock market on the date of sale, no documentary evidence was produced to show that on the date of purchase, the market price of the shares was the same as that at which the shares were claimed to have been purchased. It was highly improbable that a company whose shares rose by more than 25 times, within a span of one year was not in existence and that the directors of the company were not traceable at the address given. The addition of Rs. 15,33,160 was justified. Appeal of revenue was allowed.(AY .2001-02)

CIT .v. SanghamitraBharali (Smt.) (2014) 361 ITR 481/97 DTR 345 (Gauhati)(HC)

S.69:Unexplained investments-Difference in purity of gold-Onus on Assessee to reconcile-Addition was held to be justified.

The assessee is a manufacturer and exporter of gold ornaments. Documents recording manufacture showed substantially higher purity of gold than export documents. The onus on assessee to reconcile the difference was not discharged. Held, value of unaccounted gold was to be added to income. (AY. 1989-90)

Subodhchandra and Co. .v. CIT (2014) 362 ITR 387 (Guj.)(HC)

S.69: Unexplained investments - Gold biscuits recovered from locker – Owner of gold biscuits-Deletion was justified on facts.

There was a concurrent finding at time of recording his statement that gold biscuits recovered from locker of the assessee were not owned by brother of assessee. Hence, addition in hands of assessee was sustainable. (AY.2006-07)

Dharmendra Kumar Varshney .v. CIT (2014) 360 ITR 563 (All.)(HC)

S. 69 : Unexplained investments- Sale of flats-Valuation shown at higher for mortgage- AO. could not adopt said value in respect of flats sold to other persons.[S.28(i)]

Assessee was engaged in business of developing real estate projects, Assessee sold some flats at rate of 1200 per sq. yd. AO noticed that assessee had mortgaged some flats to PUDA where value of flats

was shown at rate of 5,000 per sq. yd. accordingly, relying upon value of flats shown in mortgage deed made addition to total income of assesse. Claim of the Assesee that valuation of flats mortgaged with PUDA was artificially inflated so that less number of flats had to be mortgaged. CIT(A) accepted claim of assessee and held that valuation mentioned in mortgage deed could not be taken to be value of flats so as to reject sale consideration as recorded in registered deeds which was in accordance with stamp duty regulation. Since no other evidence or material on record to justify addition of differential rates as recorded in mortgage deed and registered sale deed, impugned addition was deleted. (AY. 2008-09, 2009-10)

Dy. CIT .v. Singla Enclave Developers (P.) Ltd. (2014) 149 ITD 177 / (2013) 156 TTJ 1 / 40 taxmann.com 127 (Chand)(Trib.)

S. 69 : Unexplained investments-Income from undisclosed sources-Bogus purchases- Filing of confirmation of suppliers with PAN and TIN number are not sufficient to prove the purchases are genuine if they are not supported by other facts including delivery of goods & presence of suppliers-15% of bogus purchases was confirmed. [S. 143(3), 145]

The department had gathered the information through survey and search seizure in above parties and they categorically admitted that they have provided entries and not doing any purchase and sale of gems and jewellery. Even then Assessing Officer asked to produce these parties for verification which could not be produced by it. The Assessing Officer also issued summons U/s 131 of the Act, which was partly served and partly returned back unserved. The assessee's argument that case laws applied by the Assessing Officer i.e. Sanjay Oil Cake Industries and Vijay Protein are not squarely applicable, is not accepted as such because primary onus is on the assessee to produce these parties for verification before the Assessing Officer. In the assessment, the Assessing Officer has a right to estimate the profits on a reasonable basis, adopting the base provided by ITAT judgments cannot to be termed as unscientific, unreasonable or arbitrary. Filing of some confirmation with PAN and TIN number are not sufficient to prove the purchases are genuine as they are to be supported by other facts including delivery of goods, as held by the various courts. The appellant cannot directly or indirectly put blinkers on investigations of the Assessing Officer to compel him to do it as per sweet will of the assessee. It is not permissible that the assessee will direct the Assessing Officer to enquire his case at his own way, which is not required by law. The assessee wanted to shift his onus on the Assessing Officer on flimsy ground. It is rampant practice in gems and jewellery business in Jaipur that the assessee has been getting accommodation bills to reduce the profitability which has been established by the department. The Hon'ble Rajasthan High Court recently in the case of Venus Arts & Gems Vs. ITO vide order dated 20/08/2014 has also confirmed the addition on unverifiable purchases @ 21.96% and also found order of the ITAT being purely a finding of fact by the two appellate authorities as to what should be a reasonable G.P. rate after rejection of books of account and various infirmities noticed by the lower authorities and in their view no question of law much less substantial question of law can be said to emerge out of the order of the Tribunal. Tribunal held 15% of bogus purchases was held to be reasonable. (ITA no. 187/JP/2012,Dt. 22.10.2014.) (AY.2007-08)

Anuj Kumar Varshney .v. ITO (Jaipur)(Trib.) www.itatonline.org

Editorial: group matters relating to bogus purchases were decided depending on facts.

S. 69 : Unexplained investments-Income from undisclosed sources- Sale of shares-Capital gains-"Penny Stock" - AO can assess on consideration of material available on record, surrounding circumstances, human conduct, preponderance of probabilities and nature of incriminating information / evidence available on record. [S.45]

Tribunal held that the tax authorities have applied the test of human probabilities explained by the Hon'ble Supreme Court in the cases of Sumati Dayal and Durga Prasad More to disbelieve the claim of Long term Capital gains put forth by the assessee. We notice that the test of human probabilities was not applied by the co-ordinate benches of Tribunal in the case of Shri Avinash Kantilal Jain and Mr. Shyam R Pawar. Hence, in our view, the assessee cannot take support from the above said decisions. We further notice that the ld CIT(A) has placed reliance on the decision dated 04.1.2011 rendered by ITAT Delhi in the case of Haresh Win Chaddha Vs. DDIT, wherein the Tribunal has expressed the view that there is no presumption in law that the AO is supposed to discharge an impossible burden to assess the tax liability by direct evidence only and to establish the evasion

beyond doubt as in criminal proceedings. Further it was held that the AO can assess on consideration of material available on record, surrounding circumstances, human conduct, preponderance of probabilities and nature of incriminating information / evidence available on record.
In the case of Smt. Jamnadevi Agrawal, the Hon'ble Bombay High Court has upheld the order of Tribunal on the reasoning that no fault can be found with the findings recorded by the Tribunal. A perusal of the above said order would show that the revenue in the above said case had contended that the assessees in the group have purchased and sold shares of similar companies through the same broker. Further the purchase prices and sale prices were supported by producing the evidences to show that the said transactions were undertaken at the rates prevailing on the respective dates. Under these set of facts, the High Court held that the findings given by the Tribunal cannot be found fault with and further held that the decision rendered by Hon'ble Supreme Court in the case of Sumati Dayal was not applicable. In the case of Shri Mukesh Ratilal Marolia, the Hon'ble Bombay high Court has observed that the assessee has furnished copies of Share certificates to show that the shares were in fact transferred to the name of the assessee before it. Further there was no allegation that the prices of shares purchased by the assessee in the case before High Court were manipulated.

However, in the instant case, the assessee could not produce the copies of share certificates and copies of share transfer forms. The transaction of purchase of shares could not be cross verified. The shares of M/s Prime Capital Markets Ltd was declared as "Penny Stock" by SEBI and the broker Sanju Kabra, through whom the shares were sold by the assessee was indicted for manipulating the prices of penny stock shares. Hence, in our view, the tax authorities have rightly applied the test of human probabilities to examine the claim of purchase and sale of shares made by the assessee.
Usha Chandresh Shah .v. ITO (Mum.)(Trib.); www.itatonline.org

S. 69 :Unexplained investments-land-Additions cannot be made merely on the basis of stamp valuation.
The Tribunal held that the AO made the addition merely on the basis of value taken by the register for stamp duty purpose, but nothing was brought on record to substantiate that the assessee had invested more than the amount shown in the books of accounts. Therefore, addition made by the AO was not justified. The Tribunal followed the decision in the case of Krishna Kumar Rawat & Ors. .v. Union of India (1995) 214 ITR 610 (Raj.). (AY. 2001-02)
ITO .v. Anmol Marmo Grani (P) Ltd. (2014) 159 TTJ 5(UO) (Jodh.)(Trib.)

S.69: Unexplained investments-Immovable property—Transaction between related parties-Sale consideration partly set aside to decide on the basis of prevailing market rate.
Assessee is a construction company. It constructed five flats in 1994 and also constructed another three flats in same building in 2006 and sold all of them to related parties . A.O. recomputed the income by taking a uniform rate being maximum value of flat declared by assessee with regard to first five flats and FMV in respect of three flats subsequently constructed, and made addition. CIT(A) deleted addition on ground that there was no proof that any excess consideration had passed on to assessee over declared sales consideration. On appeal by revenue, assessee contended that sale consideration was at prevailing market value. Tribunal held thatwhere construction of first five flats was completed way back in 1994 and were not comparable with subsequently constructed three flats, adoption of uniform rate by Assessing Officer as sales consideration for first five constructed flat was acceptable. However, whether assessee's declared sale rate in respect of three flats subsequently constructed remained unexplained and in absence of full and proper details regarding declared sale value being in line with prevailing market rate of similar properties, matter was to be remitted back to A. O. for making fresh assessment in respect of three flats subsequently constructed. Tribunal also observed that True, genuine and bonafide transactions , even if made below par , the fair market valuation would not have any tax implication , being only undertaken in the normal course of business and inbusiness interest.(AY. 2007-08)
ITO .v. Lakewood Construction Co. (P.) Ltd. (2014)146 ITD 19 / (2013) 35 taxmann.com 224 (Mum.)(Trib.)

S. 69A : Unexplained money–In absence of information to prove that the bank account in question is not the assessees, addition of unexplained money is to be made in assessee's individual status.

During the course of the assessment proceedings, the AO observed that there was a cash deposit in the assessee's bank account and disallowed the same as unexplained income in the hands of the assessee on a protective basis and in the hands of the HUF on substantive basis The assessee clarified that the said amount was on account of money lending business of the family and was received in the name of the HUF. The CIT(A) and the Tribunal confirmed the action of the AO.

The High Court observed that on the basis of the material on record the assessee could not prove that the bank account in question was that of the HUF and not the assessee's personal account. The High Court held that no substantial question of law arose in the appeal and that it was in fact a question of fact and hence dismissed the appeal filed by the assessee. (AY. 2005-2006)

Ashok P. Magajikondi .v. ITO (2014) 221 Taxman 446 (Karn.)(HC)

S.69A: Unexplained money-Investment in shares-Burden discharged by showing circumstantial evidences, though the persons who have sold the shares have not responded to the summons-Deletion was held to be justified.

The assessee had purchased shares form a person in the year 1994-95. In the return for the relevant yea the AO sought to make addition. On request of the assessee, when notices were handed over to the assessee's representative and no response was received from the person who were stated to have sold the shares.

The courts held that the details and other evidences like details of payments, cheque numbers and dates, etc., in respect of the persons who had sold the shares to the assessee, which have also been transferred by the company in the name of assessee, and therefore the initial burden on the assessee stands effectively discharged and therefore no addition ought to have been made. The court held that the Tribunal was justified in deleting the addition made u/s. 69A. (AY. 1995-96)

CIT .v.Sadhana Jain(Smt.)(2014) 97 DTR 1 / 224 Taxman 28(Mag.) (All.)(HC)

S. 69A : Unexplained money– Additional sale consideration – Finding of fact–No substantial question of law.

Assessing Officer made additions of undisclosed income being additional sale consideration received by assessee in respect of two properties. In respect of first addition, Tribunal found that assessee furnished documentary evidence and details of transactions and that apart from e-mail seized during search action, there was no supporting evidence to conclude that there was any undisclosed income. In respect of second addition, Commissioner (Appeals) duly considered materials and deleted addition on ground that Assessing Officer had acted without any material so as to justifying additions. The High Court held that since there were pure findings of facts by Commissioner (Appeals) and Tribunal, which were borne out from material available on record, no substantial question of law arose. (AY. 2007-08)

CIT .v. Reis Magos Estates (P.) Ltd. (2014) 220 Taxman 169 (Mag.)(Bom)(HC.)

S. 69A : Unexplained money– Search - Angadia– Search on bus- seized cash belonging to assessee – Adequate cash balance at Mumbai office of assessee on the date of search– Employee of the assessee explained that the cash belonged to the assessee- Addition was deleted.

Assessee was in the business of 'Angadia'. A search was carried on a bus belonging to some other person which carried cash belonging to the assessee. AO treated the same as unexplained money. High Court held that finding of fact was given by the Tribunal that assessee had sufficient cash balance on the day of the search at the Mumbai office and also the employee of the assessee carrying the cash explained that the cash belonged to the assessee. In such circumstances addition u/s69A was not warranted.

CIT .v. Patel Natverlal Chinubhai & Co. (2014) 220 Taxman 168 (Mag.)(Guj)(HC.)

S. 69B: Amounts of investments not fully disclosed in books of account-Loose papers-Survey-Affidavit-Statement does not lose its evidentiary value-Addition was held to be

justified.[S.133A]
The assessee is a practicing Dentist. During survey loose papers were found which recorded the monthly receipts of the assessee. Assessee agreed to offer additional receipts shown in the loose paper to tax. Thereafter the assessee explained that page no had been prepared by his financial consultant for preparing a project report to obtain funds from bank so as to take from the bankers. The assessee also filed the affidavit of consultant. AO concluded that the affidavit was after thought and not supported by evidence hence made addition on the basis of statement. CIT (A) confirmed the addition. Tribunal also confirmed the order of CIT(A). On appeal to High Court the Court held that no evidence was produced regarding appointment of said consultant or that fees being paid. Moreover, no details were furnished by assessee of equipment's which were to be purchased, in the circumstances no credence could be given to affidavit filed by consultant and receipts recorded in said loose papers was undisclosed income of assessee.(AYs. 2004-05 to 2007-08)
Dr. Dinesh Jain .v.ITO (2014) 226 Taxman 27 (Bom.)(HC)

S. 69B: Amounts of investments not fully disclosed in books of account--Accounts not rejected - Reference to Valuation Officer and addition based on his report-Held to be not valid.
The Assessing Officer, after making a reference to the Valuation Officer for ascertaining the assessee's investment in the house property on the basis of such report made addition under section 69B as the assessee's unexplained investment. The Tribunal deleted the addition. On appeals to the High Court ;Held, dismissing the appeals, that the Assessing Officer having made a reference to the Valuation Officer without rejecting the books of account, the addition under section 69B was not justified. (AY. 2005-06)
CIT .v. Vijaykumar D. Gupta (2014) 365 ITR 353 (Guj.)(HC)

S.69B : Amounts of investments not fully disclosed in books of account-Sale of shares below market price-Deletion of additions was held to be justified.
UPCL a co promoter of HC Ltd., held 4000 shares in the assessee company and the balance 36000 shares were held by M Ltd. Later on HC Ltd., merged with three other companies to form a new company known as HCL Ltd. UPCL did not want to continue as a shareholder of the new HCL, it entered into a tripartite agreement with M. Ltd., and HC Ltd., to the effect that it shall sell 4000 shares to M Ltd., or its nominee, for Rs. 1.27Crs. M Ltd., did not have sufficient funds to make such payment and it entered into an agreement with SBICM Ltd., for payment of said amount to UPCL. Accordingly 4000 shares were transferred and registered in the name of SBICM and it paid Rs. 1.27 crs to UPCL . Pursuant to the scheme of merger, the originally allotted 4000 shares of RS. 100 each stood increased by 12,70,000 of Rs.10 each in HCL. Acting as a trustee pursuant to an oral trust, assessee HEICL transferred 12,70,000 shares to HCL to 62 persons at prices varying from Rs. 6.02 to Rs,18.91 per share.
The AO made an addition of Rs. 2,39,86,572/-, taking into consideration the difference between the market prize and declared sale consideration.
The Hon'ble Court held that the in the absence of any allegation or finding to the effect that an under-table consideration was received by the assessee on sale of shares made by it at a prize below the market prize, AO was not justified in making addition to income of the assessee of the amount representing the difference between the market prize and the declared sale consideration. More so the assesee acted as a trustee in selling the shares.
As far as the transfer or sale of shares by ATPPL is concerned the matter was remanded back to the AO for consideration. (AY. 1989-90)
CIT .v. Associate Technoplastics (P) Ltd.(2014) 97 DTR 17 (Delhi) (HC)
CIT .v. HCL Employees & Investments Co. Ltd. (2014) 97 DTR 17 (Delhi)(HC)

S. 69B : Amounts of investments not fully disclosed in books of account – Unaccounted stock-Survey-Addition was held to be justified.[S.133A]
In course of survey carried out at assessee's premises, unaccounted stock of Rs. 27.70 lakh was found. Statement of assessee was recorded wherein he admitted that he was unable to explain such stock. Accordingly, addition was made to assessee's income. Commissioner (Appeals) as well as Tribunal confirmed said addition. The Court held that, two lower authorities concurrently recorded a finding of

fact that assessee was unable to explain unaccounted stock at time of survey, and in absence of any evidence on record controverting said finding, no question of law arose in instant appeal and thus, it was to be dismissed.

Razakbhai R. Arabiani .v. ITO (2014) 220 Taxman 82(Mag.) (Guj.)(HC)

S. 69B : Amounts of investments not fully disclosed in books of account – Enquiry under Wealth-tax Act towards estimating market value of property –Provisions of the Wealth-tax Act and Schedule III thereto cannot be imported into the provisions of section 69B.

During assessment proceedings, assessing officer observed that assessee had acquired immovable properties for prices which were very low considering the rental income yielded by those properties. Therefore, assessing officer applied the rent capitalization method provided in rule 3 of Part B of Schedule III to the Wealth-tax Act and estimated the value of the properties at higher figures. Difference between the prices were treated as undisclosed investment u/s 69B of the Act. Tribunal however, deleted the entire addition. On appeal by revenue to High Court, dismissing the appeal held that, section 69B requires the Assessing Officer to first prove that the assessee has actually expended an amount which he has not fully recorded in his books of account. There has to be a finding that such amount was actually paid by the assessee over and above the declared consideration and the extra amount was not recorded in the assessee's books of account. The provisions of the Wealth-tax Act and Schedule III thereto cannot be imported into the provisions of section 69B because the enquiry under the Wealth-tax Act is towards estimating the market value of the property which is different from the actual price paid for the property. Section 69B does not permit an inference to be drawn from the circumstances surrounding the transaction that the purchaser of the property must have paid more than what was actually recorded in this books of account, because such an inference could be very subjective and could lead to the taxation of notional or fictitious income contrary to the strict provisions of Article 265 of the Constitution of India.

CIT .v. Dinesh Jain HUF (2014) 220 Taxman 160 (Mag.) / (2013) 40 Taxmann.com 428 (Delhi)(HC)

S. 69B : Amounts of investments not fully disclosed in books of account – Survey – Statement of partner cannot be relied upon-Addition made only on the basis of statement was deleted. [S.133A]

The AO added an amount of Rs. 31,21,590 on the basis of a document impounded during the survey and statement of partner of the assessee's firm who stated that one zero was omitted from such impounded document. The Tribunal relying on the decision of Kerala High Court in the case of Paul Mathews and Sons .v. CIT [2003] 263 ITR 101/129 Taxman 416 deleted the addition on the ground that such statement recorded during survey could not have been relied upon. Tribunal further noted that theory of omission of one zero is not borne out from the impounded document. Tribunal further observed that the contents of the documents do not suggest or bring out that notings are of loans and advances. The Tribunal was therefore, of the opinion that such addition was made only on conjectures and surmises. The HC based on the observations of Tribunal stated that it did not commit any error. A careful perusal of the orders on record would suggest that except for the impounded document and statement of partner, there was no further evidence with the Revenue to make addition. It was on the strength of the statement of the partner during the survey that the Revenue inflated such figure 10 times by adding zero. Statement of partner also suggested that it was his personal income and not that of firm. Thus entire statement was also not taken in its entirety. Further other than such statement, there was no further material available on record. Tribunal also recorded that from the document there was nothing to suggest that the entries pertained to loan and advances. Therefore no question of law arises and hence the appeal was dismissed.

CIT .v. Golden Finance (2014) 220 Taxman 162 (Mag.) (Guj.)(HC)

S. 69B : Amounts of investments not fully disclosed in books of account – Difference in the value of property shown in sale deed and as confirmed by seller – No evidence that witness gave false statement-Addition was held to be justified.

Difference in value of property as mentioned in sale deed and as confirmed by seller and seller had also filed an affidavit confirming said facts. On cross examination, he had confirmed his said

statements and moreover, he had declared income from sale of property and paid tax. Differential treated as unexplained investment of assessee (AY. 2006-07)

CIT .v.P. M. Aboobacker (2014) 363 ITR 447/270 CTR 217/225 Taxman 178 (Mag)/107 DTR 383 (Ker.)(HC)

S.69B: Amounts of investments not fully disclosed in books of account-Stocks–Bank-Addition could not be made on account of difference between the quantity and value of stock shown in the books of account and that shown in a statement furnished to the banking authorities to avail higher credit facilities if satisfactory explanation provided.

The assessee-company was engaged in manufacturing of pipes. The Assessing Officer, having noticed that there was a difference between in the quantity and value of stock as shown in the books of account and that shown to the bank, asked the assessee to explain it. The assessee in its reply stated that the difference was for the purpose of availing a credit facility from the bank. The Assessing Officer, having noted all these facts added the differential amount in both the statements to the income of the assessee under Section 69B. On appeal, the CIT(A) upheld the action of the Assessing Officer. On second appeal, the Tribunal considered various decisions and held that the addition could not be made on account of difference between the quantity and value of stock shown in the books of account and that shown in a statement furnished to the banking authorities to avail higher credit facilities. On appeal to the High Court, it uphold the order of the Tribunal and CIT(A) and held that if for the purpose of fulfilling the margin requirements of the bank purely on inflated estimate basis, when the stock statement had reflected inflated value of the stock, in wake of otherwise satisfactory explanation, both for the purpose of value as well as quantity, there is no reason to interfere with the order of the Tribunal. (AY. 2009-2010)

CIT .v. Riddhi Steel and Tubes Pvt. Ltd. (2014) 220 Taxman 148 (Guj.)(HC)

S. 69C:Unexplained expenditure-Proviso to section 69C does not apply retrospectively.

As per the notes on clauses accompanying the Finance (No.2) bill, 1998 which was inserted in the proviso to sec 69C and CBDT circular No. 772 dated 23rd Dec, 1998 w.e.f AY. Year 1999-2000, the expenditure incurred is explained but in the absence of the details about the source of income, the same shall not be allowed as deduction under any income. (AY. 1886-87, 1996-97)

Ram Gopal Varma .v. Dy.CIT (2014) 265 CTR 79 / 220 Taxman 84 (Mag.) / (2013) 357 ITR 493 (AP)(HC)

S.69C: Unexplained expenditure-Marriage of two daughters-Addition was held to be not justified merely on estimate basis.

The AO found that during the year under consideration, marriage of two daughters of the assessee were solemnised but the assessee failed to furnish complete details as regards various expenditures on the marriage/engagement ceremonies. The AO deduced that the assessee had incurred more that the declared expenditure on the ceremonies and thus estimated the expenditure considering the gifts received by the daughters and made addition on account of unexplained and undisclosed expenditure. In appeal CIT(A) deleted the addition. Tribunal also affirmed the order of CIT(A). On appeal by revenue the Court held that when the CIT(A) and the Tribunal has concurrently appreciated the entire evidence on record and have returned concurrent findings against the revenue, deleting addition under sec. 69 C, there is no illegality or perversity leading to any substantial question of law. (AY. 2005-06)

CIT .v. Babulal Agarwal (2014) 97 DTR 284(Raj.) (HC)

S. 69C : Unexplained expenditure – Discrepancy in stock-Rejection of books of accounts-Addition confirmed by the Tribunal was held to be reasonable.

The assessing officer, from the material available on record had found that there was negative stock in case of assessee from time to time. After confronting assessee with such figures and calling for his explanation, he believed that there was huge discrepancies in the stock available with the assessee which the assessee could not reconcile. For the entire year under consideration, he took aggregate of such negative stock valued at Rs. 47,72,525/- and added the entire amount as "unexplained stock" representing unexplained investment made by assessee under section 69C of the act. Aggrieved, assessee went in appeal before the CIT(A) who rejected the appeal. On appeal to Tribunal, it gave

substantial relief to the assessee and reduced the addition to Rs. 300,000. The Tribunal noted that the discrepancies noted by the AO were not clarified before the AO. Therefore it would be reasonable and proper for the AO to reject the book results of the assessee and to make reasonable addition considering the history of the assessee. Tribunal noted that without purchases there couldn't be any sales. Since the stock during the course of the proceedings was found to be negative, therefore, it could be presumed that the same was sold outside the books of account. The entire amount of the negative balance would not be treated as unexplained expenditure. The profit could be computed on the basis of sales made by the assessee. Tribunal noted that the Assessee produced all the books of account and sales and purchase vouchers before the AO for verification. The profit rate of the assessee in the assessment year is better as compared with the earlier years. The Tribunal held that ends of justice would be met if lump sum addition of Rs.3,00,000/- is maintained as against the addition made by the authorities below. The High Court confirmed the Tribunal order.

CIT .v. Jhaveri Industries (2014) 220 Taxman 70 (Mag.) (Guj.)(HC)

S.69C: Unexplained expenditure-Cash vouchers-Addition was confirmed in earlier year-Once again addition cannot be made for the relevant year. [S.68]

An addition was made as unexplained cash receipt on ground that assessee company was unable to explain some cash vouchers. Said sum was being repaid by assesse. Revenue sought to add said sum under section 69C for relevant assessment year. Addition having already been made in respect of cash vouchers in earlier year in hands of assessee, there was no scope or merit in sustaining another addition for current year on basis of same vouchers. (AY. 2008 – 09)

Alliance Finstock Ltd. .v. ACIT (2014) 146 ITD 739 / (2013) 40 taxmann.com 176 (Mum.)(Trib.)

S. 73: Losses–Speculation business–Carry forward and set off-Gross total income mainly consists of income chargeable under head capital gains or income from other sources-Deeming fiction cannot be applicable–Loss cannot be treated as speculation loss.

Whether assessee was in business of advancing loans and earning interest is not to be concluded by one isolated instance. The gross total income of assessee mainly consisted of income chargeable under head "Capital gains" or "Income from other sources". Therefore, deeming fiction not applicable and loss cannot be treated as speculation loss. Appeal of revenue was dismissed. (AY. 2000-01)

CIT .v. Paranjay Mercantile Ltd. (2014) 361 ITR 462 / 105 DTR 116 / 223 Taxman 10 (Guj.)(HC)

S.73: Loss-Speculation business–Speculation loss on transactions in derivatives can be set off against the gains of delivery shares.[S.43(5)]

Assessee, a share broker, entered into derivatives in which it suffered losses. The said losses constituted "speculation loss" (prior to the exclusion of derivatives from the ambit of speculative transactions under clause (d) of s. 43 (5) w.e.f. AY 2006-07). The assessee claimed that the said speculation loss was eligible to be set-off against the income arising out of purchase and sale of shares. The Tribunal upheld the claim of the assessee. On appeal by the department to the Tribunal HELD dismissing the appeal:

Under the Explanation to s. 73 where any part of the business of a company consists in the purchase and sale of shares of other companies, such company shall, for the purposes of the section, be deemed to be carrying on a speculation business to the extent to which the business consists of the purchase and sale of such shares. Therefore, the entire transaction carried out by the assessee was within the umbrella of speculative transaction. There was, as such, no bar in setting off the loss arising out of derivatives from the income arising out of buying and selling of shares.(AY. 2005-06)

CIT .v. Baljit Securities Pvt. Ltd(2014) 224 Taxman 45 (Cal) (HC)

S.73: Losses–Speculation business–losses on account of purchase and sale of shares- speculation loss–Set off against income from other sources. [S.56]

Loss on account of purchase and sale of shares be set off against profits earned from other sources if transaction did not constitute business carried on by assessee. (AY. 1991-92)

CIT .v. Orient Instrument P. Ltd. (2014) 360 ITR 182 (Delhi)(HC)

S. 74 : Losses - Capital gains-Derivatives-loss incurred from transaction in derivatives by assessee, being sub-account FII, could not be treated as business loss rather it was to be considered as short-term capital loss which was eligible for adjustment against short-term capital gain arising from sale of shares. [S.43(5), 115AD(1)(b)]

Following the judgment of Tribunal in Platinum Investment Management Ltd. v. Dy. DIT (IT) in [2013] 33 taxmann.com 298 (Mum(Trib.) the Tribunal held that loss incurred from transaction in derivatives by assessee, being sub-account FII, could not be treated as business loss rather it was to be considered as short-term capital loss which was eligible for adjustment against short-term capital gain arising from sale of shares and held that CIT(A) was not justified in holding that income from Index based or non-Index based derivatives be treated as "business income", whether speculative or non-speculative. The impugned order is, therefore, set aside by holding that income from derivative transaction resulting into loss of Rs.11.27 crore is to be considered as short-term capital loss on the sale of securities which is eligible for adjustment against short-term capital gains arising from the sale of shares. Accordingly, the income arising from transaction in derivative by assessee(s), being sub-account FII cannot be treated as business profit or loss. 115AD(1)(b). (AY. 2006-07)

Platinum Asset Management Ltd. .v. Dy. DIT(IT)(2014) 61 SOT 119/(2013) 40 taxmann.com 180(Mum.)(Trib).

S.80G: Donation-Foreign national-Application for renewal cannot be rejected on the ground that director of company is a foreign national who has signed the application and without giving an opportunity to rectify the curable defects.[S.2(15), 12A]

The assessee filed an application for renewal of approval granted under section 80G. The Director (Exemption) rejected said application on grounds that two of the directors of the assessee company were foreign Nationals therefore such persons were not allowed to perform work of trustees of a charitable institution in India and that application for renewal was verified and signed by incompetent person.

Though the application for renewal of approval u/s. 80G(5)(vi) was though signed by the Chartered Accountant of the assessee, form 10G annexed to the formal application has been verified and signed by one of the Directors of the assessee. The view of the DIT (Exemption) that the defect is not curable is against the settled principle of law as the DIT has not granted any opportunity to the assessee to either rectify or to explain the so called defect in the application. Therefore, the said technical objection is not sustainable. The objection of foreign national being the directors of the assessee, there is no such requirement or condition u/s. 80G(5) that the institution or fund should not have any director of foreign national. section 80G(5)(v) stipulates the conditions for eligibility to the donations for deduction. When no such objection was raised at the time of granting the earlier registration, not once but at four occasions and under different provisions of Income Tax Act as well as under Companies Act, then the objections raised by the DIT(E) are not sustainable. Denial was held to be not valid.

GIA India .v. DIT (E) (2014) 146 ITD 238 / (2013) 38 taxmann.com 323/161 TTJ 391/101 DTR 115 (Mum.)(Trib.)

S. 80HH:Newly established industrial undertakings–Derived-Scrap-Income from sale of scrap generated from manufacturing activity – Entitled to deduction.

Since scrap generated from the three units had direct and immediate nexus with the industrial undertaking and was generated from the manufacturing process itself, section 80HH benefit was to be allowed. (AYs. 1993-94, 1994-95)

CIT .v. Modi Xerox Ltd. (2014) 365 ITR 200 (All.)(HC)

S. 80HH : Newly established industrial undertakings-Non-submission of Audit Report in Form-10C along with Return of Income – Only a technical default-Deduction allowable-Form was rectification proceedings-Deduction allowable. [S.154, Form No.10C]

AO disallowed the deduction u/s 80HH by rectifying the assessment u/s 154, on the ground that Audit Report in Form-10C was not submitted along with the Return of Income. Audit Report in Form-10C was submitted by assesse during the rectification proceedings. High Court held that non submission of

Audit Report in Form-10C was a mere technical default and assessee submitted the same during the rectification proceedings. Therefore, deduction allowable.
CIT .v. A. W. Prod (2014) 220 Taxman 70 (Mag.) (All.)(HC.)

S. 80HH : Newly established industrial undertakings - Back ward areas -Crushing of granite boulders into small pieces amounts to production[S.80J, 80IB]
Crushing of granite boulders for bringing out graded metal of various sizes, which are used in construction activities, amounts to production. Special deductions can be granted under more than one provision of the Act. Special deductions under Chapter VI-A can be granted under more than one provision.
CIT .v. Panachayil Industries (2014) 363 ITR 261 (Ker.)(HC)

S. 80HH : Newly established industrial undertakings-Interest from trade debtors on outstanding balance of credit sale-Part of income of assessee from industrial undertaking-Eligible for deduction under sections 80HH and 80-I. [S.80I]
The assessee, an industrial undertaking, claimed deduction under sections 80HH and 80-I on the amount of interest received from the trade debtors on the outstanding balance of credit sale. The Assessing Officer disallowed the claim of deduction. On appeal, the Commissioner (Appeals) held that the sale was integrated part of business run by the assessee and, therefore, the interest received on outstanding balance of credit sale had to be considered as income of industrial undertaking belonging to the assessee. He, therefore, held that the interest in question was income of the assessee from the industrial undertaking and was eligible for deduction under sections 80HH and 80-I. The Tribunal upheld the order of the Commissioner (Appeals). On an appeal before the High Court, it held that the very source of interest received is as per terms of contract of sale of goods manufactured in the industrial undertaking. Hence, it is an inseparable part of the contract of sale. Consequently, it forms part of the income of the assessee from the industrial undertaking and is eligible for deduction under sections 80HH and 80-I. (AY. 1992-93)
CIT .v. Jindal Polyester and Steel Ltd. (2013) 221 Taxman 30 (All.)(HC)

S.80HH: Newly established industrial undertakings-Manufacturing cement is eligible-Derived from-Profits attributable to mining of lime used as raw material in manufacture of cement would not qualify the deduction under section 80H.
The connotation of the words "derived from" is narrower as compared to that of the words "attributable to". The words "derived from" must be understood as something which has a direct or immediate nexus with the assessee's industrial undertaking. When the Legislature has excluded the mining activity with specific words, this has to be accepted.
Therefore, the assessee was entitled to deduction only with respect to the profits attributable to the manufacture of cement and not with respect to profits attributable to the mining activity. The profits derived from the cement manufacturing activity could be apportioned in order to find out the profit derived from the mining activity. (AY.1997-98)
Deccan Cements Ltd .v. CIT (2014) 360 ITR 444/268 CTR 212/103 DTR 57 **(AP)(HC)**

S.80HH: Newly established industrial undertakings – Computation of profits-Market value-Determination of value of raw material to be made taking in to account cost of nearest available place, cost of transportation and local taxes. [S.80-I(8)]
The determination of the market value for the purpose of the Explanation to s. 80-I(8) would arise in a situation where there is an absence of a market. Therefore, one would have to hypothetically assume the existence of a market and what goods would be available there. For this purpose, the cost of the goods available at the nearest market would have to be reckoned and to that the cost of expenses such as transportation, local taxes, etc., has to be added. These inputs would have to be added to the cost of the goods available at the nearest market. A hypothetical assumption would have to be made by the AO with reference to the cost of the goods as available at the nearest market.
CIT .v. Wipro Ltd. (No.1) (2014) 360 ITR 606 /224 Taxman 220(Mag)(Karn.)(HC)

S.80HH: Newly established industrial undertakings – Consistency-Not eligible deduction –Unit was modernised and there was new Industrial undertaking.

Claim of deduction u/s.80HH and s. 80-I for assessment year 1985-86 was denied because of a finding that existing unit had been modernised and there was no new undertaking. In the absence of new evidence for assessment years 1986-87 and 1987-88, Assessee was held not entitled to deductions under sections 80HH and 80-I for those years as well.(AY. 1986-87, 1987-88 , 1992-93)

CIT .v. Wipro Ltd. (No.2) (2014) 360 ITR 658 (Karn.)(HC)

S. 80HHB : Projects outside India - Supply of material and labour by third party contractor - Assessee to supply designs, drawings and other technical inputs-Eligible deduction.[S.80HHBA]

The AO disallowed claim u/s 80HHB and 80HHBA of the assessee observing that merely giving consultancy or supervising the design of project or making work cost effective could not be said execution of any project. On appeal, the CIT(A) recorded finding that assessee was not merely providing consultancy services, but was also providing engineering services to projects namely, construction, supervision and other engineering services in execution of highway projects. He further found that there was combination of both the contractors - one, who supplied material and labour and the second, the assessee who rendered services in technical / consultancy / supervision field in completing the projects. The interdependence of both aspects was essential for the completion of project and one cannot stand without other. Both the physical as well as technical aspects of the project are equally important and one cannot be separated from the other. It was, therefore, impossible to say that assessee was not involved in executions of the entire project, both for the purpose of section 80HHB and for section 80HHBA. The Tribunal affirmed the order of the CIT(A). High Court upheld the decision of Tribunal. (AY. 2001-02)

CIT .v. Intercontinental Consultants & Technocrats (P.) Ltd. (2014) 220 Taxman 28 (Mag.) (Delhi)(HC)

S.80HHB: Projects outside India–Definition of foreign project-Planning and designing executed as a single integral work order-Deduction is available.

The assessee was engaged in assembly, reassembly, installation, renovation, continuous updating of machines, plants, mechanical, electronic and air-conditioning systems on board foreign vessels mostly while the vessels were sailing on the high seas with the help of highly efficient, quality conscious and competent technicians approved for the class of vessels they were to work on with the most modern computerised techniques. On receipt of orders the requirements of men, material, technology, cost and time was meticulously worked out, the plans got approved by principals, the equipment and technicians were carefully selected and got approved, the project was executed with a high degree of know-how, vigilant supervision and monitoring and maintenance of highest quality, efficiency, cost and time schedules was ensured. The workmen and the work executed had to be approved by international agencies and certificate of seaworthiness of the vessel had to be obtained at every port. Held, assessee was entitled to deduction u/s.80HHB.Order of Tribunal was reversed.

Maritime Overseas .v. CIT (2014) 361 ITR 434 (Cal.)(HC)

S.80HHC:Export business-Duty Entitlement Pass Book(DEPB)-Turnover exceeding Rs 10 Crores-Computation of higher profits.[S.28(iiid), 28(iiie)]

Where an assessee had an export turnover of exceeding Rs 10 Crores and had made profits on transfer of Duty Entitlement Pass Book under clause (iiid) of section 28 he would not get benefit of addition to export profits under provision to section 80HHC (3), on the contrary he would get benefit of exclusion of a smaller figure from 'profits from business' under Explanation (baa) to section 80HHC. In other words where the export turnover of an assessee exceeds Rs 10 Crores, he does not get benefit of addition of ninety percent of export incentive under clause (iiid) of section 28 to his export profits, but he gets a higher figure of profits of business, which ultimately results in computation of a bigger export profit

Harnam Syntex (P) Ltd. .v. CIT (2014) 225 Taxman 182 (Mag.)(SC)

S.80HHC: Export business-"turnover"-Sale proceeds of scrap is not "turnover" for s. 80HHC-Provision intended to encourage business men in order to bring more foreign exchange-Department should encourage such traders.

(i) The word "turnover" means only the amount of sale proceeds received in respect of the goods in which an assessee is dealing in. So far as the scrap is concerned, the sale proceeds from the scrap may either be shown separately in the Profit and Loss Account or may be deducted from the amount spent by the manufacturing unit on the raw material. When such scrap is sold the sale proceeds of the scrap cannot be included in the term 'turnover' for the reason that the unit is engaged primarily in the manufacturing and selling of steel utensils and not scrap of steel. Therefore, the proceeds of such scrap would not be included in 'sales' in the Profit and Loss Account of the assessee. (The situation would be different in the case of a person who is primarily dealing in scrap);

(ii) The intention behind enactment of s. 80HHC was to encourage export so as to earn more foreign exchange. For the said purpose the Government wanted to encourage businessmen, traders and manufacturers to increase the export so as to bring more foreign exchange in our country. If the purpose is to bring more foreign exchange and to encourage export, we are of the view that the legislature would surely like to give more benefit to persons who are making an effort to help our nation in the process of bringing more foreign exchange. If a trader or a manufacturer is trying his best to increase his exports, even at the cost of his business in a local market, we are sure that the Government would like to encourage such a person. In our opinion, once the Government decides to give some benefit to someone who is helping the nation in bringing foreign exchange, the Revenue should also make all possible efforts to encourage such traders or manufacturers by giving such business units more benefits as contemplated under the provisions of law.

CIT .v. Punjab Stainless Steel Industries (2014) 364 ITR 144/ 103 DTR 49/268 CTR 113 (SC)
CIT .v.Punjab Stainless and steel Industries (2014) 364 ITR 144/ 103 DTR 49 (SC)
CIT .v. Dhram Industries (2014)364 ITR 144/ 103 DTR 49 (SC)

S. 80HHC:Export business-Derived-Deemed credit under the CENVAT Incentive Scheme is part of the business profits eligible for deduction u/s. 80HHC.

Court held that CENVAT incentive being the refund of tax and duty paid on inputs consumed for goods manufactured and exported would automatically reduce the cost of manufacture of the exported goods, thereby necessarily increasing the profit. In view thereof, the deemed credit under the CENVAT Incentive Scheme at Rs.89,34,887/- would be a part of the business profits eligible for a deduction under section 80HHC.

In the present case, it can hardly be argued that the deemed credit under the CENVAT Incentive Scheme would not reduce the material / manufacturing cost of the goods exported by the Assessee. This was not the case of the Revenue also. That being the case, under the provisions of section 80HHC, the Assessee would be entitled to a deduction to the extent of the profits referred to in sub-section (1-B) thereof derived by the Assessee from the export of such goods or merchandise. No other provision was brought to our notice that would justify the disallowance of CENVAT incentive whilst computing the admissible deduction u/s 80HHC of the Act.(ITA No. 435 of 2012)

CIT .v. Valiant Glass Works Pvt. Ltd. (Bom.)(HC);www.itatonline.org

S.80HHC:Export business-Unabsorbed investment allowance-Required to be set off while computing the income chargeable under the head "Profits and gains of business or profession" [S.32A(3),80AB]

Court held that for the purpose of computing the deductions under section 80HHC , unabsorbed investment allowance is required to be set off while computing the income chargeable under the head "Profits and gains of business or profession". Appeal of revenue was allowed.(AY. 1991-92)

CIT .v. V.M.Salgaonkar & Bros. (P) Ltd. (2014) 109 DTR 142 (Bom.)(HC)

S. 80HHC :Export business-Exchange rate difference pertaining to exports made in earlier years–Eligible for deduction under section 80 HHC of the Act. Such amount of Exchange rate difference could neither be deducted from Export turnover norninety percent thereof can be excluded from business profit.

Amount representing the exchange rate difference relating to export of earlier period is eligible for deduction under section 80HHC of the Act. Further, the amount of exchange rate difference cannot be deducted from the export turnover and ninety percent (90%) thereof also cannot be excluded from business profit while computing deduction under section 80HHC of the Act. (AY. 2003 – 04)
CIT v. Priyanka Gems (2014) 102 DTR 193 / 267 CTR 480 (Guj.)(HC)

S. 80HHC : Export business– Deduction u/s 80-IB to be reduced from profits for calculating deduction u/s 80HHC. [S. 80-IB]
High Court relying upon the decision of the same court in case of Asian Exim International .v. CIT (IT Appeal No. 469 of 2010), held that for calculating deduction u/s 80HHC, deduction u/s 80-IB is required to be reduced from the profits. (AY. 2004-05)
CIT .v. Preet Forgings (P.) Ltd. (2014) 220 Taxman 163 (Mag.) (P&H)(HC.)

S. 80HHC : Export business – Export of marble blocks which were not polished as required vide item (X) of XIIth Schedule-Eligible deduction.
Deduction under section 80HHC could be allowed on export of marble blocks which were not polished as required vide item (X) of XIIth Schedule as held in case of CIT .v. Arihant Tiles & Minerals (P.) Ltd. [2013] 34 taxmann.com 114 (Raj.),
CIT .v. Rameshwar Sharma (2014) 220 Taxman 30 (Mag.)(Raj.)(HC)

S. 80HHC : Export business - Audit report was filed during course of assessment proceedings-Eligible deduction.[Form no 10CCAC]
For the, the assessee claimed deduction under Section 80HHC of the Act to the tune of Rs. 39,86,538/-. However, a copy of the audit report in Form No.10CCAC was not filed along with the return. During the course of assessment proceedings, the assessee, along with his letter dated 19.12.2005, submitted the report in the prescribed Form No.10CCAC dated 23.05.2003 claiming deduction under Section 80HHC at Rs.37,08,019.97. The AO declined to allow the deduction as claimed by the assessee under Section 80HHC of the Act. The High Court held that the expression "alongwith return of income" occurring in Sub-section (4) of Section 80HHC of the Income Tax Act, 1961 is directory in nature insofar it relates to the time for furnishing of the report of an accountant by the assessee in the prescribed form; and even if such a report in the prescribed form is not furnished alongwith the return of income, but is furnished during the course of assessment proceedings, it cannot be removed out of consideration only for the reason of the same having not been filed at the initial stage of filing of the return. (AY. 2003-04)
CIT .v. Godha Chemicals (P.) Ltd. (2014) 220 Taxman 31 (Mag.)(Raj.)(HC)

S .80HHC : Export business-Scrap sales not to be included in total turnover.
Scrap sales is not to be included in total turnover for purpose of computing deduction under section 80HHC (AY. 1998-99)
Brakes India Ltd. .v.JCIT (2014) 363 ITR 13 / 222 Taxman 359 / 104 DTR 122 / 270 CTR 98 (Mad.)(HC) (Mad.)(HC)

S. 80HHC : Export business-Commission to foreign agent not to be reduced from export turnover
Commission paid to the foreign agent cannot be reduced from the export turnover while calculating the deduction. (AY.2003-04)
CIT .v. Koncherry Coir Factories (2014) 363 ITR 463 (Ker)(HC)

S.80HHC:Export business-Bottling of gas into gas cylinders-Amounts to production-Entitled to deduction.[S.80I,80IA]
Bottling of gas into gas cylinders amounts to production, and assessee was entitled to deduction. High Court referred the judgment of Gujarat High Court in Bharat Petroleum Corporation Ltd .v. State of Gujrat and others.Appeal of revenue was dismissed.
CIT .v. Hindustan Petroleum Corporation Ltd.(2014) 361 ITR 190 (Bom.)(HC)

S.80HHC: Export business–Job work basis–Computation of deduction-Total turnover-Ninety percent to be reduced in total turnover to arrive at business profits.

The assessee manufactured yarn out of cotton and cotton waste purchased on its own and also did conversion of raw materials into yarn, on job work basis. The AO excluded the conversion charges received on job work from the profits of the business for arriving at the adjustable book profits in terms of clause (baa) of the Explanation to s. 80HHC. Held, that net conversion charges on job works would also form part of the gross total income. Therefore, 90 per cent of the sum had to be reduced in the total turnover of the assessee for arriving at the business profit. Appeal of revenue was dismissed. (AY.1997-98)

CIT .v. Kadri Mills Ltd (2014) 360 ITR 595/222 Taxman 108 (Mag.) (Mad.)(HC)

S.80HHC: Export business–Computation-Demurrage and dead freight charges to be allowed while calculating relief under section 80HHC.

The foreign company deducted the amount towards demurrage and dead freight and remitted the balance amount to the assessee, as agreed between it and the assessee.

Held, that the fact that the assessee received only the balance, did not mean that the sale consideration was anything less than Rs.6,14,87,164 for the purpose of claiming deduction under s. 80HHC. There was no material to show that the parties had agreed that the balance after adjusting demurrage and dead freight charges alone would be the sale consideration. Thus, the demurrage and dead freight charges were to be allowed while calculating the relief under s. 80HHC.Appeal of revenue was dismissed. (AY.1996-97)

CIT .v. Bannariamman Exports Ltd. (2014) 360 ITR 591/221 Taxman 199 (Mag.) (Mad.)(HC)

S.80HHC: Export business-Receipt of premium on special import license, insurance claim on vehicles and service charges were not linked with export business and thus would be treated as charges within meaning of Explanation (baa) to section 80HHC, thus would not be entitled to deduction.

During the year assessee received premium on special import licenses, insurance claim on vehicles and was in receipt of certain service charges. The assessee claimed deduction on these receipts under section 80HHC on the ground that these receipt were linked with export business and thus could not be treated as charges within the meaning of *Explanation (baa)* to section 80HHC. The Tribunal disallowed the claim. On appeal, the High Court relied on the law laid down by Hon'ble Supreme Court in *CIT* .v. K. Ravindranathan Nair[2007] 295 ITR 228 and held that the view which has been taken by the Tribunal is, therefore, consistent with the law which has been laid down by the Supreme Court and the question was answered in favour of revenue. (AY. 1997-1998).

Damodar Mangalji Mining Co. .v. JCIT (2014) 220 Taxman 344 (Bom.)(HC)

S. 80HHC : Export business-Computation –Total deduction should not exceed the eligible profits of the undertaking. [S. 80IA, 80IB]

Tribunal held that the export profits of the export units which have been allowed as deduction under section 80IA / 80IB should be reduced in proportion of export turnover to total turnover while allowing deduction under section 80HHC and not the entire deduction allowed under section 80IA / 80IB, subject to the condition that total deduction should not exceed the eligible profits of the undertaking. (A.Y. 2002-03)

Reliance Industries .v. Addl. ACIT (2014) 159 TTJ 349 /(2013) 55 SOT 8 (URO)(Mum)(Trib.)

S.80HHD:Earnings in convertible foreign exchange - Tour operator - Convertible foreign exchange Deduction to be computed on entire business or each eligible unit

Deduction to be computed on entire business or in respect of each eligible unit decided against the assessee following earlier years subject to the outcome of the SLP pending for the earlier years before the Apex Court. (AY.1998-99)

CIT .v. ITC Hotels (2014) 363 ITR 254/269 CTR 308 (Karn.)(HC)

S. 80HHD: Earnings in convertible foreign exchange-Profits of entire business-Computation benefit cannot be given separately to each hotel.

Computation of benefit cannot be given separately to each hotel. Profits of entire business of assesseeshould be reckoned as a whole.(AY.1997-98)
Hotel and Allied P. Ltd. .v. Dy. CIT (2014) 361 ITR 184 (Ker.)(HC)

S.80HHE: **Export business-Computer software–Total turnover. [S.10A]**
While computing total turnover for deduction u/s 80HHE, the profit or turnover of the other unit of the same concern which are otherwise eligible for deduction u/s 10A, should not be computed. As the underlying principle is once the profit and gains of an undertaking is allowed as deduction the other benefit can not at the same time be allowed under any other provision.(AY.2001 - 2002)
CIT v. Sasken Communication Technologies Ltd. (2014) 265 CTR 540 (Karn)(HC)

S.80HHE: Export business-Free trade zone- total turnover – Turnover of eligible units does not form part of the profits of the business for the purpose of deduction.[S.10A]
When assessee is held to be eligible exemption section 10A, neither the profits and gains of that business nor the turnover of that business could be added to find out the profits from export of computer software under section 80HHE.(AY. 2001-02)
CIT .v. Sasken Communication Technologies Ltd. (2014) 98 DTR194 (Karn.)(HC)

S.80HHE: Export business-Computer software–Service Income-Would not be susceptible to a reduction of 90 per cent.
Income emanating from services rendered would not be susceptible to a reduction of 90 per cent as it does not constitute a receipt of nature similar to brokerage, commission, interest, rent or charges. Such receipt could not be subject to deduction of 90 percent under sub-cl(1) of c.(d) of the Explanation and therefore, not liable to be reduced to the extent of 90 percent. (AYs. 1999-2000 to 2002-03)
CIT.v. Robert Bosch (India) Ltd. (2014) 98 DTR18 (Karn.)(HC)

S. 80HHE : Export business - Computer software Data processing-Eligible for deduction.
The Tribunal held that the assessee is entitled for deduction under section 80HHE in respect of the income earned from data processing services rendered to the enterprise outside India. The Tribunal followed earlier year's Tribunal order in assessee's own case.
TNS India (P) Ltd. .v. ACIT (2014) 163 TTJ 576 (Hyd.)(Trib.)

S.80I: Industrial undertakings–Computation of relief–Relief granted u/s 80HH cannot be deducted from gross total income.[S.80HH]
Relief granted under s. 80HH cannot be deducted from gross total income for computing of relief under s. 80-I.
CIT .v. Hindustan Pipe Udyog Ltd. (2014) 360 ITR 437 (All.)(HC)

S.80I: Industrial undertakings – Income earned or derived-Interest on short term deposit is not includible in profits and gains from manufacturing activity undertaken by Industrial undertaking.
Interest on short-term deposit is not income earned or derived from manufacturing activity undertaken by industrial undertaking. Also, tank hire charges received by assessee from consumers separately billed and charged is not includible in profits and gains from manufacturing activity undertaken by industrial undertaking. (AYs.1993-94,1994-95)
Krishak Bharati Co-op Ltd .v. CIT (2014) 360 ITR 209 (Delhi)(HC)

S.80I: Industrial undertakings-Profit derived-Service charges-crane hire charges-Interest from bank- Not entitle to deduction-Service charges from heavy water board-Entitle to deduction.
Service charges, crane hire charges , ammonia hire charges and interest from banks and financial institutions are entitled to deduction under section 80I, However service charges received from heavy water board of the Department of Atomic Energy could be considered a profit derived from industrial undertaking to qualify for deduction under section 80I.(AY.1995-96)
KrishakBharati Co-operative Ltd .v. JCIT (2014) 360 ITR 219/101 DTR 352 (Delhi)(HC)

S. 80IA: Industrial undertakings- Manufacturing or production – Installing air conditioning system at the premises of its customers amounted to assembling not entitled deduction.

Purchase of air conditioners and other parts and installing the same after connecting them with the panels and ducting at its customers premises amounted to assembling and not manufacturing and assessee is not entitle to deduction under section 80 IA of the Act. (AY. 2000 – 01)

Koolnest (P) Ltd. .v. Dy. CIT (2014) 102 DTR 127 / 223 Taxman 223 (Mag.) (Karn.)(HC)

S. 80IA :Industrial undertakings- Set off of brought forward losses and depreciation of earlier years – If before calming deduction under section 80 IA – Losses and depreciation in respect of eligible business is set off against income from other sources – The same losses and depreciation cannot again be notionally set off against the profits of eligible business.

Where before claiming deduction under section 80-IA of the Act, losses and depreciation claimed by the assessee in respect of eligible business is set off against income from other sources, the said loss or depreciation cannot again be notionally set off against the profits of eligible business while computing deduction under section 80 IA of the Act. (AY.2008–09)

CIT v. Anil H. Lad (2014) 102 DTR 241 /45 taxmann.com 98 /225 Taxman 170(Mag.)(Karn.)(HC)

S. 80IA : Industrial undertakings - Set off of losses of non-80IA unit towards profits of 80IA Unit.

The assessee company was engaged in the business of manufacturing poultry vaccines (S.80 IA unit) in collaboration with Vineland Laboratories, USA. It claimed that it had opened another unit, i.e., Animal Healthcare Products Division under the name of "Avitech". The company reported losses in respect of "Avitech" Unit and profit from its vaccine centre/undertaking. The Assessing Officer adjusted the amount of loss so claimed towards the profits earned in the Poultry Vaccine Division and computed the deduction only on the balance of profits. The assessee carried the matter in appeal. The CIT(A) observed that this was the first year of its operation and for the separate division under name 'Avitech'. Though it incurred losses in the first year, it reached stability and it earned a net profits in subsequent years and the deduction u/s 80IA has not been claimed on this profit. The CIT(A) allowed the claim of the assessee. The Tribunal agreed with the decision of the CIT (A). Before the High Court, the Revenue stated that a fair and objective reading of the record would reveal that the assessee's claim was inadmissible under Section-80IA because the second Unit was located within the same premises and could not, therefore, be characterised as a "separate undertaking". Counsel urged that once the assessee decided to open the separate division in the same premises, he cannot claim the benefit of Section 80IA as far as that activity is concerned. The High Court observed that neither the Tribunal nor the CIT (A) in fact dealt with this issue. Also, no contention that the undertaking was located within the same premises as the other poultry vaccine division or undertaking was raised before Tribunal. This being a question of fact, the High Court did not interfere with the conclusion of the below authorities. As far as the legality of the conclusions were concerned, it agreed with the view of CIT (A) and Tribunal as far the reliance on the ruling of Supreme Court in CIT .v. Canara Workshops (P). Ltd (1986) 161 ITR 320 (SC) was concerned.

CIT .v. Indovax (P.) Ltd. (2014) 220 Taxman 164 (Mag.)(Delhi)(HC)

S. 80IA: Industrial undertakings – Derived from- Interest income not eligible for deduction

Interest on KEB and NSC deposits is not income derived from Industrial undertaking and therefore not entitled to deduction u/s.80IA (AY.1998-99)

CIT .v. ITC Hotels (2014) 363 ITR 254 / 269 CTR 308 (Karn.)(HC)

S. 80IA : Industrial undertakings – Manufacture or production- Centrifuging of transformer oil purchased from the market – Not manufacturing activity or production of new articles or things-Not entitled to deduction.

Assessee purchased transformer oil from the market and the centrifuging was done by the centrifugal machine in order to make it usable in transformers. No new substance or articles or things emerged from that processing. No manufacturing activity/production. (AY. 1997-98)

CIT .v. S.K. Transformer P. Ltd. (2014) 363 ITR 394 (All.)(HC)

S. 80IA : Industrial undertakings – Insurance claim received on loss of production is not eligible for deduction.

The assessee had suffered a fire accident on 11.03.1996 relevant for A.Y. 1996-97.It subsequently received compensation from an insurance company for loss of production due to the accident and considered the same eligible for grant of relief under section 80-IA in A.Y.1998-99. The AO rejected the claim for lack of nexus between the claim and the loss suffered. The High Court noted that there were no materials produced by the assessee to substantiate the nature of the fire accident that had taken place to link it to the commercial activity to earn profit. There being no material to link this accident and the nature of damage caused in the industrial activity and to the productivity of the company, the AO had rightly held the compensation received ineligible for the purpose of granting relief under Section 80-IA of the Act. Reliance placed by the Tribunal on the decision of Rollatainers Ltd. .v. Dy.CIT [2000] 111 taxman 221 (Mag.) in favour of the assessee held to be misplaced on account of distinguishing facts.(AY.1998-99)

CIT .v.Gangothri Textiles Ltd. (2014) 221 Taxman 28 (Mad.)(HC)

S. 80IA: Industrial undertakings–Derived from manufacturing activity–Scrap sales, labour work and interest receipts-Direction was given to compute the income unit wise.

The Tribunal set aside the finding rendered by the Commissioner (Appeals) and restored the matter to the files of the AO with a direction to examine whether the receipts were derived from manufacturing activities of the assessee and if it was found that they were derived from the manufacturing activity, they should be included in the profits of the industrial undertaking and such exercise to be done after affording an opportunity of hearing to the assessee.

The High Court modified the order of the Tribunal and the AO was directed to look at the scrap sales and labour work and other interest receipts unit-wise for the purpose of computing the deduction u/s. 80-IA. (AY. 1998-99)

CIT .v. Brakes India Ltd. (2014) 361 ITR 424 (Mad.)(HC)

S.80IA: Industrial undertakings-The effect of s. 80-IA(9) is that s. 80-IA deduction has to be reduced for s.80HHC deduction in all cases and not only when the combined deduction exceeds the profits.[S.80HHC, 80IA(9)]

The Gujarat High Court had to consider the controversy whether the assessee can claim deduction u/s 80HHC of the Act, ignoring the deduction already claimed and allowed u/s 80IA of the Act, unless and until the combined effect of the deductions flowing from both the sections is to exceed the profit and gain of the eligible business of the undertaking or enterprise. HELD by the High Court deciding in favour of the department:

Sub-section (9) of s. 80IA is aimed at restricting the successive claims of deduction of the same profit or gain under different provisions contained in sub-chapter C of Chapter VI of the Act. This provision, therefore, necessarily impacts other deduction provisions including s. 80HHC of the Act. Nothing contained in s. 80HHC suggests that the deduction provided therein was immune from any outside influence or that the provision was impregnable by any other statute or enactment. Accepting any such theory would lead to incongruous results. Even the assessee concedes that sub-section (9) of s. 80IA would operate as to limiting the combined deductions to a maximum of the profits and gains from an eligible business of the undertaking or enterprise. If s. 80HHC contained a protective shell making it immune from any outside influence, even this effect of sub-section (9) of s. 80IA could not be applied. This would completely render the provisions of sub-section (9) of s. 80IA redundant and meaningless.(AY. 2001-02)

CIT .v. Atul Intermediates (2014)103 DTR 353 (Guj.)(HC)

S. 80IA : Profits and gains from infrastructure undertakings –Carbon credit-Derived from-Income on sale of Certified Emission Reduction/carbon credit-Not entitled for deduction.

The income on sale of Certified Emission Reduction/carbon credit cannot be treated as capital receipt, therefore, it is to be treated as profits and gains of business or profession; hence liable for taxation. Deduction in respect of profit and gains from industrial undertakings or enterprises engaged in infrastructure development, etc. deduction of an amount equal to 100% of the profit derived from

business undertaking is alone eligible for deduction u/s 80-IA. The industrial undertaking shall be the direct source for earning the profit and not a means to earn any other profit. Therefore, the income on sale of Certified Emission Reduction/carbon credit would form part of the profit and gains of business; cannot be treated as profit derived from the industrial undertaking. The assessee is not entitled for deduction u/s 80-IA of the Act. (AY. 2008-09)

Apollo Tyres Ltd. .v. ACIT (2014) 149 ITD 756 / 31 ITR 477 / 47 taxmann.com 416 (Cochin)(Trib.)

S. 80IA : Profits and gains from infrastructure undertakings-Developer-Contactor-A developer is a person who designs and creates new projects whereas a contractor is a person who has a contract to do work

Tribunal held that having regard to the scope of work executed by the assessee, it is difficult to comprehended that assessee was merely acting as a contractor. In common parlance, a contractor is understood as a person who carries out the assigned work as per the directions given by the contractee. In the present case, the assessee has used own-developed technology and its own resources to conceptualize, design, erect, commission, test and operate the 'Saurashtra Branch Canal Pumping Scheme'. Therefore, in our view, assessee is to be understood as a 'developer', and distinct from a 'contractor' qua the impugned contract awarded by SSNNL.

Kirloskar Brothers limited .v. DCIT (Pune)(Trib.); www.itatonline.org

S.80-IA :Industrial undertakings- Works contract –Contractor-Developer-Construction and engineering-Matter was remanded back for to verify whether the assessee fell under category of 'contractor' or a 'developer'.

Assessee carried out development work in respect of water supply and sewerage system of municipal authorities. The assessee filed its return claiming deduction under section 80-IA. The AO opined that the work was executed on behalf of the owner, i.e., the authorities who had given the contract. The assessee had not worked as a developer because for providing infrastructure facilities the assessee had not used its own funds. As per the AO the assessee had only executed the 'work contract' and there was no operation or maintenance on the part of the assessee. The AO thus, taking a view that assessee could not fulfil conditions specified u/s. 80-IA(4), rejected assessee's claim for deduction. In appeal The CIT (A) allowed the assessee's claim. Before ITAT the issue is only that whether assessee fell under category of 'contractor' or a 'developer'. The ITAT remanded back the matter for disposal afresh to ascertain whether the assessee fell under category of 'contractor' or a 'developer'. (A.Y. 2002-03)

Modern Construction Co. (P.) Ltd. v. Dy. CIT (2014) 149 ITD 71 / 42 taxmann.com 172 (Ahd.)(Trib.)

S.80IA(8):Industrial undertakings-Income from generation of power-Market value of captive consumption of power—Grid price- Arm's length value- If there are multiple "market values" assessee has the right to choose the suitable one.

S. 80-IA(8) provides that if goods or services held by the eligible unit are transferred to the non-eligible business or vice-versa, the assessee must adopt 'Market Value' as the transfer price. In the open market, where a basket of 'Market Values' (say like, independent third party transactions, grid price (average annual landed cost at which grid has sold power to the assessee), Power Exchange Price for the relevant period etc.) are available, the law does not put any restriction on the assessee as to which 'Market Value' it has to adopt, it is purely assessee's discretion. So long as the assessee has adopted a 'Market Value' as the transfer price, that is sufficient compliance of law. The AO can adopt a different value only where the value adopted by assessee does not correspond to the 'market value'. Even if assessee's Cement Unit has purchased power, also from the Grid or that assessee's Power Unit has also partly sold its power to grid or third parties that by itself, does not compel the assessee or permit the Revenue, to adopt ONLY the 'grid price' or the price at which the Eligible Unit has partly sold its power to grid or third parties, as the 'market value' for captive consumption of power to compute the profits of the eligible unit. Any such attempt is clearly beyond the explicit provisions of s. 80IA(8) of the Act.If the value adopted by the assessee is a'market value' it is not permissible for

the revenue to recomputed the profits and gains on the eligible unit by substituting the said value by any other market value. (AY. 2007-08 to 2009-10)
Shree Cement Ltd. .v. ACIT(2014) 100 DTR 33 (Jaipur)(Trib.)

S. 80-IB: Industrial undertakings-Manufacture-Buying monitor, key board, mouse and assembling–Amounts to manufacture-Entitle to deduction.
The assessee bought basic computer items such as monitor, key board, mouse, etc., and was into the activity of assembling them. The Tribunal had rightly deleted the disallowance of deduction under section 80-IB made by the Assessing Officer. Further, there was a specific finding by the Commissioner (Appeals) that the assessee had employed at least ten persons. This was a finding of fact and it could not be said that the assessee was not entitled to deduction under section 80-IB on this ground. (AYs. 2003-04 – 2007-2008)
CIT .v. Sai Infosystem India P. Ltd. (2014) 365 ITR 433 (Guj.)(HC)
CIT .v. Sunilbhai S. Kakad (2014) 365 ITR 427 (Guj.)(HC)

S.80-IB: Industrial undertakings–Delay in filing return and audit report-CBDT notification extending the date–Matter to be decided afresh as it goes to the root of the matter.[S.44AB,80AC,119,139].
The AO, CIT (A) and Tribunal held that the deduction u/s 80-IB for AY 2007-08 could not be granted as the assessee had filed the return on 5th November, 2007 instead of the due date of 31st October, 2007. Before the High Court, the assessee contended that the CBDT had extended the due date of furnishing the return for the said year. Held, since the impugned notification goes to the root of the matter, the matter was remanded back to the Tribunal for decision afresh. (AY. 2007-08)
Bal Kishan Dhawan (HUF) .v. Dy.CIT (2014) 365 ITR 581 (P&H)(HC)

S. 80-IB:Industrial undertakings- Film production-Rule of consistency-Manufacture-An "industrial undertaking" can be formed by taking Plant and machinery on hire-Not necessary for the assessee to "own" the Plant and machinery Dept's tendency to try to unsettle matters strongly disapproved
The assessee, a film producer, claimed deduction u/s 80-IB in respect of the profits from his film called 'Border'. The AO, relying on Textile Machinery Corp. Ltd. v. CIT (1977) 107 ITR 195 (SC), denied the claim for deduction on the ground that as the assessee did not own any plant & machinery, he was not an "industrial undertaking" u/s 80-IB(2)(ii). However, the CIT(A) & Tribunal allowed the assessee's claim. On appeal by the department, HELD dismissing the appeal:
(i) The argument of the department that if an assessee does not own plant and machinery, it cannot be an industrial undertaking is extreme and misconceived. S. 80-IB permits an undertaking to be formed by 'hire' of plant and machinery and does not require the assessee to own the same. A film production unit formed by engaging cameraman, editor, sound technicians and using their equipments for filming, processing, sound recording and mixing machines on contract basis is an "industrial undertaking" eligible for s. 80-IB deduction (CIT v. D.K. Kondke (1991) 192 ITR 128 (Bom) followed, Textile Machinery Corp 107 ITR (SC) distinguished);
(ii) It is unfortunate that the department does not maintain the rule of consistency and instead disobeys it. As the Tribunal had for the earlier years decided the issue in favour of the assessee and the High Court had dismissed the department's appeals, the Revenue ought not to have filed an appeal for the present year. We strongly disapprove of the attempt to canvass extreme arguments so as to take a chance and try to unsettle the settled matters and things. This tendency has to be curbed and we must come down heavily on parties to curb it, may it be the Revenue.(AY.2007-08)
CIT v. Jyoti Prakash Dutta(2014) 367 ITR 568/271 CTR 159/109 DTR 17(Bom.)(HC)

S. 80IB : Industrial undertakings–Small Scale Industrial Undertaking- Investment in Plant & Machinery to be restricted to Rs. 1 crore – Cost of gas fire equipment not to be included for calculating the limit.
Assessee claiming to be a small scale industry (SSI) filed its return claiming deduction under section 80-IB. Assessing Officer rejected assessee's claim holding that investment made by assessee in plant and machinery was more than Rs. One crore and, therefore, assessee could not be treated as SSI.

Commissioner (Appeals) noted that Assessing Officer had wrongly included cost of gas fire equipment falling in category of 'gas producer plant', in cost of plant and machinery. Commissioner (Appeals) finding that if cost of gas fire equipment was excluded, then investment in plant and machinery would not exceed Rs. One crore, allowed assessee's claim. Tribunal upheld order of Commissioner (Appeals). The High Court observed that even as per the earlier notification [even prior to 1997], an SSI undertaking in which the investment in fixed assets whether held on ownership terms or lease or on hire does not exceed Rs.1 Crore shall be regarded as SSI undertaking. As per the said notification in calculating the value of plant and machinery the cost of Gas Producer Plant was required to be excluded. It appears that subsequently by notification of 1997, the limit of Rs. 1 Crore is increased to Rs. 3 Crore. As per the circulars dated 27-03-2000 and 19-12-2000 it was clarified that if any unit has obtained any provisional registration on the basis of the registration dated 10-12-1997 and has taken concrete steps for implementing projects prior to 24-12-1999, it would continue the SSI status so long as investment in plant and machinery does not exceed Rs. 3 Crore. On appreciation of evidence and documents on record, CIT(A) held that gas fire equipment falls in the category of gas producer plants and therefore, while considering the limit of Rs. 1 Crore / 3 Crore, the cost of gas fire - gas producer plant is to be excluded i.e. Rs. 17,62,620/-. Therefore, without even considering whether the limit of Rs. 3 Crore [as per the subsequent notification] is to be considered or not, if the cost of gas fire/gas producer plant i.e. Rs. 17,62,620/- is excluded, in that case, the cost of plant and machinery for the purpose of SSI unit does not exceed Rs. 1 Crore and therefore, as rightly held by the CIT(A), confirmed by the ITAT, the assessee would be entitled to deductions under Section 80-IB of the IT Act as SSI unit.

CIT .v. W. Refoil Earth (P.) Ltd. (2014) 220 Taxman 155 (Mag.) (Guj.) (HC)

S. 80IB : Industrial undertakings–Number of workers-Workers of another unit also required to be considered.

Assessing Officer denied the deduction u/s 80-IB on the basis that number of workers attending the factory and working in the manufacturing process were less than 10. Appellate authorities allowed claim of assessee holding that Assessing Officer had only considered workers engaged in one unit, whereas assessee was having another unit of same activity and, therefore, workers engaged in another unit was also required to be taken into consideration while computing total number of workers employed by assessee. On appeal by revenue the High Court affirmed the view of Tribunal.

CIT .v. Areez P. Khambhata (2014) 220 Taxman 34 (Mag.) / (2013) 40 Taxmann.com 23 (Guj.)(HC)

S. 80IB : Industrial undertakings - Manufacturing rubber treading material and rubber compound on job work basis- Deduction allowable.

Assessee manufacturing rubber treading material and rubber compound and mixing on job work basis. Income therefrom entitled for deduction. (AY.2007-08)

CIT .v. Midas Polymer Compounds P. Ltd (2014) 363 ITR 309/225 Taxman 82(Mag.) (Ker.)(HC)

S. 80IB : Industrial undertakings-Manufacture of Polyurethane foam for automobile seats is not entitled to deduction as the articles is mentioned in eleventh schedule.

Where assessee was engaged in manufacture of polyurethane foam [PT foam] in different shapes of automobile seats and it claimed deduction under section 80-IB contending that PT foam was used by it as a raw material for manufacturing automobile seats and, therefore, end product was automobile seats, since assessee simply produced foam seats and did not undertake any further process to change its original character as PT foam, said item was covered by Entry No. 25 of Eleventh Schedule to Act and, therefore, assessee was not entitled to deduction under section 80-IB (AY. 2003-04)

CIT .v.Polyfex (India) (P.) Ltd. (2014) 363 ITR 224 / 224 Taxman 74(Mag.) (Karn.)(HC)

S. 80IB : Industrial undertakings-Manufacture-The process of bottling of gas into gas cylinders, which is very specialised with an independent plant with machinery, amounts to the production of 'gas cylinders' for the purpose of claiming deduction.

The assessee claimed deduction u/s 80IB of the Act contending that bottling LPG gas in the cylinders amounted to production/manufacturing and hence was eligible for deduction.
The issue before the Hon'ble Court was whether on the facts and in the circumstances of the case, and in law, the authorities below were justified in holding that bottling gas into gas cylinders was production for the purpose of Section 80IB(3). The Hon'ble High Court opined that though it was a fact that the assessee was neither a manufacturer/producer of gas nor of empty cylinders and the activity in which he was involved was only bottling gas into cylinders, it could not be overlooked that the activity of bottling of LPG gas required a very specialised process. It required an independent plant and machinery, and what ultimately the assessee produced was 'gas cylinders'. Unless a cylinder is produced in the form of a gas cylinder as is known in common parlance, it cannot be sold to the customers. The assessee, however, produces/manufactures gas cylinders, and once the manufacturing process is complete, neither gas nor cylinder can be regarded as original commodities and are recognised in the trade as a new and distinct commodity. In arriving at this understanding, the Hon'ble Court followed the judgment dated 7-3-2013 passed by the Division Bench of the Bombay High Court in CIT .v. Hindustan Petroleum Corpn. Ltd. and the judgment dated 28-8-2012 passed by the Supreme court in CIT .v. Vinbros & Co. [2012] 210 Taxman 252. Hence, the Hon'ble Court held that the process of bottling of gas into gas cylinders, which requires a very specialised process and an independent plant and machinery, amounted to production for the purpose of claiming deduction under Section 80IB of the Act. (AY. 2001-02)
Puttur Petro Products (P.) Ltd. .v. ACIT (2013) 221 Taxman 43 (Karn.)(HC)

S. 80-IB : Industrial undertakings-Manufacture-Purchasing old and used tyres / rubber scrap to make rubber crumb amounted to manufacturing of rubber crumb and hence was eligible for deduction.
The assessee was engaged in purchasing old and used tyres/rubber scrap, which were cut into small pieces and thereafter grounded with the help of machines producing rubber crumb, which was sold to the tyre manufacturing company. It claimed deduction under section 80-IB. The claim was disallowed by the AO as well as the Commissioner (Appeals) holding that the assessee was not engaged in manufacturing of any product. On second appeal, the Tribunal found that the end product of the assessee was different from its raw material and was commercially known to be different in the market, and allowed the deduction to the assessee. On appeal to High Court, it noted that there is nothing to indicate that the old rubber tyres and rubber scrap could be straightway reused for manufacture of new tyres without resorting to processing, as was being done by the assessee. It thus concurred with the Tribunal's view that assessee was engaged in the manufacture of rubber crumb and hence was entitled to deduction claimed under section 80-IB. (AY.2004-05)
CIT .v.Doon Valley Rubber Industries (2014) 221 Taxman 40 (HP)(HC)

S. 80-IB : Industrial undertakings - A duty drawback incentive would not form part of profits earned for purposes of deduction.
The assessee-company was engaged in manufacturing and selling finished knitted fabrics and readymade garments. It filed its return claiming deductions under section 80-IB including on the receipt of duty drawback (DDB). The AO excluded duty drawback (DDB) from the eligible profit for the purpose of calculating the deduction u/s. 80IB of the Act. The Commissioner (Appeals) upheld the action of the AO. On an appeal, the Tribunal held that DDB was eligible for deduction under section 80-IB. The High Court held that when income on DDB falls exclusively in the domain of export incentives earned by the assessee in the nature of a facility provided under legislative enactments or by the Government of India in its schemes and is not 'derived' from the 'business of industrial undertaking' of the assessee and lacks nexus between the profits earned and business of such industrial undertaking, it would not form part of profits earned for the purposes of section 80-IB. (AY. 2006-07)
CIT .v. Vallabh Yarns (P) Ltd. (2014) 221 Taxman 146 (P&H)(HC)

S. 80IB : Industrial undertakings -If the undertaking satisfies the conditions for eligibility in the initial year, it must get deduction for 10 years & non-compliance in a subsequent year is irrelevant-Revision was not justified.[S.263]

The assessee was initially set up as a small scale (SSI) undertaking and was eligible for deduction u/s 80-IB. In the ninth year, the assessee ceased to be a SSI undertaking as its investment in plant & machinery exceeded Rs. 1 crore. The AO, CIT(A) and Tribunal (order attached) held that as each AY was separate and independent, the assessee was not eligible to claim deduction u/s 80-IB in the ninth year. On appeal by the assessee to the High Court HELD allowing the appeal:
There is no indication in s. 80-IB that the conditions stipulated therein has to be fulfilled by the assessee in all the 10 years. When once the benefit of 10 years, commencing from the initial year, is granted, if the undertaking satisfy all these conditions initially, the undertaking is entitled to the benefit of 10 consecutive years. The argument that, in the course of 10 years, if the growth of the industry is fast and it acquires machinery and the total value of the machinery exceeds Rs.1 crore, it ceases to have the said benefit, do not follow from any of the provisions. It is true that there is no express provision indicating either way, what would be the position if the small scale industry ceases to be a small scale industry during the said period of 10 years. Because of that ambiguity, a need for interpretation arises. If we keep in mind the object of the Legislature providing for these incentives and when a period of 10 years is prescribed, that is the period, probably, which is required for any industry to stabilize itself. During that period the industry not only manufactures products, it generates employment and it adds to the wealth of the country. Merely because an industry stabilizes early, makes profits, makes future investment in the said business, and it goes out of the definition of the small scale industry, the benefit u/s 80IB cannot be denied. If such a literal interpretation is placed on the said provision, it would run counter to the very object of granting incentives. It would kill the industry. Therefore keeping in mind the object with which these provisions are enacted, keeping in mind the industrial growth which is required to be achieved, if two interpretations are possible, the courts have to lean in favour of extending the benefit of deduction to an assessee who has availed the opportunity given to him under law and has grown in his business. Therefore we are of the view, if a small scale industry, in the course of 10 years, stabilizes early, makes further investments in the business and it results in it's going outside the purview of the definition of a small scale industry, that should not come in the way of its claiming benefit u/s 80IB for 10 consecutive years, from the initial assessment year.Revision was held to be not justified .(AY. 2005-06)
Ace Multi Axes Systems Ltd. .v. DCIT(2014) 367 ITR 266 (Karn.)(HC)

S. 80IB:Industrial undertakings–Bottling of gas into gas cylinders –Specialised process-Entitled to deduction.
The process of bottling of gas into gas cylinders, which requires a very specialised process and independent plant and machinery, amounts to production of "gas cylinders" containing gas for the purpose of claiming deduction u/s 80-IB.(AY.2001-02)
Puttur Petro Products P. Ltd. .v. ACIT (2014) 361 ITR 290 (Karn.)(HC)

S.80IB:Industrial undertakings–Transfer before expiry of exemption–Exemption is available to transferee for remaining period.
In case of sale of business by sale of building, plant and machinery before expiry of period of exemption, transferee is entitled to deduction for remaining period.
CIT .v. WEP Peripherals Ltd.(2014) 362 ITR 508 (Karn.)(HC)

S.80IB: Industrial undertakings–Survey-Surrendered income–No presumption that surrendered income is eligible for deduction-No evidence was established-Not entitled to deduction. [S.133A]
There is no presumption that surrendered income is eligible for deduction under s. 80-IB. Burden is on assessee to demonstrate that surrendered income is derived from industrial undertaking and is eligible for s. 80-IB. In the absence of evidence to establish direct nexus of income with industrial undertaking, assessee was held not entitled to deduction. (AY.2002-03)
Tudor Knitting Works P. Ltd. .v. CIT (2014) 360 ITR 453 /225 Taxman 31/108 DTR 180(P&H)(HC)

S.80IB: Industrial undertakings–Non-claiming of s. 80-IB deduction in return is no bar for claiming it before CIT(A)[S.80HHC, 139(1)]

Non-claiming of s. 80-IB deduction in return is no bar for claiming it before CIT(A).CIT (A) was justified in allowing the assess's claim for deduction under section 80HHC and 80IB though it was not claimed in the return and was not claimed by way of filing revisd return.(AY. 2003-04)

CIT .v. MiteshImpex(2014)367 ITR 85/ 104 DTR 169/270 CTR 66/225 Taxman 168(Mag.) (Guj.)(HC).

S. 80IB : Industrial undertakings–Manufacture of article or thing-Development of Geographical Information System software-Eligible deduction.

Assessee was engaged in development of Geographical Information System software, which, inter alia, included converting raw data supplied by its customers into maps by digitizing and vectorizing it .Claim of deduction u/s. s. 80-IB was disallowed by AO and CIT (A).Tribunal held that the software produced by the assessee is not a map simplicitor but an integrative digital product which products lots of reports and relevant information ,on the basis of various inputs including maps of area. It is also clear that the product.ie. software , come in to existence after carrying on several process , and only on completion of these process, the property in the product can be transferred on the customer. The transfer of property is therefore not an ongoing process at each stage of work as will be the case of a provision of services. The fact that it has produced on aplat form not owned by the assesse is irrelevant in as much as what is being transferred by the assesse is not the plat form but the end product. The mere fact that one of the input is owned by the client does not mean that the property in the product never belong to the assessee. Appeal of assessee was allowed.(AY. 2003-04)

Bhavin Arun Shah .v. ITO (2014) 146 ITD 641 / (2013) 38 taxmann.com 63 (Ahd.) (Trib.)

S.80IB: Industrial undertakings–Claim for higher deduction cannot be made before the CIT(A) for the first time.

In the return of income filed, the assesse claimed a deduction u/s.80-IB of the Act for an amount of Rs.10,78,976/-. During the course of the hearing before the CIT(A), the assessee for the first time raised an additional claim for deduction u/s. 80-IB of Rs.50,61,142/-.

The Tribunal noted that the claim was never made before the AO and hence did not allow the additional claim for deduction u/s. 80-IB.(A.Y.2009-10)

Chiranjeevi Wind Energy Ltd. .v. ACIT (2014) 29 ITR 534 (Cochin)(Trib.)

S.80IB:**Industrial undertakings-Manufacture-granite boulders-Furnishing SSI certificate is not mandatory.[S.2(29BA)]**

The assessee was engaged in the business of extraction of granite boulders from hills and producing granite aggregates of different sizes by crushing and segregating through mechanical process. It claimed deduction under section 80-IB of the Income-tax Act 1961. Whether activity of extraction of granite boulders from hills and producing granite aggregate would constitute 'manufacture' and hence eligible for deduction u/s. 80-IB of the Act. It was held that the same amounted to manufacture within the meaning of section 2(29 BA) of the Act. Furnishing SSI certificate is not mandatory.(AY. 2008-09,2009-10)

Poabs Rock Products (P) Ltd. .v.ACIT(2014)61SOT143 (Cochin)(Trib.)

S.80IB(8A):Undertaking–Income from scientific research and development-Activity of clinical trials of pharmaceuticals carried on by the assessee could not be termed as research and development.[R.18DA]

Prescribed authority had granted approval u/s. 80IB(8A) to the assessee. The approval was renewed/extended twice after being satisfied about the main objective of the assessee, research and development activities carried on by it and the infrastructure facilities available with it. Assessee's claim for deduction could not be disallowed by the AO on the ground that the activity of clinical trials of pharmaceuticals carried on by the assessee could not be termed as research and development. (AYs. 2003-04 to 2008-09)

SIRO Clinpharm (P.) Ltd. .v. Dy.CIT (2014) 98 DTR1 / 65 SOT 149 / 49 taxmann.com 62 (Mum.)(Trib.)

S. 80-IB(10):Housing project- Limit on extent of commercial area of housing project inserted w.e.f. 1.4.2005 does not apply to projects approved before that date.

S. 80-IB(10) was amended by the Finance (No.2) Act, 2004, w.e.f. 01.04.2005 by insertion of clause (d) to provide that the built up area of the shops and other commercial establishments included in the housing project should not exceed five percent of the aggregate built up area of the housing project or 2000 square feet, whichever is less. In one case, the assessee's housing project was approved before 31.03.2005 and completed before 01.04.2005 but the sale of some of the units in the said project took place after 01.04.2005 i.e. in A.Y. 2005-2006. In another case, the housing project was approved before 31.03.2005 but completed on or after 01.04.2005, but within the time-frame as laid down in s. 80-IB(10). The High Court had to consider whether the limitation inserted by the said clause (d) of s. 80-IB(10) applied to projects that were approved before 01.04.2005. HELD by the High Court:

(i) Clause (d) of s. 80-IB(10) is a condition that relates to and/or is linked with the approval and construction of the housing project and the Legislature did not intend to give any retrospectively to it. At the time when the housing project is approved by the local authority, it decides, subject to its own rules and regulations, what quantum of commercial area is to be included in the said project. It is on this basis that building plans are approved by the local authority and construction is commenced and completed. It is very difficult, if not impossible to change the building plans and / or alter construction midway, in order to comply with clause (d) of s. 80-IB(10). It would be highly unfair to require an assessee to comply with s. 80-IB(10)(d) who has got his housing project approved by the local authority, before 31.03.2005 and has either completed the same before the said date or even shortly thereafter, merely because the assessee has offered its profits to tax in AY 2005-2006 or thereafter. It would be requiring the assessee to virtually do a humanly impossible task. This could never have been the intention of the Legislature and it would run counter to the very object for which these provisions were introduced, namely to tackle the shortage of housing in the country and encourage investment therein by private players. It is therefore clear that clause (d) of s. 80-IB (10) cannot have any application to housing projects that are approved before 31.03.2005.

(ii) The other reason for coming to the aforesaid conclusion is that if the revenue's contention is accepted, then an assessee following the project completion method of accounting, who has completed the housing project by complying with all the conditions as set out in s. 80-IB(10) as it stood prior to 01.04.2005 would be disentitled to claim the deduction merely because he offers his profits to tax in AY 2005-06 while an assessee following the work-in-progress method of accounting would be entitled to the deduction u/s 80-IB(10) upto AY 2004-05, and denied the same from AY 2005-06 and thereafter. It could never have been the intention of the Legislature that the deduction u/s 80-IB(10) available to a particular assessee would be determined on the basis of the accounting method followed. This would lead to startling results (CIT v. Brahma Associates (2011) 333 ITR 289 (Bom), CIT v. G.R. Developers (2013) 353 ITR 1 (Kar),Manan Corporation v. Asst. CIT (2012) 356 ITR 44 (Guj) followed; Reliance Jute & Industries Ltd. v. CIT (1979) 120 ITR 921, SEBI vs. Ajay Agarwal AIR 2010 SC 3466 distinguished). (ITA No. 201 of 2012, dt. 19/19/2014)

CIT .v. Happy Home Enterprises (Bom.)(HC); www.itatonline.org

S. 80IB(10) : Housing projects – Building plans were approved after 01.10.1998 - Deduction allowable.

High Court held that deduction u/s 80IB(10) will be allowed to the construction company when building plans were approved after 01.10.1998. The Court followed its own earlier years order. (AY. 1999-00, 2002-03, 2003-04)

CIT .v. Ansal Housing and Construction Ltd. (2014) 220 Taxman 157 (Mag.) (2013) 40 Taxmann.com 305 (Delhi) (HC)

S. 80IB(10) :Housing projects – Amended provision of Section 80IB (10)(d) made effective from 1-04-2005 and is not applicable to projects approved before that date.

The Tribunal held that amended provision of section 80-IB(10)(d) having been made effective from 1-4-2005, was not applicable to assessee's housing project approved in year 2003 in view of the case of Manan corpn. .v. Asstt. CIT [2013] 214 Taxman 373 (Guj.) and held that housing project having

more than 2000 sq. ft. commercial construction was eligible for deduction. The High Court dismissed the appeal made by the revenue.
CIT .v. Shreenathji Construction (2014) 220 Taxman 154 (Mag.) (Guj.)(HC)

S. 80IB(10) : Housing projects-Open terrace area cannot form part of "built up area" -Need not own property to claim deduction.
The assessee is engaged in the business of construction. The assessee entered into an agreement of sale with one Ashok Kumar for joint development of the property. The assessee's claim for deduction u/s. 80IB(10) of Act was rejected on the ground that the assessee was not the owner of the land. The CIT(A) dismissed the appeal filed by the assessee. The ITAT, granted the assessee partial relief.
Deciding the appeals filed by both the assessee and the department, the High Court following the decision of the Supreme Court in the case of Ceebros Hotels (P.) Ltd. .v. DCIT held that it was not necessary for the assessee to own the property so as to claim deduction u/s. 80IB(10) and it also held that the open terrace area cannot form part of the built up area. (AY 2005-2006 and 2006-2007)
CIT .v. Mahalakshmi Housing (2014) 222 Taxman 356 (Mad.)(HC)

S.80IB(10):Housing projects-Developer-Project completed-Building permission was applied-Permission was rejected on technical grounds-Entitled to exemption.
The AO did not allow the deduction on the ground that the assessee was not a developer and the assessee did not complete the housing project within the statutory time frame.Tribunal held that construction was completed in 2006.Application for building use permission to the Municipality authorities was filed on February 15, 2006, but was rejected on July 1, 2006.Several residential units were occupied without necessary permission. The assessee paid penalty and got such occupation certificate regularized.Tribunal allowed the deduction. On appeal by revenue the court held that assessee could not be denied the benefit of deduction on the ground that the assessee was not a developer. Under sub clause(i) of clause(a) of section 80IB(10), since the assessee had got approval for the housing project from the local authority before April 1, 2004, it was required to complete the construction latest by March 31, 2008.The assessee had not only completed the construction two years before the final date but had applied for the building use permission. Such permission was not rejected on the ground that construction was not completed but on some other technical ground. Thus, granting the benefit of deduction could not be held to be illegal.Order of Tribunal was affirmed.
CIT .v.Tarnetar Corporation(2014) 362 ITR 174 (Guj.)(HC)

S.80IB(10): Housing projects-Built up area-Court yard cannot be included to calculate the built up area-Deduction was held to be allowable.
Tribunal has held that the court yard is to be included to calculate the built up area and there by holding that the residential unit was more than 1500 sq.ft and the assessee was not eligible to claim deduction. On appeal the Court held that built up area is the carpet area plus the thickness of outer walls and balcony. Carpet area of property is defined as net usable area from the inner side wall to another. It can be seen that to meet the requirement of an area to be treated as a 'built up area' some construction has to be in existence in such area. Area of court yard cannot be included to calculate the built up area in terms of section 80IB(10). Therefore Tribunal was not justified to come to the conclusion that the said area of the court yard is to be included to calculate the built up area and thereby holding that the unit was more than 1500 sq .ft, which would disentitle the assessee to claim such deduction. Accordingly the appeal of assessee was allowed. (AY.2005-06)
Commonwealth Developers .v. ACIT (2014) 102 DTR 89/267 CTR 297/224 Taxman 77 (Mag.) (Bom.)(HC)

S.80IB(10):Housing projects-If developer does not (without just cause) develop to full extent of FSI, a part of the sale proceeds has to treated as being for sale of FSI and denied S. 80-IB(10) deduction- In the present cases none of assesse have made any special ground for non utilization of the FSI-Assessee is entitled to deduction though land was not owned by him.
The assessee, engaged in development of housing projects, constructed a residential project. Though total FSI of 15312 sq. meters was available for construction, the assessee utilized only 3573 sq. meters. The residential units were constructed only on the ground floor. The said residential units

were sold and the entire surplus was claimed u/s 80-IB(10) as profits derived from activity of developing housing project. The AO and CIT(A) held that a part of the consideration received by the developer was relatable to the unutilized FSI and had to be excluded from the profits eligible for s. 80-IB(10) deduction. However, the Tribunal upheld the assessee's claim on the basis that the assessee was not compelled to construct upto the maximum FSI and that it had satisfied all the other conditions of s. 80-IB(10). On appeal by the department to the High Court HELD reversing the Tribunal:
(i) For any commercial activity of construction, be it residential or commercial complex maximum utilization of FSI is of great importance to the developer. Ordinarily, therefore, it would be imprudent for a developer to underutilize available FSI. Sale price of constructed properties is decided on the built up area. It can thus be seen that given the rate of constructed area remaining same, non-utilization of available FSI would reduce the profit margin of the developer. When a developer therefore utilizes only say 25% of FSI and sells the unit leaving 75% FSI still available for construction, he obviously works out the sale price bearing in mind this special feature. Thus, therefore, when a developer constructs residential unit occupying a fourth or half of usable FSI and sells it, his profits from the activity of development and construction of residential units and from sale of unused FSI are distinct and separate and rightly segregated by the AO;
(ii) It is true that s. 80IB(10) does not provide that for deduction, the undertaking must utilize 100% of the FSI available. The question however is, can an undertaking utilize only a small portion of the available area for construction, sell the property leaving ample scope for the purchaser to carry on further construction on his own and claim full deduction u/s 80IB(10) on the profit earned on sale of the property? If this concept is accepted, in a given case, an assessee may put up construction of only 100 sq. ft. on the entire area of one acre of plot and sell the same to a single purchaser and claim full deduction on the profit arising out of such sale u/s 80IB(10) of the Act. Surely, this cannot be stated to be development of a housing project qualifying for deduction u/s 80IB(10);

(iii) This is not to suggest that for claiming deduction u/s 80IB (10), invariably in all cases, the assessee must utilize the full FSI and any shortage in such utilization would invite wrath of the claim u/s 80IB(10), being rejected. The issue has to be seen from case to case basis. Marginal under-utilization of FSI certainly cannot be a ground for rejecting the claim u/s 80IB(10). Even if there has been considerable under-utilization, if the assessee can point out any special grounds why the FSI could not be fully utilized, such as, height restriction because of special zone, passing of high tension electric wires overhead, or any such similar grounds to justify under utilization, the case may stand on a different footing. However, in cases where the utilization of FSI is way short of the permissible area of construction, looking to the scheme of s. 80IB(10) and the purpose of granting deduction on the income from development of housing projects envisaged thereunder, bifurcation of such profits arising out of such activity and that arising out of the net sell of FSI must be resorted to. On facts, none of the assessees have made any special ground for non-utilization of the FSI.Court held that for allowing deduction assesse need not be the owner of the land. If permission is igiven in the name of land owners is sufficient compliance.(AY. 2003-04)
CIT .v. Moon Star Developers(2014)367 ITR 621/103 DTR 278/269 CTR 259 (Guj.)(HC)

S.80IB(10): Housing projects-Approval of the project-Completion certificate-Non granting of completion certificate exemption cannot be denied where the approval was obtained on 16th March, 2005-Not required to produce completition certificate –Exemption was allowed.
Assessee had obtained the approval of the project on 16 th March , 2005 from the development Authority and also applied to the Authority on 5 th November 2008 for issue of completion certificate. The AO denied the exemption on the ground that completion certificate in terms of Explanation (ii) which was inserted w.e.f. 1st April 2005 had not been granted so as to enable to avail the benefit under section 80IB(10).Tribunal allowed the claim of assessee. On appeal by revenue the Court held that approval related to the period prior to 2005 , i.e. before the amendment of section 80IB which insisted on issuance of completion certificate by the end of the 4 year period was brought in to force. Application of such stringent conditions which are left to an independent body such as the local authority who has to issue the completion certificate, would have led to not only hardship but absurdity. The Court held that since the approval was granted to the assessee on 1st April 2005,

therefore , the assessee is not expected to fulfil the conditions which were not in the statute when such approval was granted to the assessee.(AY. 2007-08)

CIT .v. CHD Developers Ltd. (2014) 99 DTR 401/362 ITR 177/266 CTR 360/225 Taxman 154 (Mag.) (Delhi)(HC)

S. 80IB(10) : Housing projects-Area of projected terrace, open to sky is not liable to be included within the meaning of expression "built-up area".

The controversy revolves around the condition prescribed in clause (c) of section 80IB(10) of the Act. As per clause (c) of section 80IB(10) of the Act, the maximum built-up area of the residential units comprised in the eligible housing project shall not exceed 1000 sq. ft. where such units are situated within city of Delhi and Mumbai or within 25 km. from the Municipal limit of such cities and in other places the prescribed limit is 1500 sq.ft.. The housing project of the assessee before us is located within the Municipal limits of PCMC and therefore in terms of clause (c) of section 80IB(10) of the Act, the maximum built-up area of the residential unit is capped at 1500 sq.ft.. The dispute before us8 is with regard to six residential units, which have been detailed by us earlier, wherein as per the Assessing Officer, the individual built-up area exceed 1500 sq.ft.. The working of built-up area done by the Assessing Officer is sought to be resisted by the assessee and the bone of contention is whether or not to include the area of projected terrace (open to sky) for computing the built-up area of the respective units.

The Finance (No.2) Act, 2004 inserted the definition of built-up area w.e.f. 01.04.2005 in terms of section 80IB(14)(a) of the Act. In terms of the said definition, built-up area means the inner measurement of the residential unit at the floor level, including the projections and balconies, as increased by the thickness of the walls but does not include the common areas shared with other residential units. On the strength of the aforesaid definition, the claim of the Revenue is that the terraces in question are projections attached to the respective residential units and also that there is no room under the area of the terrace and such terraces are exclusively used by the respective unit owners. In other words, as per the Revenue the projected terrace falls within the meaning of words 'projections' and 'balconies' contained in section 80IB(14)(a) of the Act and the same is not a common area shared with other residential units and in this manner, in terms of section 80IB(14)(a) of the Act, such an area is liable to be included in the expression 'built-up area'.

In so far as the applicability of the definition of built-up area inserted by Finance (No.2) Act, 2004 w.e.f. 01.04.2005 is concerned, it is quite clear that the same is applicable for ascertaining the fulfillment of condition prescribed in clause (c) of the Act in relation to the present project, since the project of the assessee has been approved by the local authority on 29.07.2005 i.e. after the definition of built-up area contained in section 80IB(14)(a) of the Act came into force w.e.f. 01.04.2005. Therefore, in the present case, it is imperative that the meaning of expression 'built-up area ' is to be understood having regard to its definition contained in clause (a) of section 80IB(14) of the Act.

Consequently, the AO is wrong in including the area of terrace as a part of the 'built-up area' in a case where such terrace is a projection attached to the residential unit and there being no room under such terrace, even if the same is available exclusively for use of the respective unit holders(ITA No. 18,19 & 20 /PN/2013, dt. 28. 10.2014.) (AY. 2007-08 to 2009-10)

Naresh T. Wadhawani .v. DCIT (Pune)(Trib.); www.itatonline.org

S.80IB(10):Housing projects-Bogus purchases-Even in an assessment under section 143(3),r.w.s.147 addition to income on account of bogus purchases will qualify for deduction.[S. 143(3),144,147]

The assessment of the assessee completed under section 144 and addition was made disallowing the fictitious purchases.AO has not allowed deduction under section 80IB(10) in respect of enhanced income. On appeal CIT (A) upheld the addition. However following the decision of Tribunal in S.B.Builders & Developers 45 SOT 335 (Mum)(Trib) he allowed the alternative claim of assessee under section 80IB (10). On appeal by revenue the Tribunal held that the fictitious purchases if it is relatable to profits /receipts which are eligible for deduction under section 80IB (10) of the Act. It cannot be said that the disallowed expenditure cannot be considered as profits derived from housing

project or as operational profit. Tribunal confirmed the order of CIT(A).(ITA NO 241/Bang/2013 Bench "B' dt 13-06-2014)(AY. 2004-05)
ACIT v. Gopalan Enterprises (2014) BCAJ –August-P.25(Bang)(Trib.)

S. 80IB(10) : Housing projects- Income from developing and building housing project-Completion certificate.
The Tribunal held that even a building or a group of buildings comprised in a larger project approved by a local authority can be construed as a housing project for the purpose of deduction under section 80IB(10). The completion certificate clearly states that it is issued w.e.f. 26th March, 2008, it is to be accepted that the construction was complete on that date and, therefore, assessee is entitled for deduction under section 80IB(10). (AY. 2006-07, 2007-08)
Siddhivinayak Kohinoor Venture .v. Addl. CIT (2014) 159 TTJ 390 (Pune)(Trib.)

S.80IB(10):Housing projects-SRA project-Notification dt 5 th Jan 2011-Retrospectiveeffect-Entitled to exemption project started earlier.
Assessee had developed a "Housing project" at Dharavi, which is a Slum Rehabilitation Project (SRA),as approved by the Government of Maharsatra. One of the conditions in section 80IB (10) is that the project size should be more than one acre. However by Finance Act (no 2) 2004, the legislature has removed the restriction of the project size by a proviso in case of SRA project. Subsequently vide notification dated 3-8-2010 and notification dated 5-1-2011 the SRA projects had been notified by the Board. It was submitted that the proviso was inserted to cure defect and will have retrospective effect. The Tribunal held that the proviso has been inserted to relax the condition provided under clause (a) and (b) of section 80IB (10) and not for adding any new condition which is otherwise not required for housing projects for availing the benefit of deduction under section 80IB (10). Accordingly the assesses project is entitled to the benefit of proviso and eligible for deduction.(AY. 2OO8-09)
Ramesh Gunshi Dedhia .v. ITO (2014) 148 ITD 356/107 DTR 357/164 TTJ 822(Mum.)(Trib.)

S.80IB(10): Housing projects-Amendment to section 80IB(10) with effect from April 1, 2005 restricting the built up area of shops and commercial establishments included in housing project –Prospective –Not applicable to projects approved prior to April 1, 2005. [S.80IB(10)(d)]
Section 80IB(10)(d) was prospective in nature and could not be made applicable to the projects approved prior to April1, 2005.(AYs. 2006-07 & 2007-08)
ITO .v. Velentine Developers (2014) 31 ITR 452 (Mum.)(Trib.)
Editorial: Judgment of Tribunal in ITO v. Everest Home construction India P. Ltd (2012) 139 ITD 1 (Mum)(Trib) considered and held not applicable in view of later judgment of Gujarat High Court in Manan Corporation v. ACIT (2013) 356 ITR 44 (Guj)(HC)

S.80IB(10):Housing projects-Joint venture agreement-Claim allowed in the hands one party to the joint venture-Claim of assessee also to be allowed.
Assessee entered into a JV for developing a property. Assessee's claim for deduction u/s. 80IB(10) could not be disallowed on the ground that the assessee has not honoured the conditions of the JV agreement or that it could not substantiate its claim that the profit has been shared equally with the JV partner as these are not the conditions under s.80IB(10).On identical facts and for the same project the revenue has accepted the claim in the hands of one party to the joint venture agreement. Claim of assessee was allowed. (AY. 2009-10)
Rajkotia Securities Ltd. .v. Dy. CIT (2014) 98 DTR 275 / 65 SOT 178 (Mum.)(Trib.)

S.80IB(10): Housing projects-Limit on extent of commercial area imposed by clause (d) of S. 80IB (10) inserted w.e.f. 1.4.2005 does not apply to projects approved before that date
In the assessee's own case for the same project relating to AYs 2005-06 and 2006-07, which falls after the insertion of clause (d) to s. 80IB(10), the Tribunal held that the assessee is eligible for deduction u/s 80IB(10) in respect of the housing project. Not only this, in Manan Corporation v. Asst. CIT (2012) 214 Taxmann 373 (Guj) it was held that the condition of limiting commercial establishment/shops to 2000 sq.ft, which has come into force w.e.f. 1.4.2005 would be applicable for

projects approved on or after 1.4.2005 and where the approval of the project was prior to 31.3.2005, the amended provision would have no application for those projects. The Gujarat High Court placed heavily reliance on the decision of the Bombay High Court in Brahma & Associates 333 ITR 289 (Bom).(ITA No. 809/Mum/2011,dt. 31.01.2014.)(AY.2008-09)
ITO.v.Yash Developers (Mum.)(Trib.)www.itatonline.org

S.80-IC:Special category of States-Manufacture-Blending and mixing different reactive dyes-Matter was set aside to CIT(A) to decide the issue after considering the opinion of expert whether the activities of the assessee can be considered as manufacture. [S.2(29BA)]
Assessee firm had undertaken activity of blending and mixing different reactive dyes with different salts with help of two ball mills.AO disallowed the claim on the ground that no manufacturing activities were carried on by the assessee. CIT (A) allowed the claim. On appeal by the revenue the Tribunal observe that, nothing had been brought on record before the Tribunal to demonstrate that the chemical composition of the raw materials used by the assessee had under gone a change or there was a substantial change in the chemical composition or integral structure of the raw materials so as to form a new product and the chemical composition of the finished product was different from that of original raw material. Tribunal also observed that no report was obtained from an expert to conclude that new product which came into existence by undertaking process of mixing and grinding was on account of manufacturing process. A definite finding was required to determine as to whether activity of assessee could be termed as manufacture so as to enable assessee to claim deduction under section 80-IC. An expert opinion on composition of raw material and its transformation into finished goods was required to assess whether due to activity done by assessee, any change in chemical composition, etc. had taken place. Matter was set aside to the file of CIT (A).(AY. 2007-08 & 2009-10)
ACIT v. Avinashi Industries (2014) 149 ITD 80 / 41 taxmann.com 498 (Ahd)(Trib.)

S. 80IC : Special category States-Manufacture or Production-Manufacture of air spring assembly.
The Tribunal held that air spring assembly produced by the assessee is quite distinct from the component used and has distinct usage, therefore assessee is engaged in manufacture or production of an article or thing and it is eligible for deduction under section 80IC, more so as it has been granted similar deduction in the preceding two assessment years. (AY. 2009-10)
Resistoflex Dynamics (P) Ltd. .v. Dy. CIT (2014) 150 ITD 616 / 159 TTJ 425 (Delhi)(Trib.)

S.80P: Co-operative societies-Exclusion in s. 80P(4) applies only to credit co-operative banks but not to credit co-operative societies-Assessee is entitled to deduction.
From CBDT circular No.133 of 2007 dated 9.5.2007 it can be gathered that sub-section (4) of section 80P will not apply to an assessee which is not a co-operative bank. In the case clarified by CBDT, Delhi Coop Urban Thrift & Credit Society Ltd. was under consideration. Circular clarified that the said entity not being a cooperative bank, section 80P(4) of the Act would not apply to it. In view of such clarification, we cannot entertain the Revenue's contention that section 80P(4) would exclude not only the co-operative banks other than those fulfilling the description contained therein but also credit societies, which are not cooperative banks. In the present case, respondent assessee is admittedly not a credit co-operative bank but a credit co-operative society. Exclusion clause of sub-section (4) of section 80P, therefore, would not apply to an assessee which not a co operative bank as clarified by circular. Assessee is entitled to entitled deduction. Appeal of revenue was dismissed.(AY.2009-10)
CIT .v. Jafari Momin Vikas Co-op Credit Society Ltd(2014) 100 DTR 421/362 ITR 331(Guj.)(HC)

S.80V:Deduction of interest on moneys borrowed to pay taxes--Benefit of section 80V would be available to the Assessee if the borrowings were taken for the purpose of payment of tax.
In Hindustan Cocoa Products Ltd. v/s Commissioner of Income Tax, reported in [1999] 236 ITR 140, this Court observed that the benefit of section 80V would be available to the Assessee if the

borrowings were taken for the purpose of payment of tax. In view of the factual findings in the present case that the deposits were primarily taken for the payment of taxes, and which are uncontroverted even before us, we are of the view that the ratio of the judgment of this Court in Hindustan Cocoa Products Ltd. (supra) would squarely apply to the facts of the present case.

CIT .v. Mafatlal Dyes and Chemicals Ltd. (Bom.)(HC);www.itatonline.org

S. 90: Double taxation relief-The suspension of assessment and collection of tax takes place as soon as an application is made to Competent Authorities to settle dispute under MAP proceedings-DTAA-India-USA. [Art. 27].

The assessee company was incorporated in USA and was also a tax resident of USA and eligible to the benefit under the DTAA. The assessee was engaged in the business of international express delivery and had developed an international network of transporting documents, parcels and other items from one country to another. The assessee had taken a stand that the income which it earned under the agreement entered into from its overseas customers in respect of parcels/documents to be delivered in India were not taxable. The assessee also filed an application to respondent 3 under section 197 requesting to issue nil tax withholding order for assessment year 2010-11.The assessee also informed that the said year has been also considered while filing application of MAP proceedings with Competent authority and providing the bank guarantee.The respondent No. 3 passed an order rejecting the assessee's application for nil tax withholding order/certificate on ground that assessee's request for inclusion of said assessment year was not pending before the MAP authorities as informed by the FTD of the CBDT.Subsequently, the competent authority of USA issued a certificate confirming that withholding tax application in respect of assessment year was being considered under the MAP proceedings. On aforesaid communication, revised application was made by assessee which was rejected.

On a Writ Petition by the assessee, the High Court observed that when respondent was exercising jurisdiction under revision and he does not dispute the fact that MAP proceedings for the assessment year 2010-11 have been admitted and are pending for the assessment year 2010-11 it was obligatory on his part to have directed the grant of certificate of nil withholding tax under section 197. The High Court held that in terms of Article 27 of India-US DTAA read with MOU, suspension of assessment and collection of tax takes place as soon as an application is made to Competent Authorities to settle dispute under MAP proceedings and revenue is secured by tax payer by furnishing a bank guarantee, therefore, benefit of suspension of assessment and collection of taxes cannot be denied by taking a view that issue raised by assessee has not been admitted for consideration under MAP proceedings(AY. 2010-2011)

Halliburton Offshore Services Inc. .v. Jt. CIT (2014) 221 Taxman 414 (Uttarakhand)(HC)

S. 90 : Double taxation relief-Shipping business Receipts were covered fell within treaty-Not liable to tax in India-DTAA-India-Denmark[S.44AB, Art 9]

Assessee company was tax resident of Denmark and was in business of shipping in international water. It disclosed freight income from 145 voyages and claimed benefit under article 9 of DTAA. AO accepted assessee's claim in respect of 141 voyages for which assessee had provided details, there is no dispute with regard to the operation of ships in international traffic in case of four ships, whose revenues were less than even 5 per cent of the total revenue of the assesse. Since receipts in four cases were covered in exhaustive details filed with return and fell within treaty, they were not exigible to tax in India. (AY. 2006 – 07)

A. P. Moller Maersk .v. Dy.DIT (2014) 149 ITD 434 / (2013) 38 taxmann.com 346 (Mum.)(Trib.)

S.90: Double taxation relief–Shipping business-Presumptive profit-Once assessee became otherwise liable to tax in UAE treaty, DTAA becomes operative-DTAA-Indo-UAE-Matter set aside for verification.[S.44B,Art.8]

Assessee is a resident of UAE. Business of shipping was entered into joint pool agreement whereby other shipping company and assessee shared space on vessel owned by other. A.O. held that assessee had not paid taxes in UAE, benefit of DTAA was not applicable. AO has invoked the provisions of section 44B and computed the presumptive profit on total receipt applying the rate of 7.5 percent.

CIT(A) has deleted the addition. On appeal by revenue the Tribunal held that, once assessee became otherwise liable to tax in UAE treaty, DTAA becomes operative. Since no details were given by revenue regarding nature of receipts of assessee from shipping business, issue be restored to file of Assessing Officer to consider same and consequently, availability of article 8 of Indo-UAE DTAA. (AYs. 2006-07,2007-08)

ADIT(IT) .v. Simatech Shipping Forwarding LLC(2014)146 ITD 48 / (2013) 37 taxmann.com 232 (Mum) (Trib.)

S.92B:Transfer pricing-Corporate guarantee-A transaction (such as a corporate guarantee) which has no bearing on profits, incomes, losses or assets of the enterprise is not an 'international transaction' u/s.92B(1) and not subject to transfer pricing , even after amendment of Explanation to section 92B.

The assessee issued a corporate guarantee to Deutsche Bank on behalf of its associated enterprise, Bharti Airtel (Lanka), whereby it guaranteed repayment for working capital facility. The assessee claimed that since it had not incurred any cost on account of issue of such guarantee, and the guarantee was issued as a part of the shareholder activity, no transfer pricing adjustment could be made. However, the TPO held that as the AE had benefited, the ALP had to be computed on CUP method at a commission income of 2.68% plus a mark-up of 200 bp. This was upheld by the DRP by relying on the retrospective amendment to s. 92B which specifically included guarantees in the definition of "international transaction". On appeal by the assessee to the Tribunal HELD allowing the appeal:

(i) A transaction between two enterprises constitutes an "international transaction" u/s 92B only if it has a bearing onprofits, incomes, losses, or assets of such enterprises". Even the transactions referred to in the Explanation to s. 92 B, which was inserted with retrospective effect (which includes giving of guarantees under clauses (c)), should also be such as to have a bearing on profits, incomes, losses or assets of such enterprise;

(ii) The onus is on the revenue to demonstrate that the transaction has a bearing on profits, income, losses or assets of the enterprise. The said impact has to be on real basis, even if in present or in future, and not on contingent or hypothetical basis. There has to be some material on record to indicate, even if not to establish it to hilt, that an intra AE international transaction has some impact on profits, income, losses or assets;

(iii) When an assessee extends assistance to the AE, which does not cost anything to the assessee and particularly for which the assessee could not have realized money by giving it to someone else during the course of its normal business, such an assistance or accommodation does not have any bearing on its profits, income, losses or assets, and, therefore, it is outside the ambit of international transaction u/s 92B (1). (ITA No. 5816/Del/2012, dt. 11/03/2014, A. Y. 2008-09)

Bharti Airtel Limited. .v. ACIT(2014)101 DTR 154/161 TTJ 428(Delhi)(Trib.)

S.92B: Transfer pricing-Arm's length price-Outstanding balances cannot be added to total income of assessee.

The assessee had certain receivable from its associated enterprise which were outstanding for more than 30 days. TPO, relying on the assessment years 2003-04 and 2004-05, worked out the interest that would have been charged at 3.26% on the outstanding balances with the associated enterprises exceeding 30 days and made transfer pricing adjustments. Similar addition was deleted by Tribunal in earlier years .Following the order of Tribunal for earlier years the Tribunal deleted the addition for the relevant year. (AY. 2005-06)

ACIT .v. Nimbus Communications Ltd. (2014) 100 DTR 259/30 ITR 349(Mum.)(Trib.)

S.92B: Transfer pricing-Advertisement, marketing and sales promotion (AMP) expenses-Research and development activity-Commercial benefit from payment of royalty to its AE-International transaction subject to transfer pricing provision-Partly set aside.[S.92C]

Advertisement, marketing and sales promotion (AMP) expenses incurred by assessee constituted band promotion and development of marketing intangible for its associate enterprise there by being international transaction subject to transfer pricing provisions. Tribunal remitted the issue of AMP expenses to the files of the TPO with the directions that expenditure in connection with sales cannot

be brought within the ambit of advertisement, marketing and promotion expenses for determining the cost/value of the international transactions. the veracity of description and quantification of the amount of selling expenses, allow the assessee's claim. After deducting the selling price from the AMP expenses, the TPO shall decide the issue of AMP expenses by applying the proper comparables. Tribunal also, held that the assessee rightly considered the comparable uncontrolled price (CUP) method for determining the arm's length price. The conclusion of the TPO that the arm's length price of the royalty payment should be NIL, without specifying any cogent basis, is not sustainable, hence, the adjustment made by the TPO was deleted.(AY. 2008-09)

Reebok India Co. .v. Add.CIT (2014) 146 ITD 469 / (2013) 35 taxmann.com 578(Delhi)(Trib.)

S. 92C:Transfer pricing-Issue of shares at premium- Neither the capital receipts received by the Petitioner on issue of equity shares to its holding company, a non-resident entity, nor the alleged short-fall between the so called fair market price of its equity shares and the issue price of the equity shares can be considered as income within the meaning of the expression as defined under the Act-Issue of shares at a premium by the Petitioner to its non resident holding company does not give rise to any income from an admitted International Transaction. Thus, no occasion to apply Chapter X of the Act can arise in such a case.[S. 2(24)(xvi), 56(2)(viib), 144C]

The assessee, an Indian company, issued equity shares at the premium of Rs.8591 per share aggregating Rs.246.38 crores to its holding company. Though the transaction was reported as an "international transaction" in Form 3 CEB, the assessee claimed that the transfer pricing provisions did not apply as there was no income arising to it. The AO referred the issue to the TPO without dealing with the preliminary objection. The TPO held that he could not go into the issue whether income had arisen or not because his jurisdiction was limited to determine the ALP. He held that the assessee ought to have charged the NAV of the share (Rs. 53,775) and that the difference between the NAV and the issue price was a deemed loan from the assessee to the holding company for which the assessee ought to have received 13.5% interest. He accordingly computed the adjustment for the shares premium at Rs. 1308 crore and the interest thereon at Rs. 88 crore. The AO passed a draft assessment order u/s 144C(1) in which he held that he was bound u/s 92-CA(4) with the TPO's determination and could not consider the contention whether the transfer pricing provisions applied. The assessee filed a Writ Petition challenging the jurisdiction of the TPO/AO to make the adjustment. The High Court directed the DRP to decide the assessee's objection regarding chargeability of alleged shortfall in share premium as a preliminary issue. Upon the DRP's decision, the assessee filed another Writ Petition. HELD by the High Court allowing the Petition:

(1) A plain reading of Section 92(1) of the Act very clearly brings out that income arising from a International Transaction is a condition precedent for application of Chapter X of the Act.

(2) The word income for the purpose of the Act has a well understood meaning as defined in s. 2(24) of the Act. The amounts received on issue of share capital including the premium is undoubtedly on capital account. Share premium have been made taxable by a legal fiction u/s 56(2)(viib) of the Act and the same is enumerated as Income in s. 2(24)(xvi) of the Act. However, what is bought into the ambit of income is the premium received from a resident in excess of the fair market value of the shares. In this case what is being sought to be taxed is capital not received from a non-resident i.e. premium allegedly not received on application of ALP. Therefore, absent express legislation, no amount received, accrued or arising on capital account transaction can be subjected to tax as Income (Cadell Weaving Mill Co. vs. CIT 249 ITR 265 approved in CIT vs. D.P. Sandu Bros 273 ITR 1 followed);

(3) In case of taxing statutes, in the absence of the provision by itself being susceptible to two or more meanings, it is not permissible to forgo the strict rules of interpretation while construing it. It was not open to the DRP to seek aid of the supposed intent of the Legislature to give a wider meaning to the word 'Income';

(4) The other basis in the impugned order, namely that as a consequence of under valuation of shares, there is an impact on potential income and that if the ALP were received, the Petitioner would be able to invest the same and earn income, proceeds on a mere surmise/assumption. This cannot be the basis of taxation. In any case, the entire exercise of charging to tax the amounts allegedly not received as share premium fails, as no tax is being charged on the amount received as share premium.

(5) Chapter X is invoked to ensure that the transaction is charged to tax only on working out the income after arriving at the ALP of the transaction. This is only to ensure that there is no manipulation of prices/consideration between AEs. The entire consideration received would not be a subject-matter of taxation;
(6) The department's method of interpretation indeed is a unique way of reading a provision i.e. to omit words in the Section. This manner of reading a provision by ignoring/rejecting certain words without any finding that in the absence of so rejecting, the provision would become unworkable, is certainly not a permitted mode of interpretation. It would lead to burial of the settled legal position that a provision should be read as a whole, without rejecting and/or adding words thereto. This rejecting of words in a statute to achieve a predetermined objective is not permissible. This would amount to redrafting the legislation which is beyond/outside the jurisdiction of Courts.
(7) In tax jurisprudence, it is well settled that following four factors are essential ingredients to a taxing statute:- (a) subject of tax; (b) person liable to pay the tax; (c) rate at which tax is to be paid, and (d) measure or value on which the rate is to be applied. Thus, there is difference between a charge to tax and the measure of tax (a) & (d) above;
(8) The contention that in view of Chapter X of the Act, the notional income is to be brought to tax and real income will have no place is not acceptable because the entire exercise of determining the ALP is only to arrive at the real income earned i.e. the correct price of the transaction, shorn of the price arrived at between the parties on account of their relationship viz. AEs. In this case, the revenue seems to be confusing the measure to a charge and calling the measure a notional income. We find that there is absence of any charge in the Act to subject issue of shares at a premium to tax.
(9) w.e.f. 1 April 2013, the definition of income u/s 2(24)(xvi) includes within its scope the provisions of s. 56(2) (vii-b) of the Act. This indicates the intent of the Parliament to tax issue of shares to a resident, when the issue price is above its fair market value. In the instant case, the Revenue's case is that the issue price of equity share is below the fair market value of the shares issued to a non-resident. Thus Parliament has consciously not brought to tax amounts received from a non-resident for issue of shares, as it would discourage capital inflow from abroad.
(10) Consequently, the issue of shares at a premium by the Petitioner to its non resident holding company does not give rise to any income from an admitted International Transaction. Thus, no occasion to apply Chapter X of the Act can arise in such a case.(Wp. No 871 of 2014, Dt. 10.10.2014.)
Vodafone India Service Pvt. Ltd. .v. UOI (Bom.)(HC);www.itatonline.org

S. 92C:Transfer pricing-Computation of arm's length price- Tribunal confirmed the order of CIT(A)-No substantial question of law.[S.254(1), 260A]
Tribunal affirmed the order of CIT(A) on point of determination of arm's length price in respect of transaction entered into by assessee with its associated enterprise in detail. It also gave an opportunity to department to controvert or rebut finding arrived at by CIT(A). Revenue filed an appeal before the Court and contended that the Tribunal should have giving its own findings rather than confirming the finding of CIT(A). Dismissing the appeal of revenue the Court held that department , was not able to controvert those findings to enable Tribunal to take a view other than view taken by CIT (A) hence the said order needed no interference.(AYs.2003-04, 2004-05 and 2005-06)
CIT v. Global Vantedge (P.) Ltd. (2014) 97 DTR 438/225 Taxman 193(Mag.) (Delhi) (HC)
Editorial : SLP of revenue was dismissed SLP CC 21808 OF 2013 dt 2-1-2014

S.92C:Transfer pricing-Arm's length price-Comparable-Cost plus-Mark up-Addition to assessee's ALP by applying cost plus mark up of 5 per cent on FOB value of goods exported to AE located abroad without any foundation and liable to be deleted.
Assessee, a wholly owned subsidiary of a Mauritius based company, entered into international transactions of buying services for sourcing of garments, leather products etc. in India for its AE and was paid service charges of 5 per cent of cost plus mark up. TPO applied a markup of 5% of on the FOB value of export of Rs 1202.96 crores made by the Indian manufacturer to overseas third party customers.Order of TPO was confirmed by Tribunal. On appeal by assesse reversing the order of Tribunal the court held that in absence of any material on record showing that assessee bore significant risks and enjoyed some locational advantages, revenue authorities were not justified in

making addition to assessee's ALP by applying cost plus mark up of 5 per cent on FOB value of goods exported to AE located abroad. Order of Tribunal was set aside. (AY. 2006-07)
Li & Fung India(P) Ltd. v. CIT (2014) 97 DTR 70 (Delhi) (HC)
Editorial: Order of Tribunal Li& Fung (India) (P) Ltd v.Dy.CIT (2011) 64 DTR 73/12 ITR 748/(2012) 143 TTJ 201(Delhi)(Trib) was set aside.

S. 92C : Transfer pricing-Reliability and Authenticity of the independent international organization and its publication of rate list accepted by the appellate authorities-Deletion of addition by Tribunal was held to be justified.
In course of transfer pricing proceedings, assessee presented two sets of prices claiming them to be comparable. One set of transactions relied on by assessee was supplied by Malaysian Palm Oil Board 'MPOB' and other quotations by one Oil World, an organization based in Germany. Assessee adopted average of two sets of prices and claimed that price variance between assessee's transaction and average of two sets of prices did not exceed 5 per cent and, therefore, no addition to arm's length price was necessary. TPO made addition to assessee's ALP by rejecting comparable price list of an independent international organization submitted by assessee without assigning any reasons therefore, impugned addition deleted.
CIT .v.Adani Wilmar Ltd. (2014) 363 ITR 338/ 224 Taxman 51 (Guj.)(HC)

S. 92C : Transfer pricing-Arm's length price-CUP is suitable method when twin conditions of comparability and uncontrolled transactions are satisfied-Method adopted by assessee was contrary to basic and fundamental principle- Matter remanded DTAA-India-USA. [Art.12]
It is a pre-requisite essential condition for determination of ALP applying CUP method in relation to international transaction that price paid in a comparable uncontrolled transaction has to be taken into consideration and both these conditions, i.e., comparable and uncontrolled transactions, must exist. Assessee paid royalty at rate of 5 per cent to its AE in USA on account of technical know-how of carcass products, It applied CUP method to determine ALP of royalty and took royalty paid to its AE as comparable for purpose of determining ALP of royalty. It was held that entire exercise of determination of ALP by assessee was contrary to very basic and fundamental requirements of law and, thus, method adopted by it could not be accepted. (AY. 2006-07)
Cabot India Ltd. .v. Dy.CIT (2014) 149 ITD 802 / (2013) 158 TTJ 840 / 33 taxmann.com 110 (Mum.)(Trib.)

S. 92C : Transfer pricing -Arm's length price-CUP Method-internal CUP was available in case of assessee itself in form of guarantee charges, charged by bank from assesse-Adjustment made by TPO was deleted.
Assessee had given corporate guarantee to its AEs and charged 0.2 per cent of guarantee amount as commission. TPO held that payment of guarantee commission by AEs to assessee was an international transaction which had to be benchmarked with external CUP method and accordingly, he benchmarked ALP for guarantee at rate of 3 per cent of amount of guarantee and made upward adjustment. Assessee submitted that banks in case of assessee itself charged guarantee commission at rate of 0.25 per cent to 0.35 per cent or nil. since there was an internal CUP in form of bank guarantee charges, charged by bank from assessee, same ought to had been first analyzed and examined. Tribunal had deleted similar addition and no question of law on this score had been raised by revenue, adjustment so made by TPO was deleted. (AY. 2006-07)
Asian Paints Ltd. .v. Addl. CIT(2014) 149 ITD 511 / 41 taxmann.com 71 (Mum.)(Trib.)

S. 92C : Transfer pricing -Arm's length price- TPO had accepted segmental results for purpose of computing deduction u/s.10B, he could not reject those results while determining ALP of international transactions with its AE.
TPO had accepted segmental results for purpose of computing deduction u/s. 10B, he could not reject those results while determining ALP of international transactions with its AE. There is no need for upward adjustment to be made on the AE sales of the assessee. Addition was deleted. (AY. 2008-09)

Honeywell Electrical Devices & Systems India Ltd. .v. Dy. CIT (2014) 149 ITD 514 / 44 taxmann.com 332 (Chennai)(Trib.)

S. 92C : Transfer pricing -Arm's length price-Methodology for working of ALP on selection of CPM and RPM method supported by appropriate comparable, working could only be dislodged by TPO on basis of cogent reasons and objective findings-Method adopted by assesse was upheld.

No objective findings had been given to come to a reasoned conclusion that assessee's adoption of CPM for manufacturing segment and RPM for trading segment was factually and objectively not correct. Rejection of methods by TPO as adopted by assessee was bereft of any cogency and objectivity and same was work of guessing and conjectured and similarly adoption of TNM method by TPO suffered from same inherent aberrations as mentioned. assessee's methods of CPM and RPM respectively worked by applying appropriate comparables. Once assessee had given a methodology for working of ALP on selection of a particular method supported by appropriate comparables, working could only be dislodged by TPO on basis of cogent reasons and objective findings. Method adopted by assesse was up held. (AY. 2008-09)

Frigoglass India (P.) Ltd. .v. Dy. CIT (2014) 149 ITD 429 / 45 taxmann.com 101 (Delhi)(Trib.)

S. 92C : Transfer pricing-Arm's length price-Comparables selected by TPO were not appropriate on account of functional difference, high turnover etc. –Matter was set aside.

Assessee company engaged in providing services in enterprise solutions by operating software products and services in ITES sector. entered into international transactions with AE as well as non-AEs. For benchmark international transactions assessee adopted TNMM. A search was carried out in public data bases which yielded 27 comparable companies with weighted average arithmetic mean of 14.2 per cent. assessee's operating margin was shown at 14.76 per cent as against 14.2 per cent of comparable companies, price charged for international transactions with AEs was considered to be within arm's length range. TPO rejected TP study submitted by assessee, proceeded to select its own set of comparables. TPO selected 26 companies as comparables with an average margin of 26.36 per cent. Certain adjustment was made to assessee's ALP. some of comparables selected by TPO were not appropriate on account of functional difference, high turnover etc. It was held that TPO had not properly allocated segmental expenditure as bad debts not related to AE transactions could not be considered as part of operating cost for determining ALP of transactions with AE. Hence the matter was remanded for fresh disposal. (AY. 2007-08)

Four Soft (P.) Ltd. .v. Dy. CIT (2014) 149 ITD 732 / 44 taxmann.com 479 (Hyd.)(Trib.)

S. 92C : Transfer pricing - Arm's length price- Turnover filter– Company with turnover of Rs. 13,000 crore cannot be comparable to company with turnover of Rs. 32 crore.

Infosys Technologies limited cannot be considered as comparable as it is not only functionally different but it is a giant company having a turnover of about Rs.13000 crores, M/s Infosys Technologies Limited is a giant in the field of software development services having considerable brand value, it also assumes all the risks related to the business. Further, the turnover of Infosys Technologies during the year is about Rs.13000 crores as against Rs.32 crores of the assessee. This itself makes Infosys Technologies Limited uncomparable to the assessee. The turnover filter by adopting a lower limit of Rs.1 crore, he should also have fixed an upper limit while applying the turnover filter. Infosys Technologies Limited cannot be considered to be a comparable to the assessee. (AY.2004-05)

Cordys R & D (India) (P.) Ltd. v. Dy. CIT (2014) 149 ITD 587 / 43 taxmann.com 64 (Hyd.)(Trib.)

S. 92C : Transfer pricing-Arm's length price-RPT filter-Reimbursement of cost - cannot be considered to be part of turnover.

Reimbursement of cost actually incurred cannot be considered to be part of the turnover while computing the percentage of RPT to turnover and they are purely in the nature of reimbursement. The assessee is required to establish by producing necessary evidences that they are in the nature of reimbursements only. (AY.2004-05)

Cordys R & D (India) (P.) Ltd. v. Dy. CIT (2014) 149 ITD 587 / 43 taxmann.com 64 (Hyd.)(Trib.)

S. 92C : Transfer pricing - Arm's length price-Data in public domain-Should not have rejected.
When assessee has placed annual reports of companies, should have considered same and should not have rejected it on ground of non-availability of data in public domain as information relating to companies was available. If information relating to the companies are available with the TPO and if the companies satisfy the filter applied by the TPO then there is no justification for rejecting the aforesaid two companies as comparable.
Cordys R & D (India) (P.) Ltd. v. Dy. CIT (2014) 149 ITD 587 / 43 taxmann.com 64 (Hyd.)(Trib.)

S. 92C : Transfer pricing-Arm's length price-Internal comparisons-CUP/TNM Method.
Where internal comparisons was available application of CUP method ,instead of TNM method was more appropriate . Agreement which existed in number of years cannot be ignored. Comparisons by TPO without checking FAR convergence with assessee was to be rejected.(AY. 2004-05, 2005-06)
Dy. CIT .v. Lumax Industries Ltd. (2014) 149 ITD 371 / (2013) 36 taxmann.com 380 (Delhi)(Trib.)

S. 92C : Transfer pricing - Arm's length price -TNM Method-Cost plus method-AO had excluded research and development expenditure while arriving at operational profit of comparable company, computation of ALP in case of assessee had to be reworked.
Assessee was engaged in business of manufacturing and exporting of industrial valves made of steel casting & for determining ALP, adopted cost plus method. TPO however was of the view that (TNMM) was most appropriate. For necessary comparison TPO selected one company 'A' as comparable for A.Y. 2004-05 and two companies 'O' and 'S' as comparable for A.Y. 2005-06 and compared financial statements of assessee company with comparable and determined ALP adjustment and accordingly, upward revision of income was made. AO had excluded research and development expenditure while arriving at operational profit of 'A'. CIT(A) without verifying computation adopted by assessee by cost plus method and without any finding on same simply deleted addition made on basis of TNM method. TPO did not examine intricacies of assessee company and cryptically arrived at conclusion that assessee company should have determined ALP for its international transactions and should have determined ALP for its international transactions, the issue was to reexamined by TPO and AO afresh. Matter remanded. (AYs. 2004-05, 2005-06)
Dy. CIT v. Flow Link Systems (P.) Ltd.(2014) 149 ITD 604 / 43 taxmann.com 48 (Chennai)(Trib.)

S. 92C : Transfer pricing -Arm's length price-Transaction with international transaction has to be decided by using current year data - Current year data does not give a true picture, multiyear data can be considered.
In order to determine ALP, comparability of an uncontrolled and unrelated transaction with international transaction has to be decided by using current year data, when current year data does not give a true picture of affairs and results of comparables due to existence of abnormal circumstances, multiyear data can be considered. An entity cannot be excluded or eliminated from list of comparables solely on basis of high profit making unit or loss making unit until such factor finds place either in rule 10B(2) or 10B(3) of 1962 Rules. benefit of +/- 5 per cent under proviso to section 92C(2) shall not be allowed as standard deduction for purpose of computation of arm's length price rather such a benefit has to be allowed only when price of international transaction is within tolerance range of +/- 5 per cent of ALP computed by taking arithmetic mean of more than one price. Decided in favour of revenue. (AY. 2008-09)
Chrys Capital Investment Advisors India (P.) Ltd. .v. Dy. CIT (2014) 149 ITD 566 / 42 taxmann.com 276 (Delhi)(Trib.)

S. 92C : Transfer pricing - Arm's length price-Developer of software products could not be held as comparable with a software service provider company-Objections regarding comparables were not raised before DRP can be permitted to be raised before Tribunal.

Once the assessee has accepted the aforesaid company as a comparable by not raising any objection before the DRP, the issue attained finality so far as the selection of the aforesaid comparable is concerned. The assessee cannot be permitted to raise objection with regard to the said company before the Tribunal once the selection of the said comparable has attained finality. A mistake on the part of the assessee that it failed to object to the selection of the aforesaid company as a comparable. Assessee has not shown any reasonable cause as to why it did not object to the said company before the DRP. Tribunal held that development of software products could not be held as comparable with a software service provider company.(AY. 2008-09)

App Labs Technologies (P.) Ltd. v. Dy. CIT (2014) 149 ITD 99 / 42 taxmann.com 11 (Hyd)(Trib.)

S. 92C : Transfer pricing - Arm's length price- Transfer pricing adjustment could not exceed global profit earned by assessee and its AE from international transactions.

Assessee had entered into certain international transactions with its AEs. TPO had made TP adjustment for purpose of determining ALP. DRP had allowed assessee's ground with regard to restricting TP adjustment to global profits of group from international transactions. TPO had not implemented such direction of DRP in consequential order passed by him. Adjustments if any, cannot exceed the global profits earned by the group from 'those transactions'. The DRP while summarising its finding categorically held that it has allowed the assessee's ground with regard to restricting TP adjustment to the global profits of the group from the international transactions. Tribunal directed the AO for deciding it a fresh inconformity with direction given by DRP. (AY. 2008-09)

App Labs Technologies (P.) Ltd. .v. Dy. CIT (2014) 149 ITD 99 / 42 taxmann.com 11 (Hyd.)(Trib.)

S. 92C : Transfer pricing-Arm's length price-Difference in operating margin was within range of plus/minus 5 per cent, no adjustment was required to be made.

The difference in the operating margin, as per the TPO's order itself, is within the range of 5% and, accordingly, no adjustment under law is required to be made. No doubt, the safe harbor rule of 5% is with reference to the arm's length price; the same however translates to an equivalent difference in the operating margin, as the costs toward the same are not disturbed. If a part of the interest cost, is to be excluded from the operating cost, being a part of the capital cost, the assessee's profit margin would rather stand further improved. Therefore, consider the sustenance of the said adjustment. Difference in operating margin was within range of plus/minus 5 per cent, no adjustment was required to be made**.** (AY. 2006-07)

BASF Coatings (India) (P.) Ltd. v. ACIT (2014) 149 ITD 802 / 42 taxmann.com 417 (Mum)(Trib.)

S. 92C : Transfer pricing -Arm's length price-Deputation of employees to AE -TPO was justified in making addition to assessee's ALP holding that a markup of 5 per cent should have been charged in addition to reimbursement of salary expenses by AE.

Assessee's technical / manufacturing process being followed for manufacturing of tyres by AE located abroad, it had deputed some of its employees to South Africa. Deputed employees remained on payroll of assessee but worked for AE and salary of those employees were paid by assessee. Subsequently recovered from AE without a markup by way of a debit note. salary expenses were reimbursed on account of certain services rendered by deputed employees to AE. addition to assessee's ALP holding that a markup of 5 per cent should have been charged in addition to reimbursement of actual expenses. Unless there was a commercial value in services rendered by employees deputed by assessee, there was no occasion for AE to reimburse expenditure incurred by assessee. To determine quantum of addition TPO was justified in making addition to assessee's ALP holding that a markup of 5 per cent. (AY. 2008-09)

Apollo Tyres Ltd. .v. ACIT (2014) 149 ITD 756 /31 ITR 477 /47 taxmann.com 416 (Cochin)(Trib.)

S. 92C : Transfer pricing-Arm's length price-AE located abroad as well as in domestic sector, various differences in export segment and domestic segment-Adopting CPM as most appropriate method not correct-Matter remanded.

Assessee was engaged in business of manufacture and sale of industrial products such as decanters, separators etc. to its AE located abroad as well as in domestic sector, in view of fact that there were various differences in export segment and domestic segment such as market functions, geographic difference, volume difference, credit risk, related party transactions etc., In adopting CPM as most appropriate method in order to make adjustment to assessee's ALP in respect of international transactions entered into with AE is not a correct method. CPM was not the most appropriate method for determining the ALP. Matter remanded. (AY. 2008-09)

Alfa Laval (I) Ltd. .v. Dy. ITO (2014) 149 ITD 285 / 46 taxmann.com 394 / (2013) 158 TTJ 409 (Pune)(Trib.)

S. 92C : Transfer pricing-Arm's length price-TP adjustment towards AMP expenses-'Selling expense' / Discounts Not an 'international transaction'–Matter remanded.

Assessee was engaged in business of providing data processing and related services to its AEs. TPO made addition on account of transfer pricing adjustment towards AMP expenses. Revenue generated from bookings done by subscribers was major source of assessee's income from its A.E and such 'Incentive' to subscribers could not be viewed as anything other than 'Selling expense' which was liable to excluded from total AMP expenses. Contention of assessee that it was not an 'international transaction' was rejected and further contention about application of 'Bright Line Test' as a method for determining ALP was also repelled in view of Special Bench order in LG Electronics India (P) Ltd v. ACIY (2013) 140 ITD 41 (Delhi)(Trib.). Matter was remitted to file of AO with direction to re do determination of TP adjustment if any on account of AMP expenses by considering relevant factors as noted in the order. (AY. 2007-08)

Amadeus India (P.) Ltd. .v. Addl. CIT (2014) 149 ITD 496 / 44 taxmann.com 154 (Delhi)(Trib.)

S. 92C : Transfer pricing-Arm's length price-TPO selected a company as comparable on basis of S. 133(6)-Duty of TPO to have necessarily furnished information-TPO selected a company as comparable based on reasoning given in TPO's order for earlier year-Selection process adopted by TPO was defective. [S.133(6)]

Where TPO selected a company as comparable only on basis of information obtained u/s. 133(6), it was duty of TPO to have necessarily furnished information so gathered to assessee and taken its submissions thereon into consideration before deciding to include that company in its final list of comparables. Non-furnishing of information obtained u/s. 133(6) to assessee would vitiate selection of that company as a comparable. Annual reports of companies selected as comparables showed that those companies were functionally dissimilar and different from assessee, said companies ought to be omitted from set of comparables. Where TPO selected a company as comparable based on reasoning given in TPO's order for earlier year and had not conducted any independent FAR analysis for that company for year under consideration, selection process adopted by TPO was defective. (AY. 2008-09)

Curam Software International (P.) Ltd. .v. ITO (2014) 149 ITD 458 / (2013) 37 taxmann.com 141 (Bang.)(Trib.)

S. 92C : Transfer pricing - Arm's length price-Company owns intellectual property in form of registered patents cannot be compared with the companies which does not own intellectual property-Product designing company cannot be compared with company engaged in software development services.

A company, which owns intellectual property in form of registered patents and several pending applications for grant of patents, cannot be considered as a comparable to assessee which does not own any intangible. A company, predominantly engaged in product designing services, cannot be compared to a company engaged in software development services. Functionally different company cannot be selected as a comparable.

Curam Software International (P.) Ltd. .v. ITO (2014) 149 ITD 458 / (2013) 37 taxmann.com 141 (Bang.)(Trib.)

S. 92C : Transfer pricing - Arm's length price-RPT filter has to be on a standalone basis and not on a consolidated basis-Matter remanded.

While selecting a company as comparable, RPT filter has to be on a standalone basis and not on a consolidated basis. TPO rejected certain companies selected by assessee as comparables on ground that they failed export revenue filter and RPT filter adopted by him. Issue of comparability of said companies was to be fresh considered. Remanded to TPO.

Curam Software International (P.) Ltd. .v. ITO (2014) 149 ITD 458 / (2013) 37 taxmann.com 141 (Bang.)(Trib.)

S. 92C : Transfer pricing - Arm's length price- Mere investment in a business activity cannot be a reason for rejection of a company as a comparable.

Mere investment in a business activity cannot be a reason for rejection of this company as a comparable. Every company is normally required to make investment in business activities and this factor alone cannot be a reason for rejection of a comparable; particularly if the investment pertains to the earlier years, as claimed by the assessee. The TPO is required to demonstrate as to how this particular investment has impacted the margin and why such an impact could not have been adjusted for comparability. In this view of the matter, we restore this issue back to the file of the TPO to consider the issue afresh in the light of the above observations. The TPO is directed to afford the assessee adequate opportunity of being heard before deciding the issue. It is ordered accordingly. (AY. 2008-09)

Curam Software International (P.) Ltd. .v. ITO (2014) 149 ITD 458 / (2013) 37 taxmann.com 141 (Bang.)(Trib.)

S. 92C : Transfer pricing-Arm's length price-Foreign exchange gain related business activities to be treated as operating income while computing operating margins and comparable companies.

The TPO has considered the foreign exchange income as non-operating income based on assumptions and surmises. Foreign exchange gain related to business activities is to be treated as operating income while computing operating margins of assessee and comparable companies.

Curam Software International (P.) Ltd. .v. ITO (2014) 149 ITD 458 / (2013) 37 taxmann.com 141 (Bang.)(Trib.)

S. <u>92C</u> : Transfer pricing-Arm's length price-Method of applying Resale Price Method (RPM) method, (ii) high advertisement expenses has no bearing on the RPM, (iii) comparables with more than 25% of related party transactions (RPTs) have to be excluded, (iv) transactions which do not impact the profitability should be excluded from the formula, (v) potentially comparable companies cannot be expelled only on the ground of high or low turnover. [S.92CA]

(i) The assessee simply purchased mobile phones and accessories from Nokia group companies situated outside India and resold the same as such without any further value addition, mainly, to HCL Info systems in India. Since the goods imported from the foreign AEs representing the international transaction under this segment were neither processed further nor used as raw material for manufacturing any other product, in our considered opinion, RPM is the first choice as the most appropriate method for determination of ALP of the international transaction under this segment.

(ii) The incurring of high advertisement and marketing expenses by the assessee vis-a-vis the other comparable companies does not in any manner affect the determination of ALP under the RPM. When we consider gross profit in numerator and net sales in denominator, all the expenses debited to the Profit & loss account automatically stand excluded. It is but natural that only those expenses can have bearing on the gross profit that are debited to the Trading account. As the amount of advertisement and marketing expenses falls 'below the line' and finds its place in the Profit and loss account, the higher or lower spend on it cannot affect the amount of gross profit and the resultant ALP under the RPM. If the assessee has incurred more expenses on advertisement and promotion, which,

in the opinion of the ld. DR went on to brand building for an AE, then, the transfer pricing adjustment on account of such AMP expenses was separately called for.

(iii) In principle if any company though functionally comparable, but, has more than a specific percentage of the RPTs, then, the same should be ignored by treating it as a controlled transaction. However, the percentage of RPTs to make a company as ineligible for comparison, in our considered opinion, should be taken as more than 25% and not 15% as suggested on behalf of the assessee. The view adopting more than 25% RPTs making a company incomparable has been taken by various benches of tribunal including Aglient Technologies International P. Ltd. VS. ACIT (2013) 36 CCH 187 Del Trib.; Stream International Services Pvt. Ltd. VS. ADIT (IT) (2013) 152 TTJ (Mumbai) 553 ; and Act is Advisers Pvt. Ltd. VS. DCIT (2012) 20 ITR (Trib) 138 (Delhi). We, therefore, hold that a company can be considered as incomparable if its RPTs exceed 25%.

(iii) Ratio of the RPTs represents the proportion of transactions with the associated enterprises (numerator) vis-a-vis the total of transactions (denominator). In order to decide that what should constitute the contents of numerator and denominator for the purposes of finding out the percentage of RPTs, it is relevant to note the logic behind applying this filter. It is manifest that the aim of the transfer pricing regime is to ensure that the international transactions are recorded at arm's length price. This is done under the TNMM by comparing the profit earned from the international transaction with that earned by the comparable independent parties in an uncontrolled situation. Thus, while choosing comparables, it must be ensured that the profit earned by them correctly reflects true profit as is earned by an enterprise from an independent third party. If such a chosen company, though functionally comparable, has also entered into international transactions beyond a particular percentage with the related parties, it is quite possible that its overall profit may have been distorted due to such transactions rendering it as incomparable. That is why, this filter is applied to make certain that a company sought to be considered as comparable should have its profit uninfluenced by the impact of the related party transactions.

(iv) Transactions which do not impact the profitability, such as loan given or taken or other items finding place in the balance sheet, can have no place either in the numerator or the denominator of this formula. However, any income or expenditure resulting/relating from/to or likely to result/relate from/to such items of assets or liabilities, should not be confused with the per se international transactions finding place in the balance sheet of the company calling for exclusion.

(v) In CIT VS. Agnity India Technologies (P.) Ltd. (2013) 219 Taxman 26 (Del), the assessee was a captive unit providing software services to its associated enterprises. The Hon'ble High Court directed the exclusion of Infosys Ltd. from the list of comparables, which list otherwise included several companies with huge turnover. The exclusion was ordered on account of the giantness of this company, which was, in turn, determined by seeing the cumulative effect of several factors, including risk profile, nature of services, turnover, ownership of branded/proprietary products, onsite vs. offshore services, expenditure on advertisement and R&D etc. The higher turnover was only one of the criterion and not the sole criteria for the exclusion of this company. In view of the above discussion, we hold in principle that no potentially comparable company can be expelled from the list of comparables simply for the reason of high or low turnover.(ITA No. 242/Del/2010, AYs. 2002-03, dt. 31.10.2014.)

Nokia India (P) Ltd. .v. DCIT (Delhi)(Trib.); www.itatonline.org

S. 92C : Transfer pricing-Resale Price Method applies even where the goods are bought from an AE and sold to another AE.

The argument of the department that under Rule 10B(1)(b) the Resale Price Method can be applied only when the assessee buys from an associated enterprise and sells to a non-associated enterprise and not when the sale is to an AE is not correct. As per the Rule 10B(1)(b), under the Resale Price Method the price at which property purchased or services obtained is sold to an unrelated enterprise, the price at which this property is sold less margin of the associated enterprise is to be reduced for determination of the resale arm's length price. There is no condition that this method cannot be used when the tested party is an associated enterprise. The contention of the learned DR that the basic condition of resale price method is that "the property has to be obtained by the enterprise i.e. the assessee from an associated enterprise is incorrect." In the Act as well as Rules the words 'enterprise' and 'associated enterprise' have been used interchangeably. Thus the argument that enterprise will

mean 'the assessee' and associated enterprise will mean' the other party' to whom the assessee has sold or purchased the goods is incorrect. The above definition of 'enterprise' and 'associated enterprise' in the Act nowhere indicates that the 'enterprise' shall mean the assessee and the 'associated enterprise' will mean other than the assessee. Thus the contention of the learned DR that resale price method cannot be used in the case of the assessee company is devoid of any merit. This view gets further supported by the fact that there is no such condition or prohibition provided in Section 92C as well as Rule 10B. In the absence of any such condition or prohibition it cannot be read into the Rule to mean that resale price method shall not be applicable in case the assessee company is selling its product to an associated enterprise. The OECD guidelines in respect of resale price method support this interpretation. (ITA No. 5748/Del/2011 dt. 29/10/2014.) (AY.2007-08)

Yamaha Motor India Pvt. Ltd. .v. ACIT (Delhi)(Trib.); www.itatonline.org

S. 92C: Transfer pricing-"Umbrage" taken in Casio that BMW did not follow L. G. Electronics is based on "wrong head note". L. G. does not deal with a case of distributor and so there is no conflict with the law laid down therein.

In L. G. Electronics 140 ITD 41 (Del)(SB), the Special Bench laid down guidelines on how to determine whether a transfer pricing adjustment for "Advertisement & market Promotion" ("AMP") expenses had to be made or not. Subsequently, in BMW (AY 2008-09), a division Bench held that the ratio of L. G. Electronics did not apply to a "full risk distributor". Another Division Bench in the case of Casio "took umbrage" at the observations made in BMW and made "surprising observations" that "There is no prize for guessing that Special Bench order has more force and binding effect over the Division Bench order on the same issue." The Bench in the case of Casio and later in Perfetti Van Melle took the view that the principle laid by the Special Bench in L. G. Electronics applied to the case of a "distributor" as well. When the case of BMW for AY 2009-10 came up for hearing, the Bench took the view that there was a conflict between the order passed in the case of BMW (AY 2008-09) and that passed in Casio/ Perfetti Van Melle and the VP was asked to consider whether the matter ought to be referred to a 5 Member Bench. Thereafter, when the matter came up before the present Bench HELD:

The observations of the co-ordinate Bench in Casio India and Perfetti Van Melle are based probably on the line of arguments advanced by the parties, presumably relying on head notes of the publisher in BMW's case. This may not be the appropriate way to conclude what was decided in the decision dated 16.08.2013 in BMW. We are of the view that it would be more appropriate to refer to the said decision itself and see if the decision of the Special Bench in L. G. Electronics case has been by-passed in BMW's case. The umbrage expressed in the decision dated 13.12.2013 of the coordinate Bench in Casio India on reflection and consideration would show that it may have been based probably on incorrect pleadings before it based on the head notes as such the observation that there are no prizes for guessing that Special Bench shall prevail probably would not have been made. This aspect has adequately been addressed in the order dated 31.07.2014 in Bose Corporation India Pvt. Ltd. vs. ACIT case where it was held that "needless controversy appears to have arisen apparently due to certain observations made in order dated 13.12.2013 in Casio India Company wherein in para 5 and 6, the co-ordinate Bench appears to be guided by the arguments addressed by the Ld. AR in that case who, relying upon the order in the case of BMW India Pvt. Ltd., advanced arguments apparently on the basis of head notes of the order in BMW India Pvt. Ltd instead of reading the complete order and submitted that BMW India Pvt. Ltd. be followed in preference to the Special Bench in L.G. Electronics. The observations in para 5 and 6 of the order appears to completely overlook the fact that the material finding in BMW India Pvt. Ltd. actually considered and followed wherever applicable the principles laid down by the Special bench in L.G. Electronics. Hence the surprising observation in para 6 that "there is no prize for guessing that Special Bench order has more force and binding effect over the Division Bench order on the same issue. This contention raised by the Ld. AR, therefore, fails" appears to be the result of the mistaken submissions which could not have been based on reading the entire order and appears to be based only on a reading of the head notes. The fact that head notes can at times be misleading is a well known fact as they are only the reporting done for the convenience of the professionals and it is imperative therefore to read the entire order. Be it as it may, we would not be out of place to sound a caution that hasty conclusions based on arguments advanced on the basis of the head notes in the reporting of the orders may not be advisable and it may lead to misleading conclusions …. The advancing of arguments that a distributor remuneration model is

separate and distinct is accepted in L.G. Electronics case also as would be borne out from parameter one of para 17.4 of L.G. Electronics. Accordingly taking cognizance of this decision rendered in BMW India Pvt. Ltd. does not run contrary to the decision of L.G. Electronics case. The fact that in L.G. Electronics case there was no occasion to analyze, consider in detail and consequently adjudicate only on a distributor's case is self evident since all possible manner of business models were considered together for which purposes acknowledging its humane limitations the Special Bench was constrained and candid to admit the obvious fact that it is not possible to have a straight jacket formula for all eventualities ….. The view taken in BMW India Pvt. Ltd. was that a distributor remuneration model is distinct and peculiar. Thus the view taken was in conformity with the decision of the Special bench and concurring with the view taken, we hold that this view does not override the Special Bench." Accordingly we hold that there is no conflict between the decision in BMW India Pvt. Ltd. with L.G. Electronics. (ITA No. 385/Del/2014, Dt. 21/10/2014)(AY. 2009-10)
BMW India Pvt. Ltd. .v. ACIT (Delhi)(Trib.); www.itatonline.org

S. 92C : **Transfer pricing-Principles on right of TPO to collect info u/s. 133(6), exclusion of high profit comparables, adjustment for limited risk environment, exclusion of reimbursement costs for computing operation margins explained. [S.133(6)]**
(i) The TPO conducted search in the data bases for finding additional comparable by applying 25% employee cost filter. After examining the information obtained from the company u/s 133(6) of the Act the TPO treated it as comparable by observing that the company is engaged in IT enabled services and qualifies all the filters adopted by the TPO. It is very much clear from the order of the Assessing Officer that the assessee was not given any opportunity/ information to examine the comparability of the aforesaid company. Though the TPO is empowered under the provisions of the Act to obtain information with regard to selection of comparables, however before utilising the information obtained, he has to give fair opportunity to the assessee to have its say in the matter. The DRP has also over-looked this aspect.
(ii) Company showing extraordinarily high profit cannot be treated as comparable and have to be excluded as held in Avineon India P. Ltd Zavata India P. M/s. Capital IQ, M/s. HSBC Electronic Data Processing India P. Ltd., Information Systems India Pvt. Ltd and also Special Bench decision of the Mumbai Tribunal in Maersk Global Centres (India) P. Ltd., Mumbai vs. ACIT, Circle 6(3), Mumbai dated 07.03.2014.
(iii) The assessee is a captive provider functioning under a limited risk environment with most of the risks being assumed by its AEs and comparables selected for analysis include companies which have fairly diversified areas of specialisation, bearing risks akin to any third party independent service provider. Since assessee is operating in a risk mitigated environment vis-à-vis the comparable companies performing entrepreneurial risk taking functions, the assessee seeks adjustment for the risk being taken by the comparable, whose profit would be more dependent on the risk involved. Since the assessee does not bear any risk of incurring losses and since comparable companies work in the market environment, the margins earned by the comparable companies would be comparatively more to reflect the higher level of functions and risks.
(iv) Reimbursement transactions towards travel, air fare and site expenses relating to employees of AE travelling to India for business purposes. Even though these transactions are considered as international transactions for the purposes of TP, since there is no mark up on these reimbursements, these transactions are to be excluded for working out the operative costs/operative margins .(ITA No. 1826/Hyd/2011, dt. 24.10.2014.) (AY. 2007-08)
HSBC Electronic Data processing India .v. ACIT (Hyd.)(Trib.); www.itatonline.org

S. 92C : Transfer pricing-In case of "sogo shosha" business model (high volume, low risk, trading of goods), the "berry ratio" (benchmarking gross profit and/ or net revenues (after subtraction of cost of sales) against operating expenses is an appropriate PLI.
(i) Even the TPO does not dispute that (a) MCI is a low risk activity in the field of trading, (b) MCJ group is primarily involved in high volume sales, or 'colossal sales' of a wide range of merchandise; (c) MCJ, following the sogo shosha business model, has global network and MCI is a part of this network. The low risk high volume business model of the assessee is thus not even in dispute. It is also not the case of the revenue that the assessee is only playing an assigned role in linking the buyers

and sellers and is not engaged in the sogo shosha activity as a whole. As a corollary to this accepted position, the unique intangible of sogo shosha business model, even if that can be treated as a unique intangible asset, belongs to the MCJ group and not the MCI individually;
(ii) The assessee plays an assigned role, which is essentially a support function, in the core sogo shosha activity of the parent company MCJ. While sogo shosha is a Japanese expression which means, when translated literally, a general trading company, in business parlance a sogo shosha is something much more than a general trader. Sogo shosha is a unique business model in the world of commerce. A sogo shosha cannot be equated with a general trading company in all material respects;
(iii) In case the normal PLI of operating profit to operating costs (including inventory costs) or operating profit to sales was applied, every comparable which is picked up for comparing trading activity of the assessee, which is admittedly an integral part of sogo shosha activities of the MCJ group, will, therefore, have its inherent limitations because functional profile of the assessee's trading activity is, and cannot be, the same as that of the comparables. It is, therefore, important to find out a way, by selecting the appropriate profit level indicator, to eliminate this critical difference between sogo shosha activity of the assessee and any other trading activity that the comparables may have. As a matter of fact, it is the level of inventory which is crucial factor in determining the kind of trading activity an assessee has carried out. The CBDT has defined wholesale trader with reference to, inter alia, its monthly inventory level being less than 10% and prescribes a lower tolerance range at one third the level of normal tolerance range. This notification is in the context of tolerance range, prescribing lesser tolerance range for the whole traders implying that the margin of profits for wholesalers must move in a lower range which can only happen when margins are also lower vis-à-vis margins in wholesale trading, but this also indicates that lower inventory levels lead to lower inventory risks and generally resultant lower profit levels also. There is thus a direct relationship between the normal inventory levels and the normal profitability;
(iv) It is beyond dispute and controversy that the comparables carrying on the trading activity similar to assessee group's trading activity are difficult to find. Here is a case in which true comparables are difficult, or almost impossible, to find and, therefore, a way is to be found to find such comparison meaningful by adopting a profit level indicator which ignores the impact of vital dissimilarities in inventory levels between the assessee and the comparables;
(v) What follows is that use of transfer pricing mechanism, on the facts of this case, should be in such a manner in such a manner so as to minimise the impact of higher risks assumed by, and higher assets employed by, a normal trader vis-à-vis a sogo shosha entity. It is, therefore, worth an examination whether use of berry ratio, which assessee has all along contended to be appropriate to eliminate differences between an ordinary trader and the assessee, could indeed help in elimination of this vital difference of profile of the assessee vis-à-vis normal trading entities which may be available as comparables;
(vi) The answer to the fundamental question of whether a taxpayer should be entitled to a return on the value of goods handled by it, would actually depend on the functions performed and the related risks borne by it, with respect to the goods; and not on whether the taxpayer has taken title to the goods, shorn of the assessee's FAR profile;
(vii) On facts, neither the assessee has performed any functions on or with respect to the goods traded by it, beyond holding flash title for the goods in some of the cases, nor has the assessee borne any significant risks associated with the goods so traded. All the functions, assets and risk of the assessee are quite reasonably reflected by the operating costs incurred and the value of goods traded does not have much of an impact on its analysis of FAR. The cost of goods sold would be relevant if and only if the assessee would have assumed any significant risks associated with such goods sold and when monetary impact of such risks is not reflected in operating expenses of the assessee. The berry ratio should, therefore, be equally useful in the present case as well. In the case of the traders like assessee, who neither assume any major inventory risk nor commit any significant assets for the same and particularly as there is no value addition or involvement of unique intangibles, the berry ratio should also be equally relevant as in the case of a limited risk distributor;
(viii) What berry ratio thus seeks to examine is the relationship of the operating costs with the operating profits. It thus proceeds on the basis that there is a cause and effect relationship between operating costs and the operating profits. The factors, however, which can also have substantial impact on the operating profits, and thus dilute this direct relationship, could be factors like (a) in

terms of functions – processing and value addition to the goods; (b) in terms of assets – fixed assets such as machinery, inventory, debtors and otherwise high assets, including intangible assets; and (c) in terms of risks – risk associated with holding inventories;
(ix) In typical cases of pure international trading, there is neither any processing of goods involved nor is there use of any significant trade or marketing intangibles. The inventory levels are also extremely low, at least with respect to the goods traded, since the nature of activity does not require maintenance of inventories and there is sufficient lead time between order being received and the actual procurement activity. There are no other factors, in addition to the operating costs, which affect direct relationship between operating costs and operating profits. Therefore, except in a situation in which significant trade or marketing intangibles are involved or in a situation in which there is further processing of the goods procured before selling the same or in a situation which necessitates employment of assets in infrastructure for processing or maintenance of inventories, the use of berry ratio does seem to be quite appropriate;
(x) There is, therefore, neither anything inappropriate in the use as such of berry ratio per se, nor there are any real issues with respect to accounting policies of the assessee vis-à-vis accounting policies of the comparables finally selected. Obviously, as final comparables are not yet selected, there cannot be any question of the accounting policies adopted by the comparables vis-à-vis accounting policies of the assessee being so significantly different that the very comparability is not possible;(ITA No. 5042/Del/2011, Dt. 21.10.2014.)(AY. 2007-08)
Mitsubhai Corporation India Pvt. Ltd. .v. DCIT (Delhi)(Trib.); www.itatonline.org

S. 92C : Transfer pricing-Arm's length-If assessee has followed CUP method, it cannot argue at the appellate stage that TNMM should be followed even if TPO has for later years accepted TNMM as the most appropriate method.
The assessee applied CUP as the most appropriate method for benchmarking the international transactions undertaken by it. The assessee did not dispute before the TPO that the CUP was the most appropriate method. However, it was only during the course of first appellate proceedings that the assessee came out with an additional ground contending that the most appropriate method was TNMM and the same should be applied. Even in AY 2002-03, the assessee applied the CUP method for benchmarking its international transactions.
On appeal the Tribunal held that, we do not find any force in the argument of the ld. AR that simply because the TPO has applied TNMM for the A.Ys 2007-08 and 2008-09 and hence the application of the same by the CIT(A) be upheld. This factor, though significant, but is not conclusive. What persuaded the TPO to observe departure in these two later years from the consistent stand taken by him in the immediately preceding four years up to A.Y. 2006-07 in following the CUP method, is not available on record. There may have been some change in the factual position necessitating the adoption of TNMM in these later years. Further, the mere fact that the TPO adopted TNMM in a later year can be no ground to argue before the tribunal that the same method be followed in a preceding year, which stand has been specifically rejected by him in the instant years. As such, we cannot uphold the application of TNMM on this reason alone, more specifically, when in the immediately preceding year, where the facts are admittedly similar, the tribunal has restored the matter to the TPO for de novo adjudication. (ITA No. 282/Del/2012, , dt. 31.10.2014.) (AY. 2003-04)
DCIT .v. Insilco Ltd. (Delhi)(Trib.) www.itatonline.org

S. 92C : Transfer pricing–Arm's length price-Payment of management fees to AE-Matter restored.
The Tribunal held that neither the TPO nor the Assessing Officer has examined whether the payment of fee is according to the agreement or not. The assessee was given invoices for a fixed amount whereas the agreement provides otherwise therefore in order to verify the pricing methodology as prescribed in the agreement and payment by assessee the matter is restored to the Assessing Officer to examine this aspect with reference to the agreement between the parties. (AY. 2003-04 to 2005-06)
TNS India (P.) Ltd. .v. ACIT (2014) 163 TTJ 576 (Hyd.)(Trib.)

S. 92C : Transfer pricing-Arm's length price-Fraud in determination of LIBOR / EURIBOR no reason to discard it as ALP.

The department claimed that in determining the ALP of an international transaction of loan by the assessee to its AE, LIBOR could not be treated as the ALP as there was a "fraud" regarding fixation of 'LIBOR' as evidenced by the fact that Barclays Bank & UBS were fined by the United States Department of Justice for attempted manipulation of the LIBOR and Euribor rates and ultimately UBS agreed to pay to regulators. HELD by the Tribunal:

Even though Revenue has raised additional grounds on the reason that LIBOR cannot be considered as a basis as it was fraudulently fixed, we are not in a position to agree with the additional grounds. Whether that was fraudulently fixed or not is not a consideration now, as it was the basis for all international transactions at that point of time as far as borrowing of funds are concerned. In fact, assessee's A.E. also obtained loan from a local branch at LIBOR plus basis only. Accordingly, assessee has justified the interest on the rate prevalent at that relevant point of time. Even though there may be same fraud involved in fixing the rate of international rates, as it became basis for subsequent international transactions at that point of time, We do not see any reason to differ from the LIBOR plus basis points for T.P. comparison. The Revenue cannot contend that rate of interest prevailing in India has to be adopted as the rates in India cannot be compared while loans are obtained abroad, even though funds are flown from India. What is required to be seen is whether the transaction is at arms length or not. Since, the international loan rates are based on LIBOR, we do not see any reason for differing from the Ld. CIT(A) order, which itself based on Coordinate Bench decisions that LIBOR plus basis points is at arm's length.(ITA No. 1159/Hyd/2013, , 15.10.2014.)(AY. 2008-09)

Vijay Electricals limited .v. ACIT (Hyd.)(Trib.); www.itatonline.org

S. 92C : Transfer pricing - Arms' length price -Foreign exchange fluctuation gain arising on realization of trade debtor's, payment to creditors etc. is operational income.

The TPO had considered foreign exchange fluctuation gains to be non-operational in nature. This view was confirmed by the DRP stating that the foreign exchange fluctuations had nothing to do with the business operations of a tax payer. The DRP had refused to follow the decision of M/s. Saplap India (P) Ltd . None of the authorities have given any finding that foreign exchange fluctuation gains were relatable to any capital receipts or outgoes. Assessee had given a break up of foreign exchange gain in which it had specifically excluded the exchange loss on purchase of fixed assets. We are of the opinion that the foreign exchange fluctuation gain arising to the assessee on realization of trade debtor's, payment to creditors etc., were nothing but operational income.(IT(TP) A No. 270/Bang/2014, Dt. 17/10/2014.) (AY. 2009-10),

Cisco system service B. E. .v. ADIT(IT) (Bang.)(Trib.); www.itatonline.org

S. 92C : Transfer pricing-Arm's length price-Turnover filter is an important criteria in choosing comparables.

Tribunal held that, the ICAI TP Guidelines note on this aspect lay down in para 15.4 that a transaction entered into by a Rs. 1,000 crore company cannot be compared with the transaction entered into by a Rs. 10 crore company. The two most obvious reasons are the size of the two companies and the relative economies of scale under which they operate. The fact that they operate in the same market may not make them comparable enterprises.

A reading of the provisions of Rule 10B(2) of the Rules shows that uncontrolled transaction has to be compared with international transaction having regard to the factors set out therein. Before us there is no dispute that the TNMM is the most appropriate method for determining the ALP of the international transaction. The disputes are with regard to the comparability of the comparable relied upon by the TPO.

In this regard we find that the provisions of law as the decisions clearly lay down the principle that the turnover filter is an important criteria in choosing the comparables. The assessee's turnover is RS. 47,46,66,638. It would therefore fall within the category of companies in the range of turnover between 1 crore and 200 crores (as laid down in the case of Genesis Integrating Systems (India) Pvt. Ltd. v. DCIT**,** ITA No.1231/Bang/2010). Thus, companies having turnover of more than 200 crores have to be eliminated from the list of comparables as laid down in several decisions referred to by the ld. counsel for the assessee. (ITA No. 1054/Bang/2011, Dt. 23.11.2012)(AY. 2007-08)

Trilogy E-Business software India .v. DCIT (Bang.)(Trib.); www.itatonline.org

S. 92C : Transfer pricing-Arm's length price-Adjustment for capacity underutilization has to be in the results of the comparables and not the tested party. A 100% captive unit has to show that underutilization was for reasons beyond its control. [S.10B]

The CIT(A) granted relief by making adjustments, on account of capacity underutilization, in the results shown by the tested party and thus computing hypothetical financial results which the tested party would have achieved in perfect conditions. Such an exercise is impermissible. As is the undisputed legal position, such comparability adjustments can only be made in the comparables and not the tested party itself. It is specifically provided in Rule 10B (1)(e)(iii) that adjustments for variations, which could materially affect the amount of net profit margin in the open market in comparable uncontrolled transactions, are to be made in respect of net profits realized by the comparable transactions or enterprises. The CIT(A) was thus clearly in error in proceeding to make capacity underutilization adjustments in the profits earned by the assessee. That apart, in the case of a one hundred percent captive service unit, as is the assessee before us, the very concept of capacity underutilization may not really make any sense unless the assessee has not been able to offer, for reasons beyond its control, the underutilized capacity to its AE. There is no finding on this aspect of the matter. As the assessee does not have the liberty to work for any other customer, and is wholly dependent on its AE for productive use of its capacity to work, the AE should normally make good any losses to the captive unit caused by its not being able to make use of the available capacity. In the case before this, the AE has indeed given some financial support to the assessee which has been reduced from the ALP adjustment figure, and the business rationale of AE's extending financial support to the assessee is thus not in doubt. However, there is nothing on record to show how this financial support has been computed and is on what ground, and on what basis, this financial support is given. The reason for underutilized capacity and the facts regarding financial support extended to the assessee are not clear from the material on record. The CIT(A) has granted the impugned relief merely by making capacity underutilization adjustments to the profits achieved by the tested party, but then such an approach, as we have noted earlier, is wholly unsustainable in law.(ITA No. 549/Del/2011, Dt. 13.10.2014) (AY.2005-06)

DCIT .v. EDAG Engineers & Design India Pvt. Ltd. (Delhi)(Trib.); www.itatonline.org

S. 92C : Transfer pricing-Arm's length price-Foreign exchange gains and loss--In computing operating profits, expenditure of other years has to be excluded. Forex gains and losses have to be treated at par.

There is a categorical finding by the CIT(A) that superannuation contribution of Rs 5,88,254 pertains to the assessment year 2000-01 and 2001-02. This finding remains uncontroverted. In this view of the matter, there cannot indeed be any rationale in taking into account this expenditure for computation of operating profits of the assessee for the current year. Similarly, there is a categorical finding that Catia software, in respect of which amount of Rs 8,21,628 was excluded, was not used for the purpose of any work in the relevant previous year and it was only subsequent year that this software was actually used. This finding also remains uncontroverted. Clearly, therefore, this expense cannot be included in the computation of operating profit for the current year. As regards forex gain, the relief granted by the CIT(A) is only a natural corollary to the stand taken by the TPO to the effect that the forex losses are to be included in computation of operating income. When he does so, it cannot be open to him to take a stand that income from forex gain is to be treated as non operational income. In any event, forex gains cannot be considered in isolation of the revenues generated. It is in respect of such revenues that forex gains are received. As for the exclusion of bad debts, amortizations and provisions, in computation of the PLI of the comparables, we are unable to see any rationale in the same nor has it been justified before us. (ITAT 3618/Del/2009, Dt. 13.10.2014.) (AY. 2003-04)

ITO .v. EDAG Engineers & Design India Pvt. Ltd. (Delhi)(Trib.); www.itatonline.org

S. 92C : Transfer pricing-Arm's length price- CUP cannot be applied on hypothetical or imaginary value but a real value on which similar transactions have taken place is required. TPO has no jurisdiction to question commercial expediency of transaction

One of the very basic pre condition for use of CUP method is availability of the price of the same product and service in uncontrolled conditions. It is on this basis that ALP of the product or service can be ascertained. It cannot be a hypothetical or imaginary value but a real value on which similar

transactions have taken place. Coming to the facts of this case, the application of CUP is dependent on the market value of the arrangements under which the present payments have been made. Unless the TPO can identify a comparable uncontrolled case in which such services, howsoever token or irrelevant services as he may consider these services to be, are rendered and find out consideration for the same, the CUP method cannot have any application. His perception that these services are worthless is of no relevance. It is not his job to decide whether a business enterprise should have incurred a particular expense or not. A business enterprise incurs the expenditure on the basis of what is commercially expedient and what is not commercially expedient. As held by Hon'ble jurisdictional High Court in the case of CIT v.EKL Appliances Limited (345 ITR 241), "Even Rule 10B(1)(a) does not authorise disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same".

The very foundation of the action of the TPO is thus devoid of legally sustainable merits. There is no dispute that the impugned payments are made under an arrangement with the AE to provide certain services. It is not even the TPO's case that the payments for these services were not made for specific services under the contract but he is of the view that either the services were useless or there was no evidence of actual services having been rendered. As for the services being useless, as we have noted above, it is a call taken by the assessee whether the services are commercially expedient or not and all that the TPO can see is at what price similar services, whatever be the worth of such services, are actually rendered in the uncontrolled conditions.

As for the evidence for each of the service stated in the agreement, it is not even necessary that each of the service, which is specifically stated in the agreement, is rendered in every financial period. The actual use of services depends on whether or not use of such services was warranted by the business situations whereas payments under contracts are made for all such services as the user may require during the period covered. As long as agreement is not found to be a sham agreement, the value of the services covered under the agreement cannot be taken as 'nil' just because these services were not actually required by the assessee. In any case, having perused the material on record, we are satisfied that the services were actually rendered under the agreement and these services did justify the impugned payments. (ITA No. 6480/Del./2012, Dt. 13/10/2014.) (AY.2008-09)

AWB India Pvt. Ltd. .v. DCIT (Delhi)(Trib.); www.itatonline.org

S. 92C : Transfer pricing-Arm's length price-Failure to pass draft assessment order after TPO's order renders proceedings void. SCN cannot be equated with draft assessment order.[S.144C]

Even though a transfer pricing adjustment under section 92CA(1) was made to the income of the assessee, and accordingly the assessee is covered by the provisions of Section 144C(15), the Assessing Officer did not furnish to the assessee a draft assessment order, before passing a final assessment order. The assessee was thus deprived of an opportunity of approaching the Dispute Resolution Panel. Under Section 144 (C) of the Act, it is evident that the assessing officer is required to pass only a draft assessment order on the basis of the recommendations made by the TPO after giving an opportunity to the assessee to file their objections and then the assessing officer shall pass a final order. Where there is an omission on the part of the assessing officer to follow the mandatory procedures prescribed in the Act, such an omission cannot be termed as a mere procedural irregularity and it cannot be cured. The impugned assessment order is a legal nullity. The show cause notice issued by the Assessing Officer, before making the ALP adjustment cannot be treated as a draft assessment order nor the assessee could have approached the DRP against the same (Vijay Television Pvt. Ltd. Vs DRP [(2014) 46 taxmann.100 (Mad) followed]. (ITA No. 1356/Del/2012, Dt. 30/09/2014.) (AY.2007-08)

Capsugel Healthcare Ltd. .v. ACIT (Delhi)(Trib.); www.itatonline.org

S. 92C : Transfer pricing –Arm's length price-Resale price Method-If margins of the wholesale distributor can be compared with the margins of the assessee, no adjustment can be made

The assessee used Resale Price Method for benchmarking its international transactions so far as purchase of books is concerned. The claim of the assessee was that its purchase is at arm's length price because while its gross margin for the sale of books, other than imported books, is 33.82%, whereas its gross margin for sale of imported books is 38.08%. The TPO, however, rejected this stand on the ground that the comparison of profit earned on imported books with profit earned on other

books is incorrect because the latter is an entirely uncomparable activity on the facts of this case. It was pointed out that, apart from distributing books imported from the AEs, the assessee publishes Indian reprints of foreign books by paying royalty thereon, and that this activity cannot be compared with distribution of books.

A plain look at the computations done by the TPO shows glaring inconsistencies. While the TPO has proceeded on the basis that the assessee has received 85.15% discount on published price of the books and allowed 30% discount on the same published price to the wholesale dealers, the figures reproduced above have a different story to share. Going by the business model as perceived by the TPO, which constitute foundation of the impugned ALP adjustment, for each purchase of Rs 24.85 (100-85.15) by the assessee, the sale price has to be Rs 70 (100-30). The profit margin thus works out to 45.15 which works out to margin of 64.50% of sales whereas the profit margin of the assessee on sale of these books is admittedly 38.08%. Clearly, therefore, there is a discrepancy in the perceptions of the TPO vis-à-vis actual facts of the case. This discrepancy, however, seems to be explained by the assessee's uncontroverted claim that, as submitted by the assessee before the AO vide chart attached to letter dated 13.12.2006- a copy of which is placed before us at the paper-book page 144, the UK cover price of the book and Indian cover price is not the same. While the discount allowed to the assessee is on the UK published price, the discount allowed to wholesale dealer is on Indian cover price. For example, UK cover price of the book 'The Age of Kali- Indian Travels and Encounters' is stated to be UK £ 8.99 whereas Indian cover price for sale is stated to be UK £ 4.99 and the discount allowed to the distributor is on Indian cover price. There are variations in the discount rates also but that aspect, for the present purposes, is not really material. Similarly, in the case of 'Sleepover Club Ponies' the UK cover price is stated to be UK £ 3.99 whereas Indian cover price is stated to be UK £ 2.50. All these details were before the TPO, yet has proceeded to compute the hypothetical sale price of the books in the hands of the distributor on the basis that it will be equivalent to 402.414869% (i.e. 100/ 24.85 X 100) of the purchases in the hands of the assessee. This approach, including the presumption underlying therein, is clearly erroneous. The computation of profit margins of the wholesale distributor, as computed by the AO, are, therefore, are also incorrect. The TPO has not adopted the profit margin by the wholesale distributors on the basis of actual figures or the undisputed discount policies on cover prices but based on certain hypothesis which turns out to be based on misconception of facts and is, in any case, unsubstantiated by material on record. We are, therefore, of the view that the very foundation of impugned ALP adjustment is unsustainable in law. (ITA No. 4790/Del./2010, dt. 13/10/2014). (AY.2004-05)

ACIT .v. Harper Collins Publishers India Ltd. (Delhi)(Trib.); www.itatonline.org

S. 92C : Transfer pricing-Arm's length price-The expenses like rent, depreciation, electricity, insurance charges, office maintenance and other miscellaneous expenses have no co-relation with the number of employees.

The assessee has used allocation key of employee head account. The expenses like rent, depreciation, electricity, insurance charges, office maintenance and other miscellaneous expenses have no co-relation with the number of employees. On the contrary, these expenses have a direct bearing to the revenue generation. As per Rule 10-B(1) of the Act, determination of ALP u/s 92CA(2) of the Act, the ALP in relation to an international transaction has to be determined by the most appropriate method. In our considered opinion, the method adopted by the TPO is slightly better than the method adopted by the assessee. More so when the allocation by the assessee is not supported by any certificate from the management. Considering the nature of expenses in totality, we do not find any merit in the case of the assessee.

Varian India Pvt. Ltd. .v. Addl.DIT (Mum.)(Trib.); www.itatonline.org

S. 92C : Transfer pricing-Arm's length price- Depreciation-Adjustment for depreciation has to be made.

If the methods of depreciation adopted by the two companies are different, then the net margins arrived at are not strictly comparable unless suitable adjustment is made in the amount of depreciation so as to adopt depreciation under the same method in the two cases. Therefore, the Transfer Pricing Officer is directed to take into consideration the difference in the method of providing depreciation in

the case of the assessee and the chosen comparable case and if the methods are different, then to make suitable adjustment for the same as per law

Siemens Heathcare Diagnostices .v. ACIT (Mum.)(Trib.); www.itatonline.org

S. 92C : Transfer pricing-Arm's length-Operating Profit to operating Revenue should be taken as the PLI and not Operating Profit to Operating Cost.

The purpose of identifying the PLI is to ensure that the comparability of the controlled transactions is objective and reference in this regard was made by him to the OECD Transfer Pricing Guidelines 2010, wherein it was explained that the denominator should be reasonably independent from controlled transactions, as otherwise, there would be no objective starting point. Explaining further, it was observed in the OECD Transfer pricing Guidelines that when analyzing a transaction consisting in the purchase of goods by a distributor from an associated enterprise for resale to independent customers, one could not weigh the net profit indicator against the cost of goods sold because these costs are the controlled costs for which consistency with the arm's length principle is being tested.

In the present case, the issue involved was relating to determination of Arms length price of the international transactions of the assessee company with its AE involving purchase of medical devices, and this being so, we are of the view that the CIT(A) was fully justified in accepting the Operating Profit to operating Revenue as the PLI, as claimed by the assessee for Transfer Pricing Analysis, and not Operating Profit to Operating Cost as taken by the Assessing Officer/TPO, relying on the relevant OECD Transfer Pricing Guidelines, 2010.

DCIT .v. St. Jude Medical India Pvt. Ltd. (Hyd.)(Trib.); www.itatonline.org

S.92C: Transfer pricing -Arm's length price - Comparables and Adjustments –Functionally dissimilar companies cannot be taken as comparable.

As the same comparables had been chosen by TPO as in case of Trilogy E-Business Software India (P.) Ltd. v. Dy. CIT [2013] 140 ITD 540 / 29 taxmann.com 310 (Bang.) Tribunal's order in such case for same assessment year was to be followed regarding comparability of companies. Application of turnover filter of Rs. 1 crore to Rs. 200 crore for selecting comparables is justified. Functionally dissimilar companies cannot be taken as comparables. Where company is engaged in varied lines of businesses, segmental profits of comparable line of business should be taken. Companies having related party transaction in excess of 15 per cent of total receipts cannot be taken as comparable. Where margin of assessee was well within +/- 5 per cent range of arithmetic mean of comparables, no TP adjustment was required.(2007-08)

Witness Systems Software India (P) Ltd. v. Dy. CIT (2014) 61 SOT 64 (URO)/ (2013) 34 taxmann.com 183 (Bang.) (Trib.)

S. 92C : Transfer pricing -Arm's length price-proper and legible details of comparable were not provided-Matter set aside.

Assessee an engineering design service provider, rendered design services to its Associated Enterprises (AEs) to support execution of overseas offices turnkey project.TPO rejected comparables selected by assessee except one and selected its own comparable and on basis of average mark up on cost, he made corresponding transfer pricing addition to income of assesse.TPO selected other comparables. Assessee raised objection that proper and legible details of comparable were not provided to assessee and that one of comparables of assesse. Matter was to be set aside to file of TPO to address these issues and pass a speaking order in accordance with law. (AY. 2008-09)

Bechtel India (P.) Ltd. .v. ACIT (2014) 146 ITD 733 / (2013) 33 taxmann.com 213 (Delhi)(Trib.)

S. 92C : Transfer pricing - Arm's length price-Comparable-Small company-Cannot compared with giant company engaged in development of various niche products.

Assessee engaged in development of softwares for its associated enterprise (AE).TPO rejected some of comparable companies considered by assessee and adopted some other companies whose data was collected by resorting to provisions of s. 133(6). Assessee objected to comparables adopted by TPO. Tribunal held that since assessee was a small company, it cannot compared with giant company engaged in development of various niche products. Where A.O. noted functional dissimilarity between assessee and comparable company, same cannot be compared without making adjustment for dissimilarities. (AY. 2005-06,2007-08)

Intoto Software India (P.) Ltd. .v. ACIT (2014) 146 ITD 360 / (2013) 35 taxmann.com 421 (Hyd.)(Trib.)

S. 92C : Transfer pricing - Arm's length price-Order was passed without considering the objections -Matter remanded .

Assessee filed detailed objections regarding functional comparability of comparables chosen by TPO were not considered by Dispute Resolution Panel, Objections raised by assessee, find that DRP has not considered and merely held that Info Edge (India) Ltd. and Overseas Manpower Corporation Ltd. are functionally same as the assessee. In A.Y. 2007-08 the matter has already been restored back to the file of the DRP and, therefore, entire conspectus of the case and in the light of the submissions made by the assessee and the findings recorded by the DRP, in the interest of justice the order of DRP/AO was restored back for readjudication and passing a speaking order.(AY. 2008-09)

Genpact Mobility Services (India) (P.) Ltd. .v. Dy. CIT (2014) 146 ITD 706 / (2013) 37 taxmann.com 136 (Delhi)(Trib.)

S. 92C : Transfer pricing -Arm's length price-Expenditure incurred in connection with sales-Cannot be within the ambit of advertising / marketing and promotion-Matter set aside.

Expenditure incurred in connection with sales which does not lead to brand promotion, cannot be brought within ambit of advertisement, marketing and promotion expenses for determining cost/value of international transactions. The TPO shall examine the veracity of description and quantification of the amount of selling expenses. After deducting the selling price from the AMP expenses as mentioned, the TPO shall decide the issue of AMP expenses by applying the proper comparables determining cost/value of international transactions. (AY. 2006-07, 2007-08)

Haier Appliances India (P.) Ltd. .v. Dy. CIT(2014) 146 ITD 730 / (2013) 35 taxmann.com 203 (Delhi)(Trib.)

S. 92C : Transfer pricing – International Transaction – Assignment of onshore contract by AE to assessee company – Opportunity of being heard.

The Tribunal held that the provisions of section 95 were applicable to the assignment of portion of onshore contract by AE to the assessee, however, PGCIL (Govt. Co.) neither being part of a prior agreement as stipulated in the first limb of section 92B(2) nor having in substance determined the terms of the transaction with the assessee as stipulated in the second limb of section 92B(2), it cannot be held that there is a deemed international transaction within the meaning of section 92B(2) between the assessee & AE.

Further, the Tribunal held that the assessee has not been afforded a proper opportunity of presenting its case, therefore, the impugned orders of the CIT(A) are set aside and the issue of determination of ALP is remanded to the AO who is directed to make a reference to the TPO. (AY. 2003-04 & 2004-05)

Tellabs India (P) Ltd. .v. ACIT (2014) 159 TTJ 215 / 61 SOT 200 (Bang.)(Trib.)

S. 92C : Transfer pricing – Application of cost plus method.

The TPO took the cost relating to charter live activity as 50 per cent of total cost whereas the assessee took the actual cost relating to the charter live activity, the cost plus method can be applied only by taking the actual cost of the activity and once the figures used in the calculation made by the TPO are replaced by actual figures, the payments made by the assessee is at ALP and, therefore no adjustment is called for. (AY. 2002-03)

Reliance Industries .v. Addl. ACIT (2014) 159 TTJ 349/(2013) 55 SOT 8 (URO) (Mum.)(Trib.)

S. 92C : Transfer pricing-Interest-free loans-Corporate guarantee -Export turnover adjustments-CUP method.

The Tribunal had to consider the law on transfer pricing adjustments for the following three issues:

(i) **Interest free loans to AEs**: We have no issue of the TPO applying the CUP method. But the problem arises when in the name of applying CUP method; a wholly inapplicable comparable model applied which leads to distorted results. A significant sector of multi-national corporate set up involves creation of subsidiaries and associate enterprises for advancement of their overseas business.

They help them in terms of finance by offering soft loans and subsidiary loans; they are primary focused to spread the business of the principal unit. It would have been very reasonable, judicious and appropriate on the part of the TPO to have looked into such type of transactions and applying it as uncontrolled transactions. Re-course straightaway to CRISIL, which deals in hardcore institutional finance transactions that too with clear commercial object of earning out of loans bereft on other considerations, is wholly inapplicable. While the real income theory has no application to a fictional working as provided by section 92 but this being part of the Income-tax Act, the valid consideration for properly assessing a transaction cannot be given a go by. Every fiction has limits to its application. In view thereof, the rate of 13.49% applied solely relying upon a third party opinion by applying on uncontrolled set of transaction is factually not correct and cannot be accepted. The correct comparable which can be applied is of LIBOR rate which is internationally recognized. It is the most appropriate comparable for the relevant periods and being reasonable and scientific uncontrolled comparable to be applied to the assessee's loan transactions;

(ii) **Adjustment for corporate guarantee**: The TPO's action, in first going to SBI and then further enhancing it for mark-up, is based on surmises and conjectures. His adjustment has no basis or corroboration whatsoever from any authentic source. In Reliance Industries Ltd and Nimbus Communications Ltd., the ITAT Mumbai has adopted the rate of such inter group guarantees at 0.38% and 0.5% respectively. The assessee itself has charged guarantee fee of 1% from one AE. Accordingly, the guarantee commission adjustment under TP at the rate of 1% is fair and reasonable;

(iii) **Export Turnover Adjustments**: The main controversy on the export turnover adjustment pertains to the method to be adopted for adjustment. The TPO, having earlier adopted the TNMM method, should not have reviewed his own report in the first place without giving cogent reasons. The business model, agreement, relationship of parties remaining the same, there is no justification in switching to CUP method. The reasons given by the TPO for applying CUP method are totally vague and bereft of any cogent reasons. There is a perceptible difference in the risk between the sales made to related parties as the surety of repayments is within the control of the assessee and in case of sales to unrelated parties, the recovery of repayment of goods bears potentially high risk. In our view, the TNMM method as adopted earlier by TPO is the most appropriate method which deserves to be first applied.(ITA No. 3689/del/2012, A Y. 2003-04, Dt. 21/07/2014.)

Kohinoor Foods Ltd. .v. ACIT (Delhi)(Trib.) www.itatonline.org

S. 92C : Transfer pricing- Share application money, though not allotted into shares for a long time, cannot be treated as a "loan" for taxing notional interest

The TPO has not disputed that the transactions were in the nature of payments for share application money, and thus, of capital contributions. The TPO has not made any adjustment with regard to the ALP of the capital contribution. He has, however, treated these transactions partly as of an interest free loan, for the period between the dates of payment till the date on which shares were actually allotted, and partly as capital contribution, i.e. after the subscribed shares were allotted by the subsidiaries in which capital contributions were made. No doubt, if these transactions are treated as in the nature of lending or borrowing, the transactions can be subjected to ALP adjustments, and the ALP so computed can be the basis of computing taxable business profits of the assessee, but the core issue before us is whether such a deeming fiction is envisaged under the scheme of the transfer pricing legislation or on the facts of this case. We do not find so. We do not find any provision in law enabling such deeming fiction.(ITA no 4909/Mum/2012 & 4910/Mum/2012 Bench "K" dt 11-06-2014 (AYs. 2007-08, 2008-09)

Allcargo Global Logistics Ltd. .v. ACIT (2014) 150 ITD 651 (Mum.)(Trib.)

S.92C: Transfer pricing-Arm's length price-TNMM-Total cost-Matter remanded.

While applying the rule 10B of 1962 Rules provides for base for 'cost incurred' it has to be total cost and not any fraction thereof.When TPO embarks upon determination of ALP by considerin denominator of 'total cost', all aspect of 'total operating cost' such as cost of goods sold adminsitartion, selling distribution expenses and depreciation etc, are required to be considered both for assesse and comparbles as well.Matter remanded.(AY.2008-09)

POSCO Engineering & Construction Co. Ltd .v. ADIT(2014) 31 ITR 255/148 ITD 527(Delhi)(Trib.)

S.92C: Transfer pricing-Arm's length price-Notional interest on outstanding amount of export proceeds realized belatedly-Addition was deleted.

TPO made notional addition in respect of amount outstanding for more than year and taking interest rate at 10%. Tribunal noted that that there was complete uniformity in act of assessee in not charging interest from both associated enterprises and non associated enterprise debtors for delay in realization of export proceeds. Tribunal thus deleted the addition. On appeal by revenue the Court dismissed the appeal holding that no substantial question of law.

CIT .v. Indo American Jewellery Ltd. (2014) 223 Taxman 8 (Mag.) (Bom.)(HC)

S.92C: Transfer pricing-Arm's length price-Addition on the basis of notional interest was held to be not valid.

Assessee is engaged in business of manufacturing and trading of pharmaceutical goods. It entered in agreement with its foreign subsidiary, for grant of a convertible loan of US $ 27 million. As per terms of loan agreement, no interest was payable if amount was converted into equity, however, if same was redeemed, interest was payable at Libor Plus 290 bps and interest was to be computed at annual rates and payable at maturity which was 5 years from date of first disbursement. During relevant year, assessee filed its return wherein no income was shown from aforesaid loan. Foreign subsidiary had not opted for conversion of loan during year, and therefore it was loan for year and as per terms of agreement, no interest or income accrued from amount of loan. TPO considered Optionally Fully Convertible loan as debt, computed interest chargeable to tax. CIT(A) held that funds were provided by assessee as per RBI guidelines and in immediately next year, entire loan given to subsidiary was converted into equity shares of foreign company. Held that since loan had been converted into equity in immediate next year, there was no question of taxing notional interest. Tribunal also confirmed the order of CIT (A) by observing that assessee has converted the loan into equity in the immediate next year, there was no question of taxing notional interest. Order of CIT(A) was confirmed. (AY. 2008-09)

Dy. CIT .v. Cadila Healthcare Ltd. (2014) 146 ITD 502 / (2013) 39 taxmann.com 51 (Ahd.)(Trib.)

S.92C: Transfer pricing -Arm's length price-Advertisement, marketing and sales promotion expenses for its foreign associate enterprise-Matter was set aside.

Daikin Air-conditioning India Pvt. Ltd is a wholly owned subsidiary of Daikin Industries Ltd, Japan (DIL). Assessee is engaged in distribution of air-conditioners in India. The assessee imported finished goods from DIL and resold them to dealers and end users in India. Besides the main activity of distribution of air conditioners, the assessee was also engaged in import of compressors and air-conditioner parts from other associated enterprises for sale in India and in the provision of maintenance services for the products sold in India. The assessee company had infrastructure like branch offices, warehouses and dealer network at all important towns throughout the country. The issue of consideration in both the appeals as the transfer pricing adjustment made in regard to advertisement, marketing and sales proportion expenditure. Following the ratio of Tribunal in LG Electronics India (P.) Ltd. v. ACIT (2013) 140 ITD 41 (Delhi) (SB). ITAT set aside the issue to the AO for fresh adjudication as per provision of law. (AY. 2007 – 08, 2008 – 09)

Daikin Airconditioning India (P.) Ltd. v. Dy. CIT (2014) 146 ITD 335 / (2013) 37 taxmann.com 14 (Delhi) (Trib.)

S.92C: Transfer pricing -Arm's length price-Financial advisory support service-Merely functional advisory consultancy service without any risk was not accepted –Assessee's services to be treated as marketing services.

Where assessee company provided marketing support services to its associated enterprise, engineering companies providing end to end solutions the comparable will not applicable due to functional incomparability. Appeal was partly allowed. Tribunal directed to exclude Vapi and WAPCOS comparables. (AY. 2008 - 09)

Actis Advisers (P.) Ltd. v. Addl. CIT (2014) 146 ITD 314 / (2013) 36 taxmann.com 320 (Delhi)(Trib.)

S.92C: Transfer pricing -Arm's length price-Benefit of 5 per cent allowed as deduction under second proviso to section 92C(2) was not sustainable as it is only a tolerance range and not a standard deduction. [R.10B, 10D]

Assessee manufactured product under contract with its AEs in Singapore and USA.TPO rejected comparables selected by assessee as they were international companies, unlike assessee and took four other comparables. CIT(A) included three comparables taken by assessee as they had been taken as comparables for two subsequent years by TPO, and allowed 5 per cent standard deduction by invoking second proviso to section 92C(2).On appeal by revenue Tribunal held that since comparability of each case is tested independently and separately for each year, comparables added by CIT (A) were to be rejected on grounds of functional dissimilarity and fact that one company was persistently loss making. Benefit of 5 per cent allowed as deduction under second proviso to section 92C(2) was not sustainable as it is only a tolerance range and not a standard deduction. (AY. 2003-04)

Advance Power Display Systems Ltd. .v. ACIT (2014) 146 ITD 761 / (20130 35 taxmann.com 145 (Mum.)(Trib.)

S.92C:Transfer pricing-TNMM- Companies in ITES cannot be classified into low-end BPO services and high-end KPO services for comparability analysis but have to be classified based on the functions performed. Comparables with abnormal profit margins cannot be discarded per se but must be examined to determine whether the high margins are due to normal business conditions or not.[R. 10B(3)]

The Special Bench had to consider two issues: Whether, for determining the ALP under TNMM, (i) a company performing (high-end) KPO functions is comparable with a company providing (low-end) back office support services, given that both are in the "ITES" sector? & (ii) companies earning abnormally high profit margin have to be discarded from the list of comparables? HELD by the Special Bench:

(i) As regards Q. 1, in view of the peculiarity of the ITES sector, the problem of performing a comparability analysis has to be solved by splitting the exercise into two steps in order to attain relatively equal degree of comparability, the first being to select the potential comparables at ITES sector level by applying the broad functionality test. By applying a broad functionality test, all entities providing IT enabled services can be taken as potential comparables;

(ii) In the second step, though further classification of IT enabled services may be required to be done, it cannot be on the basis of BPO (low end) and KPO (high end) services because the line of difference between them is very thin. There are a large number of services falling under ITES with significant overlap and it is difficult to classify these services either as low-end BPO services or high-end KPO services;

(iii) Instead, the purpose of attaining a relatively equal degree of comparability can be achieved by taking into consideration the functional profile of the tested party and comparing the same with the entities selected as potential comparables on broad functional analysis taken at ITES level. The principal functions performed by the tested party should be identified and the same can be compared with the principal functions performed by the entities already selected to find out the relatively equal degree of comparability. If it is possible by this exercise to determine that some uncontrolled transactions have a lesser degree of comparability than others, they should be eliminated. The examination of controlled transactions ordinarily should be based on the transaction actually undertaken by the AE and the actual transaction should not be disregarded or substituted by other transaction;

(iv) As suggested in the OECD Guidelines on Transfer Pricing, determining a reliable estimate of arm's length outcome requires flexibility and the exercise of good judgment. It is to be kept in mind that the TNMM may afford apractical solution to otherwise insoluble transfer pricing problems if it is used sensibly and with appropriate adjustments to account for differences. When the comparable uncontrolled transactions being used are those of an independent enterprise, a high degree of similarity is required in a number of aspects of the AE and the independent enterprise involved in the transactions in order for the controlled transactions to be comparable. Given that often the only data available for the third parties are company-wide data, the functions performed by the third party in its total operations must be closely aligned to those functions performed by the tested party with respect

to its controlled transactions in order to allow the former to be used to determine an arm's length outcome for the latter. The overall objective should be to determine a level of segmentation that provides reliable comparables for the controlled transaction, based on the facts and circumstances of the particular case. The process followed to identify potential comparables is one of the most critical aspects of the comparability analysis and it should be transparent, systematic and verifiable. In particular, the choice of selection criteria has a significant influence on the outcome of the analysis and should reflect the most meaningful economic characteristics of the transactions compared. Complete elimination of subjective judgments from the selection of comparables would not be feasible but much can be done to increase objectivity and ensure transparency in the application of subjective judgments;

(v) On facts, the assessee is a captive contract service provider mainly rendering back office support services and incidental services involving some degree of special knowledge and expertise. It is not comparable to Mold-Tek & eClerx which are engaged in providing high-end services involving specialized knowledge and domain expertise in the field;

(vi) As regards Q.2, potential comparables cannot be excluded merely on the ground that their profit is abnormally high. In such cases, the matter would require further investigation to ascertain whether earning of high profit reflects a normal business condition or whether it is the result of some abnormal conditions prevailing in the relevant year. The profit margin earned by such entity in the immediately preceding year/s may also be taken into consideration to find out whether the high profit margin represents the normal business trend. The FAR analysis in such case may be reviewed to ensure that the potential comparable earning high profit satisfies the comparability conditions. If it is found on such investigation that the high margin profit making company does not satisfy the comparability analysis and or the high profit margin earned by it does not reflect the normal business condition, the high profit margin making entity should not be included in the list of comparable for the purpose of determining the arm's length price of an international transaction. Otherwise, the entity satisfying the comparability analysis with its high profit margin reflecting normal business condition should not be rejected solely on the basis of such abnormal high profit margin.(ITA No. 7466/Mum/2012, Dt. 07.03.2014. (AY. 2008-09)

Maersk Global Center (India) Pvt. Ltd. .v. ACIT(SB)(2014) 101 DTR 1/161 TTJ 137/31 ITR 1/147 ITD 83(Mum.) (Trib.)

S.92C:Transfer pricing-Business expenditure-After TPO determines the AMP expenditure incurred for benefit of AE, balance is deemed to be incurred for assessee's business & is automatically allowable u/s 37(1).[S.37(1)]

The avowed object of the TP adjustment on account of AMP expenses is to first find out and attribute the amount spent by the assessee towards promotion of its foreign AE's brand/logo etc and then make addition for such amount with appropriate mark-up. By this exercise, the total AMP expenses get segregated into two classes, viz., one benefiting the assessee's business and two, benefiting the foreign AE by way of promotion of the brand. Whereas the first amount is deductible in full subject to the regular provisions, the second amount is added to the total income with suitable mark-up by way of the TP adjustment. Once the total amount of AMP expenses is processed through the provisions of Chapter X of the Act with the aim of making TP adjustment towards AMP expenses incurred for the foreign AE, or in other words such expenses as are not incurred for the assessee's business, there can be no scope for again reverting to s. 37(1) qua such amount to make addition by considering the same expenditure as having not been incurred `wholly and exclusively' for the purposes of assessee's business. If the amount of AMP expenses is disallowed by processing under both the sections, that is 37 and 92, it will result in double addition to the extent of the original amount incurred for the promotion of the brand of the foreign AE de hors the mark-up.(ITA No. 426/Del/2013. dt.13/01/2014, A. Y. 2008-09)

Whirlpool of India Ltd. .v. DCIT(2014) 30 ITR 29/162 TTJ 328/102 DTR 369(Delhi)(Trib.)

S.92C:Transfer pricing-Arms' length price-Prior to the amendment to S. 92CA(4) w.e.f. 1-6-2007, AO was not bound to accept ALP as determined by TPO -TPO cannot make adjustment to the ALP by merely following order passed in earlier year.[S.92CA]

The AO proceeded to compute the total income of the assessee u/s. 92C(4) on the basis of the arm's length price worked out by the TPO. On appeal by the assessee, the Tribunal observed that the AO is not bound to accept the ALP as determined by the TPO but has to determine the ALP, only after giving an opportunity of hearing to the assessee.The Tribunal observed that in the case before it the AO had not given any such opportunity. Accordingly, the Tribunal restored the matter back to the AO with the direction that the AO will determine the computation of income having regard to the ALP after giving due and effective opportunity of hearing to the assessee. (AY. 2004–05).

Abacus Distribution Systems (India) (P.) Ltd. .v. DCIT (2014) 29 ITR 1/159 TTJ 156 (Mum.)(Trib.)

S.92C:Transfer pricing-Arms' length price-Where TPO made adjustment to ALP by merely following order passed in earlier year without going into merits of case, order was not sustainable

While deciding the appeal for the subsequent year, the Tribunal observed that the TPO has duplicated the same order as passed by the TPO for the earlier year except for the variation in the figures. It also noted that the assessee's explanations and all its objections and documents have not been considered at all, which were specific to the issues involved for that particular year and that this shows that the TPO has passed the order without application of mind, which he is required to do under the provisions of law and equity. Accordingly, the Tribunal held that such an order shows an unprecedented bias and pre-determined mind without going into the merits of the case and therefore such an order passed by the TPO and confirmed by the CIT(A) cannot stand and the entire matter needs to be remanded back to the file of the TPO/AO for passing fresh order, in accordance with provisions of law and after giving due and effective opportunity of hearing to the assessee and also considering the entire material and evidence including explanation filed.(A.Y. 2005–06)

Abacus Distribution Systems (India) (P.) Ltd. .v. DCIT (2014) 29 ITR 1/ 159 TTJ 156(Mum.)(Trib.)

S.92C:Transfer pricing-Arms' length price–TPO cannot determine ALP under TNMM by relying upon multiple year data where current year data of comparable companies are available on public domain. [R.10B(4)]

The assessee charged its AE with ALP by adopting TNMM and operating profit/total cost (OP/TC) as the profit level indicator (PLI). The assessee selected six companies as comparables with average OP/TC margin based on multiple year data worked out at 10%. Since the assessee's OP/TC margin of 11.03% for the current year was higher than the average margin of 10% of the comparables, thus it concluded that the price charged to its AE was within ALP. The TPO, however, rejected one of the comparables and relied on the data for the immediately preceding 2 years and arrived at the average OP/TC at 19%, thereby proposing an upward adjustment of Rs. 1,72,49,399/- for which an addition was made by the AO. The CIT(A) decided in favor of assessee by relying on the data of the relevant financial year.

On appeal by the tax department, the Tribunal held that the TPO's method of relying on multiple year data was contrary to Rule 10B(4) of IT Rules. The said rule makes it clear that only the data relating to the relevant financial year has to be relied upon for computing the OP/TC margin of the comparable company. The Tribunal observed that, when the current year data of the comparable companies were available on public domain, and since the assessee's OP/TC margin 11.03% is much higher than the OP/TC margin of the comparable companies by using the current year data being 8%, no adjustment can be made to the ALP declared. (AY. 2003-2004)

ACIT .v. Infotech Enterprises Ltd. (2014) 29 ITR 67 (Hyd.)(Trib.)

S.92C:Transfer pricing-Arms' length price–Adjustment of guarantee fee - same rate as applied in the earlier year was to be applied as there were no change in facts and circumstances - Adjustment on notional interest - AO to decide on the basis of LIBOR prevalent at the relevant point of time.

The AO has made addition on account of guarantee fee of Rs. 1,77,61,212 and towards notional interest of Rs. 2,03,02,396 on the directions of the DRP. On appeal to the Tribunal, it is observed that in light of the earlier years' orders of the Tribunal, insofar as the application of rate of 4.66% by the

TPO on account of guarantee fee is concerned, the same cannot be upheld as in the earlier year, it has been held that the rate of 3% should be applied for the guarantee fee. In fact, there are many cases of the co-ordinate bench of the Tribunal where guarantee fee commission between 0.20% to 0.5% have been upheld. Thus, under the facts and circumstances wherein 3% has been upheld in the earlier year in case of the assessee, the same rate should be applied in this year also as a matter of consistency without there being any change in the facts and the circumstances.

For the disallowance of interest after applying the interest on the advance given to the AE, the Tribunalin the earlier year has restored this issue back to the file of the AO to deal and decide on the basis of LIBOR rate prevalent at the relevant point of time. Therefore, for the current year also the Tribunal restored the issue to the file of the AO to apply LIBOR rate with a direction that, in case LIBOR rate is less than 6%, then the charging of interest rate of 6% by the assessee should be taken at ALP. (AY. 2008-09)

Mahindra & Mahindra Ltd. .v. ACIT (2014) 29 ITR 95 (Mum.)(Trib.)

S.92C: Transfer pricing-Arms' length price–Contract manufacturer of jewellery entitled for making charges–cannot be compared with full-fledged independent manufacturers-availability of internal CUP method would outwit TNMM.

The assessee was engaged in the activity of purchasing cut and polished diamonds, colour stones, etc. from its AEs and sold jewellery to same AEs as per designs supplied by said AEs. The assessee was simply a job worker or a contract manufacturer who was entitled to making charges based on cost incurred by it and not based on value of material supplied by its AEs. The assessee failed to carry out any comparability analysis by following nay of the prescribed methods and therefore its international transactions with its AEs had not been benchmarked by the assessee. The TPO applied the TNMM and made an adjustment, which was confirmed by the DRP.

On appeal by the assessee, the Tribunal held that if there is a direct method of CUP available, then there was no requirement of resorting to TNMM. If any of the direct methods, like CUP, RPM or CPM can be adopted for bench marking then they should be given preference and once these traditional methods are rendered inapplicable only then, the TNMM should be resorted to as a last measure. It observed that that the argument of applicability of internal CUP had not been taken up either before the TPO or before the DRP, and therefore, the order of the TPO / AO was set aside and the entire matter was remanded back to the file of the AO / TPO to examine whether the CUP could be considered as the most appropriate method or not. The Tribunal also directed that Cost Plus Method could also be examined with some external comparabilities by carrying out FAR analysis, if CUP method failed. Thus the entire matter of transfer pricing adjustment was remanded to the file of TPO/AO to consider the applicability of internal CUP and carry out comparability analysis afresh with the unrelated parties. (AY. 2008-09)

Twilight Jewellery (P.) Ltd. .v. DCIT (2014) 29 ITR 296/147 ITD 89/ 106 DTR 367 / 164 TTJ 814 (Mum.)(Trib.)

S.92C: Transfer pricing-Arms' length price–Assessee and the TPO accept a particular company as functionally comparable – assessee did not agitate on such comparable before CIT(A) - the same cannot be excluded from the list of comparables.

The assessee, the Tribunal held that under Rule 10B(2) comparability of international transactions with uncontrolled transactions has to be judged with reference to functions performed, assets employed and risks assumed (FAR analysis). It noted that the assessee has not contested that due to any of the above, such company is functionally not similar, its objections are only on the basis of high turnover or even low turnover in some cases. The Tribunal therefore observed that it would not be appropriate to apply turnover filter, when in fact assessee has accepted very low turnover company as comparable and since the assessee is in the service sector, scale of operations do not have any effect on margins unlike in manufacturing companies. The Tribunal held that this filter can only be considered in the light of the facts and cannot be applied in every case uniformly on the basis of decisions in other cases. Accordingly, the Tribunal upheld the order of CIT(A) and observed that it was appropriate to include the companies selected by the assessee as comparable for the purpose of determining the average PLI in the relevant assessment year. (AY.2004-05)

IVY Comptech (P.) Ltd. .v. DCIT (2014) 29 ITR 328 /61 SOT 93(Hyd.)(Trib.)

S.92C: Transfer pricing-Arms' length price–Segmental results–to be accepted even if not included in audited accounts.

The Tribunal observed that the reason given by the TPO and DRP for not accepting the segment results was that the assessee had not shown the same in the audited financial accounts and that the segment reporting was done only for transfer pricing purposes. It noted that the, TPO / DRP have also stated that allocation of expenses between the contract manufacturing segment and non AE local/domestic segments are abnormal. Deciding on these, the Tribunal held that in so far as the reason that the assessee has not shown the segmental report/results in audited financial accounts and therefore, such segmental results cannot be accepted for ALP has not been accepted by the Tribunal in the case of 3i Infotec Ltd. v. ITO [2013] 35 taxmann.com 582 (Chennai) wherein it has been held that even though segmental reports were not shown in audited financial accounts, they had to be accepted. Deciding on the issue of allocation of expenses, the Tribunal observed that the TPO / DRP have rejected the segmentals alleging that the assessee could not substantiate as to how 'other expenses' were allocated to contract manufacturing segment and local manufacturing segment and that the low employee cost combined with higher depreciation in contract manufacturing segment indicates that the assessee did not apportion the employee cost to contract manufacturing segment appropriately. The Tribunal noted that, the figures adopted by the TPO/DRP in their orders in analyzing these facts and coming to the decision/conclusion to reject the segmental results of the assessee are wrong. It also noted that the TPO has accepted the segmental results of the assessee in the earlier years on the contract manufacturing transactions with the AE for arriving at ALP while computing the relief under section 10A of the Act and the TPO/DRP has not given any reason as to why segmental results shall not be considered for determining ALP for transactions with AE having accepted very same segmental results of the assessee for the purpose of computing deduction under section 10B of the Act. Accordingly, the Tribunal held that there is no valid reason for not accepting the segmental reports in determining the ALP on the AE sales for assessment year in question having accepted the segmentation approach for the earlier assessment years and especially when there was no change in the facts and circumstances of the case in year. (AY. 2007-08)

Honeywell Electrical Devices and Systems India Ltd. .v. ACIT (2014) 29 ITR 347 /64 SOT 118 (URO)(Chennai)(Trib.)

S.92C: Transfer pricing- Arms' length price–Diamonds of similar description sold to both AEs and third party-price of transactions with both AEs and third party can be compared-internal CUP method available [R. 10B(1)(a)].

The assessee engaged in the business of manufacturing of cut and polished diamonds and selling them to AE as well as to the third parties. TPO made an adjustment as there was difference of price by more than 5% as price charged from AEs were less than the price charged from non-AEs. TPO observed that since for diamonds, properties of the product are very different the application of CUP method becomes very difficult. Even a minor changes in the properties of the products, renders the applicability of CUP method inapplicable. The CIT(A) deleted the addition.

On appeal by the department, the Tribunal observed that though it is to be held that in the sale of diamonds, it is very difficult to benchmark the price by applying the CUP method, however, on the peculiar facts of the present case, it is seen that in the nature of sale transaction undertaken by the assessee and price which has been charged from the AE appears to be on similar description of diamonds which have been sold to the third party. Accordingly, the Tribunal upheld the findings of the CIT(A) that there was internal CUP available in the case of the assessee for determining the transfer price. It held that once a direct method of internal CUP is available then there is no need to resort to the TNMM method. (AY.2007-08)

Livingstones .v. DCIT (2014) 29 ITR 362 (Mum.)(Trib.)

S.92C: Transfer pricing-Arms' length price–AE purchased huge quantity and marketing expenses and risk of bad debt in case of AE are comparatively less - no upward adjustment permissible

The assessee was engaged in the business of manufacturing of cut and polished diamonds and selling them to AE as well as to the third parties. The assessee's sales with its AE aggregated to Rs. 126.43 crores, whereas in case of non-AE it was only 70 lakhs. The assessee argued that, in the case of third

party there is always a risk of bad debt which is not there in the case of the AE and also the marketing expenses in the case of the AE are less. The TPO and the CIT(A) rejected this contention.
On appeal by the assessee, the Tribunal held that the reasoning given by the CIT(A) cannot be upheld, because these factors do have affect in the negotiation of price. The difference on account of factors affecting the prices have to be given adjustment with the comparables. Since, in a CUP method a very high degree of comparison of business conditions, products and other physical attributes of the products and services are to be examined, therefore, more often it becomes very difficult to have such comparable transactions. Difference of volume, definitely has a bearing on the negotiation of the prices and, therefore, adjustment on this factor has to be made. Accordingly, the Tribunal deleted the upward adjustment made. (AY. 2007-08)
Livingstones .v. DCIT (2014) 29 ITR 362 (Mum.)(Trib.)

S.92C: Transfer pricing-Arms' length price–Delay in payment is normal - No notional interest to be levied on delayed payment by AEs.
The assessee was engaged in the business of manufacturing of cut and polished diamonds and selling them to AE as well as to the third parties. The TPO observed that average days of realization in respect of sales to AE was 210 days, whereas in respect of non-AEs was 126 days and thus made an adjustment on account of notional interest on delayed collection of payment on sale invoices from AEs. The CIT(A) observed that there had been several instances when the unrelated parties also had made payments beyond the credit period granted and in such cases also the assessee had not charged any interest on such delayed payment. The CIT(A), while deleting the adjustment noted that in the diamond industry, payment beyond the credit period is a usual business practice and none of the entities charge any interest on such delayed payments.
On appeal by the department, the Tribunal observed that in the case of AE the volume of sale is very huge as compared to the volume of sale in case of 3rd party and such delay in realization of payment should not be adversely viewed on the basis of average working of days. The average days of delay in payment as worked out by the TPO is also inappropriate as the number of sale transactions with AE is far more than the non-AE. Accordingly, the Tribunal while dismissing the ground of the department held that such notional interest cannot be charged for the purpose of making adjustment in ALP (AY. 2007-08)
Livingstones .v. DCIT (2014) 29 ITR 362 (Mum.)(Trib.)

S.92C: Transfer pricing-Arms' length price–Comparable data which was not available to assessee at time of preparing TP documentation can be used by TPO–only if it is made available to assessee for its objections.
The assessee reported international transactions with its AE. The TPO recommended certain adjustments which were confirmed by the DRP.
On appeal to the Tribunal, the assessee challenged the adjustment on the ground that the comparables were not available with the assessee during the TP documentation. The Tribunal held that if comparables were available with the TPO/ public domain and the same were made available to the assessee who was given an opportunity to raise its objections, then adjustment can be made by the TPO. (AY.2007-08)
Avineon India (P.) Ltd. .v. DCIT (2014) 29 ITR 404/150 ITD 543 (Hyd.)(Trib.)

S.92C: Transfer pricing-Arms' length price–Different segmental activities, which are independent of each other-required to be analysed on transaction-to-transaction basis–cannot be combined.
The assessee has 3 business verticals, GIS (STPI unit), IT (non-STPI unit), Engineering (STPI unit). Books of account were maintained with each unit as a separate profit center and the common expenses were allocated on the basis of revenue. The TPO rejected segment result on the ground that segmental data is not audited. The AO, however, neither raised any objection on the profit computation nor made any adjustments to the working given by assessee. The DRP confirmed the decision of the TPO.
On appeal the Tribunal held that for the purpose of Transfer Pricing, each segment is a different activity and FA analysis will have to be distinct for each segment and the AO/ TPO should

consider each service separately for benchmarking and should not combine all of them into one. (AY. 2007-08)
Avineon India (P.) Ltd. .v. DCIT (2014) 29 ITR 404 (Hyd.)(Trib.)

S.92C:Transfer pricing-Arms' length price–Companies having supernormal profit - to be excluded.
On appeal to the Tribunal the assessee objected adjustments made by the TPO and confirmed by the DRP as wrong comparables were used. The Tribunal held that as per rule 10B if there are any differences between comparables, relevant transactions should be taken and differences to be adjusted to arrive at the ALP for the reason that after taking number of companies as comparables, the TPO should allow adjustments towards differences in depreciation, differences in risk perceptibility, of working capital adjustments, etc., depending on the facts of the case. The Tribunal also held that selecting a company, which is not comparable at all or which affects comparison due to unusual features cannot be taken as a comparable company. Thus if there are certain extraordinary events or different business models, such companies cannot be used as comparables. (AY. 2007-08)
Avineon India (P.) Ltd. .v. DCIT (2014) 29 ITR 404 (Hyd.)(Trib.)

S.92C: Transfer pricing- Arms' length price-Direct comparables available-segmental result of companies engaged in other business-should not be taken as a comparable.
The assessee is engaged in providing technical and administrative services relating to oil and gas exploration and drilling activities. It entered into international transactions with its AEs. The assessee chose TNMM with operating profit to total cost (OP/TC) ratio as the Profit Level Indicator (PLI) to benchmark its international transaction with the AEs at 8.30%. The assessee chose 14 comparables and used 3 years data. The PLI ratio of the comparable selected by the assessee was computed at 11.25% and thus, the assessee contended that its transactions with the AEs were at ALP. The TPO, however, adopted the current year data and rejected the search process undertaken by the assessee to identify the comparables. The TPO selected seven comparables with the mean PLI of 31.9% and accordingly made certain adjustment after re-computing the ALP of international transactions. The action of the TPO was confirmed by the DRP.
On appeal by the assessee, the Tribunal held that when direct comparables are available then segmental results of companies engaged in other business should not be taken as comparable. (AY. 2008-09)
Premier Exploration Services (P.) Ltd. .v. ITO (2014) 29 ITR 427 /162 TTJ 125/146 ITD 580/102 DTR 240(Delhi)(Trib.)

S.92C: Transfer pricing-Arms' length price–Foreign exchange fluctuation in case of exporter - to be regarded as operating income - to be included while working out the PLI.
The assessee is engaged in providing technical and administrative services relating to oil and gas exploration and drilling activities. It entered into the international transactions with its AEs. The assessee had included foreign exchange difference income from the operating income while comparing ALP. The same was rejected by the TPO.
On appeal, the Tribunal following the decision of the Bangalore Bench of the Tribunal in the case of SAP Labs India (P.) Ltd. v. ACIT (2010) 8 taxmann.com 207 directed the TPO to include the foreign exchange income as operating income while working out the PLI. (AY. 2008-09)
Premier Exploration Services (P.) Ltd. .v. ITO (2014) 29 ITR 427 (Delhi)(Trib.)

S.92C: Transfer pricing-Arms' length price –Risk adjustment–can be made–only if difference in risk results in deflation or inflation of financial results.
The assessee is engaged in providing technical and administrative services relating to oil and gas exploration and drilling activities. It entered into the international transactions with its AEs. The assessee made appropriate adjustment for varying risk profiles and difference in working capital vis-à-vis comparables. The same was rejected by the DRP.
On appeal, the Tribunal observed that no risk adjustment can be allowed when the same has not been quantified. It noted that the assessee has failed to bring any evidence on record to show that there was any difference in risk profile of comparable companies. Accordingly, it held that the risk adjustment

cannot be allowed as a thumb rule and since the assessee has also failed to establish any working capital difference the same too was not allowed. (AY. 2008-09)
Premier Exploration Services (P.) Ltd. .v. ITO (2014) 29 ITR 427 (Delhi)(Trib.)

S.92C: Transfer pricing–Arm's length price– Selection of comparables-Functionally different.
High profit margin of a company cannot be a factor for exclusion from comparables. Companies functionally different and persistently loss making cannot be considered as comparables. (A.Y. 2008-09)
Syscom Corporation Ltd. .v. ACIT (2014) 98 DTR 45 (Mum.)(Trib.)

S.92C:Transfer pricing–Arm's length price–Data of relevant year.[R.10B(4), 10D(4)]
In the absence of any exceptional circumstances influencing the determination of transfer prices the data relating to the financial year in which the international transaction has been entered into shall be used. (AY. 2008-09)
Syscom Corporation Ltd. .v. ACIT (2014) 98 DTR 45 (Mum.)(Trib.)

S.92C: Transfer pricing–Arm's length price–Tolerance range.
Assessee is entitled to benefit of proviso to s. 92C(2) if the prices of the international transaction of the assessee are within the tolerance range of ± 5 per cent of the arithmetic mean of more than one comparable prices. (AY. 2008-09)
Syscom Corporation Ltd. .v. ACIT (2014) 98 DTR 45(Mum.)(Trib.)

S.92C: Transfer pricing–Arm's length price– Relevancy of financial results of AE.
Financial results of the AE are not at all relevant for the purpose of determination of ALP in relation to the international transaction entered into. (AY. 2008-09)
Syscom Corporation Ltd. .v. ACIT (2014) 98 DTR 45(Mum)(Trib.)

S.92C: Transfer pricing–Arm's length price– Selection of comparables–Assessee not prevented from pointing out why comparables chosen by it are not correct
Assessee had included two companies in its transfer pricing study, not being functionally comparable. In the course of transfer pricing proceedings, assessee cannot be prevented from pointing out cogent reasons and give proper analysis as to why the comparables chosen are not correct. (AY. 2008-09)
Tata Power Solar Systems Ltd .v. Dy. CIT (2014) 98 DTR 250/30 ITR 1/62 SOT 93 (Mum.)(Trib.)

S.92C: Transfer pricing – Arm's length price – Selection of comparables – Absence of proper segmental details.
A comparable cannot be included in the absence of proper segmental details for the working of the margin and the operating expenses. (AY. 2008-09)
Tata Power Solar Systems Ltd .v. Dy. CIT (2014) 98 DTR 250 (Mum.)(Trib.)

S.92C: Transfer pricing–Arm's length price–Sale transactions with AE vis-à-vis entire sales.
ALP has to be determined on the international transactions undertaken by the assessee and not in relation to the assessee's entire sales turnover. (AY. 2008-09)
Tata Power Solar Systems Ltd..v. Dy. CIT (2014) 98 DTR 250 (Mum.)(Trib.)

S.92C: Transfer pricing –Arm's length price – Interest on loan advanced to AE.
Interest charged by assessee from it AE on loan advanced in the foreign currency should be benchmarked by interbank rate. Assessee charged interest from its AE at a rate higher than LIBOR, therefore, transfer pricing adjustment is not warranted. (AY. 2008-09)
Hinduja Global Solutions Ltd. .v. ACIT (2014) 98 DTR 266 (Mum.)(Trib.)

S.92C: Transfer pricing-Arms' length price–Price paid for import of LPG from AE.[R.10B(1)(a)].

DRP found that the prices paid by the assessee for import of LPG from its AE in respect of two shipments were in excess of the ALP by computing the freight charges on the basis of distance between the port of origin and port of destination as suggested by the assessee itself. The finding of the DRP was based on the most appropriate method under the given circumstances and warranted no interference.(AY.2008-09)

SHV Energy (P) Ltd .v. Dy. CIT (2014)149 ITD 432/98 DTR 177/160 TTJ 737 **(Hyd.)(Trib.)**

S.92C: Transfer pricing- Bank guarantee-Rate was modified to 0.5% as against 0.25% adopted by the CIT (A).

The assessee was not charging bank guarantee commission from AE . The Tribunal held that the same is liable to adjustment towards ALP of the transaction and rate of guarantee commission modified to 0.05% as against 0.25% adopted by the CIT(A).(AY. 2005-06)

ACIT .v. Nimbus Communications Ltd. (2014) 100 DTR 259/30 ITR 349 (Mum.)(Trib.)

S.92C: Transfer pricing-Argument, based on BMW, that the AMP adjustment law laid down in L. G. Electronics (SB) does not apply to a full-risk distributor in not correct

In LG Electronics India Pvt. Ltd. vs. ACIT (2013) 152 TTJ (Del) (SB) 273 the Special Bench held by majority that incurring of AMP expenses towards promotion of brand, legally owned by the foreign AE, constitutes a `transaction'. The contention that no disallowance could be made out of AMP expenses by benchmarking them separately when the overall net profit rate declared by the assessee was higher than other comparable cases also came to be specifically rejected by the special bench. Resultantly, the transfer pricing adjustment in relation to such AMP expenses was held to be sustainable in principle. In the eventual order, the Special Bench restored the matter to the file of the AO/TPO for fresh determination of Transfer Pricing Adjustment in relation to AMP expenses. In order to enable the determination of correct ALP of AMP expenses, the Tribunal listed out 14 parameters in Para 17.4 of its order which should be examined by the AO/TPO before reaching the final conclusion about the warrant for a TP Adjustment on this score. It is relevant to note that there were 22 interveners in this case, some of which were distributors, while others were licensed manufacturers. While setting out 14 parameters, the Special Bench has held vide first parameter that the AO/TPO should ascertain as to whether the Indian AE is simply a distributor or is holding a manufacturing license from its Foreign AE. The second parameter talks of examining as to whether or not the Indian AE is a full fledge manufacturer and whether it is selling the goods purchased from the Foreign AE as such or is making some value addition to the goods purchased from its Foreign AE before selling it to customers. Thus there is not even a slightest doubt that the special bench order not only applies to a `Manufacturer', but also extends to a distributor, whether he is a bearing full risk or least risk. Thus, such tests are applicable with full vigor to the extent applicable, to the distributors. There is nothing in the special bench order which restricts its operation only to the `Manufacturers'.

The argument, based on BMW India Pvt. Ltd. vs. ACIT (Del) that as the assessee was a full fledged distributor and as such the benefit of AMP expenses did not spill over to the foreign AE is not acceptable because the Special Bench order in LG Electronics is applicable with full force on all the classes of the assessees, whether they are licensed manufacturers or distributors. The Bench in BMW did not have any occasion to bestow its attention to the correctness of the application by the TPO of the aforesaid parameters laid down in the special bench order as these were naturally not considered by the Officer since he passed his order much before the advent of the special bench order. There is no prize for guessing that Special Bench order has more force and binding effect over the Division Bench order on the same issue.(ITA No. 1180/kol/2011, ,27.dt.01.2014.) (AY. 2008-09)

ACIT .v. Casio India Co. Pvt. Ltd.(2014) 30 ITR 577/62 SOT 110 (Delhi)(Trib.)

S.92C:Transfer pricing-Profit split method- Law for applying Profit Split Method as per Rule 10B (1) (d) explained-Matter remanded.[R.10B]

The Profit Split Method as provided under Rule 10 B(1)(d) is applicable mainly in international transactions: (a) involving transfer of unique intangibles; (b) in multiple international transactions which are so interrelated that they cannot be valuated separately. The method specified in clause (ii) of Rule 10 B(1)(d) that the relative contribution made by each of the associated enterprise should be evaluated on the basis of FAR analysis and on the basis of reliable external data. Thus, bench marking

by selection of comparables is mandatory under this Method. The profits need to be split among the AEs on the basis of reliable external market data, which indicate how unrelated parties have split the profits in similar circumstances. For practical application, we are of the view that, bench marking with reliable external market data is to be done, in case of residual profit split method, at the first stage, where the combined net profits are partially allocated to each enterprise so as to provide it with an appropriate base returns keeping in view the nature of the transaction. The residual profits may be split as per relative contribution of the Associated Enterprise. In our view at this stage of splitting of residual profits, no bench marking is necessary, as it is not practicable. Nevertheless, for splitting the residuary profits a scientific basis for allocation may be applied.Matter remanded.(AY. 2004-05)
ITO .v. Net freight (India) P. Ltd.(2014) 30 ITR 441/63 SOT 67 (Delhi)(Trib.),

S.92C: Transfer pricing-RBI approval-TPO cannot sit in judgment on commercial expediency-RBI approval means the payment is at ALP. If overall TNMM analysis done, royalty cannot be analyzed separately.
The TPO is not entitled to sit in judgment on the business and commercial expediency of the assessee in paying royalty to its' parent company as per the provisions of the Act as laid down clearly by the Delhi High Court in CIT v. EKL Appliances Ltd. (2012) 345 ITR 241. It is also noted that various Tribunals such as DCIT vs. Sona Okegawa Precision Forgings (ITA No. 5386 /Del/2010), Hero Motocorp (ITA No 5130 /Del/2010), Thyssen Krupp Industries (ITANo6460/Mum/2012), Abhishek Auto Industries (ITA No 1433/Del/2009) have taken a view that RBI approval of the Royalty rates itself implies that the payments are at Arm's Length and hence no further adjustment needs to be made viewed from this angle too. Furthermore, we are of the opinion that once TNMM has been applied to the assessee company's transaction, it covers under its ambit the Royalty transactions in question too and hence separate analysis and consequent deletion of the Royalty payments by the TPO seems erroneous. We draw support from Cadbury India (ITANo7408/Mum/2010 and ITANo.7641/Mum/2010) wherein the ITAT upheld the use of TNMM for Royalty.(ITA No. 1040/Hyd/2011. dt. 13.02.2014.) (AY. 2005-2006)
DCIT.v.Air Liquide Engineering India(2014) 31 ITR 205 (Hyd.)(Trib.)

S.92C:Transfer pricing-CUP method-No bar on reliance of private database u/R 10D(3)-Nuances of the CUP Method under Rule 10B(1)(a)(i) explained-Most appropriate method-Export of rice-Matter remitted to the AO for fresh determination of ALP under the CUP method.
Rule 10 D(3) is only illustrative in nature and merely describes the information required to be maintained by the assessee under section 92D "shall be supported by authentic documents, which may include the following …". The logic employed by the Transfer Pricing Officer that since databases compiled by private entities is not included in rule 10D (3), such databases cannot be relied upon by the assessee is clearly fallacious inasmuch as an item not being included in illustrative list of required documents does not take outside the ambit of 'acceptable document' for the required purposes.It was also open to the TPO to, if he had any doubts, call for further information from this database supplier and examine authenticity of the data so furnished. His summary rejection of the data as unreliable on a technical ground is not tenable in law;
If there are minor variations in prices of generic goods, such factors are adequately taken care of by average in the case of large size of comparables;

The expression 'the international transaction' referred to in rule 10 B(1)(a)(iii) is used in singular and does not permit taking into account, unlike rule 10B(1)(a)(i), 'a number of such transactions'. While averaging is thus permissible for the uncontrolled transactions, each international transaction is to be taken on standalone basis. It is not open to the assessee to compare the average price in his transactions with AEs with average price in uncontrolled transactions;

Also, the CUP method does not allow exclusion of high priced sale instances unless such high prices could be explained by differences of product or commercial terms. In any event, exclusion of extreme cases, such as in quartile ranges, is normally not permissible under the scheme of determination of ALP under the CUP method. (AY. 2008-09)

Tilda Riceland Pvt. Ltd. v. ACIT (2014) 101 DTR 89/ 161 TTJ 213/64 SOT 61(Delhi)(Trib.)

S.92C: Transfer pricing-TNMM-Unaudited segmental accounts can be relied upon for comparing profitability of controlled transactions with uncontrolled transactions-While size is relevant in entity level comparison, it is not relevant in transaction level comparison within the same entity.

(i) In applying the Transactional Net Margin Method (TNMM) under Rule 10B(1)(e) it is not necessary that the net profit computations, in the case of internal comparables (i.e. assessee's transactions with independent enterprise), have to be based on the audited books of accounts or the books of accounts regularly maintained by the assessee. All that is necessary for the purpose of computing arm's length price, under TNMM on the basis of internal comparables, is computation of net profit margin, subject to comparability adjustments affecting net profit margin of uncontrolled transactions, on the same parameters for the transactions with AEs as well as Non AEs, i.e. independent enterprises, and as long as the net profits earned from the controlled transactions are the same or higher than the net profits earned on uncontrolled transactions, no ALP adjustments are warranted. It is not at all necessary that such a computation should be based on segmental accounts in the books of accounts regularly maintained by the assessee and subjected to audit;

(ii) The size of the uncontrolled transaction being smaller, by itself, does not make it incomparable with the transaction in controlled conditions. Size of the comparable does matter in entity level comparison because scale of operations substantially vary and so does the underlying profitability factor, but in a transaction level comparison within the same entity, mere difference in size of the uncontrolled transactions does not render the transaction incomparable. If the size of uncontrolled transaction is too big, it may call for an adjustment for volume business. If the size of the uncontrolled transaction is too small, it may provoke an inquiry by the TPO to ensure that it is not a contrived transaction outside the normal course of business or with regard to other significant factors surrounding smallness of such transaction. However, in none of these cases, a comparable can be rejected on the basis of its size per se. (AY. 2008-09)

Lummus Technology Heat transfer BV .v. DCIT(2014) 162 TTJ 263/64 SOT 47(URO)(Delhi) (Trib)

S.92C: Transfer pricing-Adjustment to profit margin for "capacity underutilization" can be made. In choosing comparables, there cannot be a cherry picking for deciding parameters of rejection. All comparables must face the same test.

(i) Under Rule 10B (1)(e)(ii), an adjustment to the net profit margin has to be made for "capacity underutilization". Capacity underutilization by enterprises is an important factor affecting net profit margin in the open market because lower capacity utilization results in higher per unit costs, which, in turn, results in lower profits. Of course, the fundamental issue, so far as acceptability of such adjustments is concernedis reasonable, accuracy embedded in the mechanism for such adjustments, and as long as such an adjustment mechanism can be found, no objection can be taken to the adjustment. On facts, the CIT(A)'s approach is reasonable and the adjustments are on a conceptually sound basis;

(ii) In view of Dy. CIT v. Quark Systems (P) Ltd.(2010) 132 TTJ 1 SB there is no estoppel against an assessee changing his stand as regards the acceptance or rejection of a comparable. However, there cannot be a cherry picking for deciding parameters of rejection of a comparable, and the parameters have to be broad enough of being general application. In the scheme of things envisaged under the TNMM, it is inevitable that there will be some differences between the comparables and the tested party but the impact of these differences is substantially mitigated by the averaging. If a comparable is being sought to be rejected on the ground of its differences vis-à-vis the tested party, similar criteria must be adopted for deciding suitability of other comparables as well. It cannot be open to any judicial authority to reject a comparable on the ground that the comparable has significant differences vis-à-vis the tested party, unless the differences are broad enough of general application, are such as materially affecting the profitability, as not being capable of reasonably accurate adjustments to eliminate the impact of such differences, and as are also not found in other comparables. All the comparables must face the same test on which comparability of a particular comparable is being sought to be rejected.(ITA No. 4620/Del/2011, A.Y. 2004-05, 21/02/2014.)(AY.2004-05)

DCIT .v. Panasonic AVC Networks India Co.Ltd.(2014) 63 SOT 121(URO)(Delhi)(Trib), www.itatonline.org

S.92C:Transfer pricing-Arm's length price–Comparables -Adjustments to be restricted only to purchases made from Associated Enterprise and not to entire turnover of assessee-company-Matter set aside

Assessee is a company incorporated in Israel and was a tax resident in Israel.It is in the business of purchase and sale of rough diamonds. Indian branch imported goods from various parts of world and sold it in local market. TPO held that diamonds purchased from Associated Enterprise and non-Associated Enterprise were mixed in course of business.Hence, while determining ALP for international transactions A.O. applied net profit margin at 2.25 per cent to calculate ALP of purchases from Associated Enterprise. Accordingly, additions were made. In appeal CIT(A) rejected assessee's contention holding that assessee had not maintained separate account for controlled transactions, hence, net profit margin had to be applied for entire turnover and only on that basis ALP of controlled transactions could be found out .Tribunal following earlier orders passed by Co-ordinate Bench in assessee's own case, it was to be concluded that impugned adjustment made to assessee's ALP by considering entire purchases of assessee in assessment years under consideration was not in accordance with law . impugned order was to be set aside and matter was to be remanded back for disposal afresh with a direction that adjustment, if any, was required to be made to determine ALP, it should be restricted only to purchases made from Associated Enterprise and not to entire turnover of assessee-company.(AY. 2002-03,2003-04)

Penfort (Israel) Ltd. .v.Dy.DIT(International Taxation) (2014) 146 ITD 14 /(2013) 36 taxmann.com 499/99 DTR 121 (Mum.)(Trib.)

S.92C:Transfer pricing-Arm's length price Comparables- General submissions without filing profit and loss account and balance sheet in support of comparables chosen by it, such comparables were liable to be rejected-There is no limit fixed in Act or in Rules on number of comparables which can be used.- Assessing Officer is directed to allow the benefit of +/-5 per cent benefit to the assessee.

The assessee is engaged in manufacturing of diamonds studded gold jewellery and trading of diamonds. The assessee sold diamonds studded jewellery manufactured by it to AE and had also imported diamond from the AE. The assessee in the transfer pricing study selected TNMM as the most appropriate method for bench marking the transactions. In relation to manufacturing segment, the assessee selected 7 comparables out of which 4 were rejected by the TPO. The TPO thereafter added nine more comparables selected by him and computed the arithmetic mean margin of 12 comparables including the three comparables selected by the assessee. For the trading segment, the assessee selected seven comparables for carrying out the transfer pricing study. The TPO held that these comparables were not comparable to the trading business of the assessee which was dealing in diamonds. He, therefore, rejected all the seven comparables and selected his own 10 comparables. The assessee objected to six of the comparables selected by the TPO, which was not accepted, and TP adjustment was made. Before the DRP, the assessee also objected to rejection of its claim of abnormal expenses in relation to the manufacturing segment. The assessee also claimed that there was lower capacity utilization in its case. However, DRP confirmed the order of TPO. Tribunal held that where assessee only made general submissions and did not file profit and loss account and balance sheet in support of comparables chosen by it, such comparables were liable to be rejected .There is no embargo on Transfer Pricing Officer to carry out a fresh search when some comparables chosen by assessee are found unreliable, as there is no limit fixed in Act or in Rules on number of comparables which can be used. where segmental data was not available in respect of a comparable chosen by assessee, and it also had related party transactions in excess of 16 per cent, such company could not be taken as a comparable.The objection raised in relation to comparables is therefore rejected. However there is substance in the additional ground raised by the assessee requesting for benefit of +/-5 per cent margin. Therefore, the Assessing Officer is directed to allow the benefit of +/-5 per cent benefit to the assessee. (AY. 2008 - 09)

Royal Star Jewellery (P.) Ltd. .v. ACIT (2014) 146 ITD 1 / [2013] 36 taxmann.com 500 /161 TTJ 503/99 DTR 396(Mum.)(Trib.)

S.92C:Transfer pricing-Arms' length price –Comparables-Reimbursement of mark up cost-Matter remanded.

AO levied mark up of 5 per cent on reimbursement of cost recovered by assessee from its Associated Enterprises. In AY. 2005-06, there existed an arrangement for mark up on cost at 2 per cent and 5 per cent, whereas TPO applied 5 per cent mark up on flat basis. Tribunal restored the matter to the AO for restricting transfer pricing adjustment to agreed mark up as per arrangement between assessee and its AEs. In view of order passed by Tribunal in assessee's own case for assessment year 2005-06, impugned order was to be set aside and matter was to be remitted to AO / TPO for deciding in accordance with directions given by Tribunal.(AY.2007-08)

Tecnimont ICB Ltd. .v. Dy. CIT (2014)146 ITD 219 / (2013) 32 taxmann.com 357/30 ITR 199 (Mum) (Trib.)

S.92C:Transfer pricing-Arms' length price–Comparables-Recover of expenses from AE beyond credit period allowed-Matter remanded to AO to consider the interest beyond agreed period.

Assessee recovered expenses from AEs .TPO noticed that in some cases expenses incurred on behalf of AEs were recovered after a delay of substantial period without charging any interest, therefore proposed adjustment on that score which finally came to be made in assessment order. Contention of assessee was that computation of delay by TPO was not correct inasmuch he ignored credit period allowed by assessee as agreed .Impugned order was to be set aside and matter was to be remitted to Assessing Officer /TPO for restoring amount of adjustment on account of interest to period beyond agreed credit period. (AY.2007–08)

Tecnimont ICB Ltd. .v. Dy.CIT (2014)146 ITD 219 / (2013) 32 taxmann.com 357 (Mum.)(Trib.)

S.92C:Transfer pricing-Arms' length price–TNMM-Comparables- when overall price of assessee was within tolerance limit of 5 per cent, in terms of proviso to section 92C(2) no adjustment to ALP determined by assessee was permissible.

The Assessee company is engaged in the business of manufacturing and dealing in textile machinery and its spare. The assessee is a joint venture between M/s. ATE Enterprises Pvt. Ltd. and M/s. Saurer Gmbh. M/s. Saurer Gmbh & Com. KG holds 70% shares in assessee's company. During the year under consideration, the assessee has undertaken international transaction relating to purchase and sale of components, payment of royalty and reimbursement (payment) with its AE. The assessee bench marked the International transaction relating to purchase of components valuing Rs. 22.93 crores by using Cost Plus Method (CPM) as most appropriate method. For the international transaction relating to sale of components and payment of royalty, the assessee has used (TNMM) as the most appropriate method.TPO made adjustment only with respect to royalty payment by treating ALP of royalty at nil. Commissioner (Appeals) confirmed adjustment made by TPO in respect of royalty payment and he also enhanced assessment by making adjustment in respect of purchase of components. Commissioner (Appeals) determined ALP by taking TNMM as most appropriate method but at entity level of assessee.He arrived at arithmetic mean of comparables' operating profit at 8.33 per cent against operating profit at entity level of assessee at 4.71 per cent. Tribunal held that Commissioner (Appeals) determined arm's length price by considering entity level results of assessee which included all international transactions, in such a case, when overall price of assessee was within tolerance limit of 5 per cent, in terms of proviso to section 92C(2) no adjustment to ALP determined by assessee was permissible.(AY. 2007- 08)

Zinser Textile Systems (P.) Ltd. .v. Dy.CIT (2014) 146 ITD 222 /(2013) 37 taxmann.com 59/30 ITR 675 (Mum.)(Trib.)

S.92C:Transfer pricing-Arm's length price-Comparables and adjustments/CUP method-Assessee seconded its employees to foreign AEs-cost of deputation of employees–Not seconded employees to any independent enterprise- CUP method could not be applicable.

The CUP method could not be applied under the facts of the case, as the Assessee has not transferred/seconded employees to any other independent enterprises. The similar transaction on the basis of which the TPO determined ALP was not with an independent enterprise and the said

transaction was also with an Associated enterprise. In such circumstances, even the determination of ALP by the TPO was not proper.(AYs. 2003-04 to 2006-07)

3i Infotech Ltd..v. Add. CIT (2014) 146 ITD 405 / (2013) 38 Taxmann.com 422 /(2014) 162 TTJ 184(Mum.)(Trib.)

S.92C:Transfer pricing-Arm's length price-TNM Method-subsidiary of NNML-TPO rejected three out of seven comparables adopted by assessee-Arithmetic mean of remaining four comparables which were accepted by TPO-determination of ALP was to be restored to file of TPO for de novo consideration.

The assessee adopted transactional net margin method (TNMM) to establish the arm's length price of its International Transaction with overseas group of companies .It adopted operating profit over operating revenue(OP/OR) as the pofit level indicator (PLI).In its transfer pricing analysis the assessee identified seven comparables. The TPO accepted the TNMM method adopted by assessee and held that three comparables were not comparable. Certain adjustments were made in ALP determined by assessee, which were confirmed by the DRP .On appeal the Tribunal held that no details were provided as regards claim of assessee in respect of AMP expenses provision for warranty and prior period expenses matter could not be concluded .Matter restored the file of TPO for de novo consideration.(AY. 2006-07)

Nortel Networks India (P) Ltd. v. Add. CIT (2014) 146 ITD 463 / (2013) 36 Taxmann.com 439/33 ITR 97(Delhi)(Trib.)

S.92C:Transfer pricing-Arm's length price-Information Technology (IT) enabled back office services and contract software development services-Transactional Net Margin Method (TNMM).

TPO rejected some of the comparables adopted by assessee and at same time TPO selected four new comparables .On the basis of fresh list of comparables TPO made certain adjustment to ALP determined by assessee. In appeal CIT(A) held that comparables selected by TPO owning software products and undertaking R&D , command a premium return as compared to any routine contract software development service provider like assessee and thus they could not be taken as comparables. Accordingly adjustments were set aside. On appeal by revenue in absence of four comparables searched by the TPO were not comparable with the assessee, the order of CIT(A) was confirmed.(AY. 2005-06)

ITO .v. Clot Technology Services India (P.) Ltd. (2014) 146 ITD 468/34 taxmann.com 182(Delhi)(Trib.)

S.92C:Transfer pricing- Notional interest on share application money paid to Associated enterprises-Addition on the basis of hypothesis basis was held to be not legal.

Assessee made payments towards share application money to its foreign subsidiaries. AO treated the said transaction as interest free advances and made adjustment on the basis of notional interest. Tribunal held that payment of share application money by the assessee to its AES could not be treated as partly in the nature of interest free loans and accordingly ALP adjustment made on the basis of hypothesis was not legally sustainable.(AY. 2008-09)

Bharti Airtel Ltd .v.ADCIT (2014) 101 DTR 154/161 TTJ 428
(Delhi) (Trib)

S.92CA:Transfer pricing-Arm's length price-Comparable-Tribunal deleting the addition on ground that unit compared by TPO was not comparable to assessee-Matter remanded.

Dispute Resolution panel directed the TPO to make proportionate adjustment on the total sales to the associated enterprise alone and not on the other sales. Tribunal deleted the addition on the ground that unit compared by TPO was not comparable to the assesee. On appeal by revenue the Court held that whether there was any other comparable unit or any other method,might be a question to be considered by TPO once the matter was remanded to him. It was not a proper exercise of discretion on the part of the Tribunal to have given quietus to the matter after deleting the addition. The matter was remanded to the TPO.

CIT .v. Manaksia Ltd. (2014) 362 ITR 56/224 Taxman 48 **(Cal.)(HC)**

S. 94(7) : Transaction in securities –Short term loss-Proviso would be applicable only from AY. 2006-07. [S. 43(5)]

Where the assessee during A.Y. 2004-05 suffered loss on account of the sale of shares and claimed that loss was to be treated as short-term capital loss in view of proviso (d) to section 43(5), loss could not be considered as short-term capital loss, since said proviso would be applicable from A.Y. 2006-07 (AY. 2004-05)

Lachhmi Narain Gupta & Sons .v. CIT (2014) 221 Taxman 356 (P&H)(HC)

S.111A:Tax on short term capital gains-Equity shares- Transaction tax is chargeable–claim of earlier year will not apply res judicata for the following year when facts of the case are not identical.

The assessee claimed STCG from sale of shares during the year. The AO held that in view of the large number of transactions during the year and short holding period, the intention of the assessee was to earn profit on resale and not to hold them as investment and thus treated the income as 'business income'. The CIT(A) however allowed the claim of the assessee following the stand in the previous assessment years.

On appeal by the department, the Tribunal observed that the assessee had offered a portion of its income as 'speculative' and thus the observation of the CIT(A) to that extent was contradictory and the facts of the current year were not absolutely identical to the previous years. Accordingly, the Tribunal set-aside the order of the CIT(A) and held that the principles of res judicata do not apply for taxation as each assessment year is a separate unit and has to be assessed on the peculiar facts of the case for that assessment year. (AY. 2007-08)

ACIT .v. Hitesh Bhagat (2014) 29 ITR 660 (Mum.)(Trib.)

S. 113:Tax-Surcharge-Block assessment - Search cases – Proviso inserted by Finance Act, 2002 w.e.f. 01.06.2002 to impose surcharge in search assessments is not clarificatory or retrospective-Not to apply to block assessments pertaining to period prior to 1-6-2002-Intention of legislature not to give it retrospective effect.[S. 132,158BA]

A search and seizure operation u/s 132 was conducted on 10.02.2001 pursuant to which an assessment order for the block period from 01.04.1989 to 10.02.2000 was passed on 28.02.2002 at a total undisclosed income of Rs.85 lakhs. Tax was charged at the rate prescribed in s. 113. Subsequently, a Proviso was inserted in s. 113 by the Finance Act 2002 w.e.f. 01.06.2002 to provide for the levy of surcharge at 10%. The AO took the view that the said amendment was clarificatory in nature and he levied surcharge by passing an order u/s 154. However, the Tribunal and High Court upheld the assessee's claim that the said amendment was prospective in nature and did not apply to block periods falling before 01.06.2002. However, the plea of the assessee was rejected by the Supreme Court in CIT v. Suresh N. Gupta(2008) 297 ITR 322 (SC) (followed in (Rajiv Bhatara (SC)) and it was held that the said proviso is clarificatory in nature and applied to earlier block periods. When the present case reached the Supreme Court, the Bench was of the view that the issue ought to be referred to a larger Bench of 5 judges.HELD by the Full Bench of the Supreme Court:

(i) Chapter XIVB comprehensively takes care of all the aspects relating to the block assessment relating to undisclosed income, which includes s. 156BA(2) as the charging section and even the rate at which such income is to be taxed is mentioned in s. 113. Though s. 4 is also a charging provision, it does not apply to Chapter XIVB;

(ii) On the application of general principles concerning retrospectivity, the proviso to s. 113 cannot be treated as clarificatory in nature, thereby having retrospective effect. The rule against retrospective operation is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication;

(iii) An assessment creates a vested right and an assessee cannot be subjected to reassessment unless a provision to that effect inserted by amendment is either expressly or by necessary implication retrospective;

(iv) There cannot be imposition of any tax without the authority of law. Such a law has to be unambiguous and should prescribe the liability to pay taxes in clear terms. If the concerned provision of the taxing statute is ambiguous and vague and is susceptible to two interpretations, the

interpretation which favours the subjects, as against there the revenue, has to be preferred. This very principle is based on the "fairness" doctrine as it lays down that if it is not very clear from the provisions of the Act as to whether the particular tax is to be levied to a particular class of persons or not, the subject should not be fastened with any liability to pay tax.

(v) Though the Chief Commissioners in their Conference suggested that there should be a retrospective amendment to s. 113, the legislature chose not to do so even though other amendments were made with retrospective effect. The CBDT circular No.8 of 2002 dated 27.08.2002 (2002) 258 ITR (St.)13 also makes it clear that the amendment to s. 113 is prospective;

(vi) Consequently, the conclusion in CIT v. Suresh N. Gupta(2008) 297 ITR 322 (SC) treating the proviso to s. 113 as clarificatory and giving it retrospective effect is not correct and is overruled.

CIT v. Vatika Township (2014) 367 ITR466/271 CTR 1/109 DTR 33(FB)(SC)

Editorial:CIT v. **Suresh Gupta (2008)** 297 ITR 322 (SC) and CIT v.Rajiv Bhatara (2009) 310 ITR 105 (SC) overruled.

S.113:Tax-Surcharge–Block Assessment–Search cases-Surcharge is payable even prior to introduction of proviso to section 113 of the Act. However, the A.O. directed to await the outcome of the Hon'ble Apex Court on the issue.[S.158BC]

Surcharge is payable even prior to introduction of proviso to section 113 of the Act. However, as the issue of levy of surcharge prior to 01.06.2002 was referred to a larger Bench by the Apex Court in the case of, CIT v. Vatika Township (P) Ltd. (2009) 314 ITR 338 (SC) the High Court directed the A.O. to await the decision of the Larger Bench of the Apex Court and may proceed subject to the outcome of the decision.

(Block Period: 01.04.1989 to 28.06.2000)

CIT .v.B.Suresh Baliga (2014) 102 DTR 83/364 ITR 560 /225 Taxman 228(Mag.)(Karn.)(HC)

S. 113 :Tax-Surchrge -Block assessment-Search cases- Levy of surcharge –Whether valid-AO was directed to await the decision of the larger bench of Apex court. [S. 132, 158BC]

Supreme Court in case of CIT .v. Suresh N. Gupta (2008) 297 ITR 322(SC) held the levy of surcharge in respect of block period valid. However, in CIT .v. Vatika Township P. Ltd.(2009) 314 ITR 338(SC) the larger bench of the Apex Court held that the issue needs to be considered by a larger bench. Assessing Officer directed to await the decision of the Apex Court.

CIT .v. B. Nagendra Baliga (2014)363 ITR 410 (Karn.)(HC)

S. 115J : Book profit- Profit from exports claimed as a deduction - To be reduced while calculating book profit. [S. 80HHC]

The assessee claimed deduction u/s. 80HHC on profits earned from exports made. It also reduced such profits from book profits while calculating profit u/s. 115J. The Tribunal confirmed the working of the assessee.

On appeal, the High Court dismissing the departmental appeal followed the decision of the Supreme Court in the case of CIT .v. Bhari Information Technology Systems (P.) Ltd. (2012) 340 ITR 593 and held that where the assessee had claimed deduction of profit from export under section 80HHC, such amount was to be reduced for working out book profit under section 115J.

Dy.CIT .v. Atul Products Ltd. (2014) 222 Taxman 130 (Mag.) (Guj.)(HC)

S.115J: Book profit – Change in method of depreciation-Straight line method to written down value-No prohibition.

There is no prohibition on changing in method of charging depreciation from straight line method to written down value method.

CIT .v. Hindustan Pipe Udyog Ltd. (2014) 360 ITR 437 (All.)(HC)

S. 115JA : Book profit-Prima facie adjustment merely after examination of return and documents enclosed with return cannot be sustained. [S.143((1)(a)]

The assessee was a company. It had filed its return of income declaring 'nil' income. It claimed that provision of minimum alternate tax under section 115JA was not applicable to it. The Assessing Officer computed the taxable income under provisions of minimum alternate tax i.e. section 115JA. The High Court held that, since computation of minimum alternate tax was cumbersome which was

not possible by merely examining return or documents enclosed with return itself as several aspects were required to be examined, prima facie adjustment under section 143(1)(a) could not be made. (AY. 1998-99)

Ester Industries Ltd. .v. CIT (2014) 220 Taxman 159 (Mag.) / (2013) 40 taxmann.com 376 (Delhi)(HC)

S. 115JA : Book profit - Book profit cannot be increased on the ground that a part of the stock has been valued at cost price and not at market price.

The AO made addition of defective stock valued at market price while making computation under Section 115 JA on the ground that it was an unascertained liability. The CIT(A) and the Tribunal deleted the addition. On appeal, the High Court held that closing stock has to be valued at lower of the cost price or market price. This is not a liability in the books. Thus it cannot be considered to be contingent or unascertained liability. The book profit cannot be enhanced on the ground that the part of the closing stock has been valued at market price and not at cost price. (AY. 1999-2000)

CIT .v. Samsung India Electronics Ltd. (2014) 220 Taxman 158 (Mag.) (Delhi)(HC)

S.115JA: Book profit-Adjustment, refund of admitted tax-No provision under the Act to refund the amount which had been admitted and which had been paid by the assessee as MAT. [S.115JB, 226]

The petitioner company had admitted certain tax liability in the return of income under Section 115JB which was to be paid on or before October 2007. Admitted tax was not deposited. An intimation order under Section 143 (1) was passed creating tax liability on the assessee and thereafter an order was passed under Section 226(3) attaching bank account of assessee. According to the assessee, as profits were worked out on the basis of book profits under Section 115JAA and 115JB, it was entitled to a credit of tax to be paid for up to the next seven years. Therefore it filed a writ, praying for the notice under Section 226(3) to be quashed, for a refund of the unadjusted balance (since the liability of tax as a MAT company was much lower than the normal tax paid by the assessee in the subsequent year and thus there was no question of adjustment of tax in those year of the amount to be paid for the current AY) and permission to make payments of demanded tax in 4 quarterly installments.

The High Court held that since liability was admitted, there was no question of giving time to pay tax by giving installments for which there was no provision under the Act or Rules. The Court also held that there was no provision under the Act to refund the amount which had been admitted and which had been paid by the assessee as MAT and therefore no relief could be granted to the assessee. (AY. 2007-2008)

B.R.K. Finance & Inv. Company Ltd..v.ITO (2014) 220 Taxman 145 (All.)(HC)

S. 115JB : Book profit–Calculations to be made with respect to adjusted book profit and not with respect to income assessable under head 'profits and gains of business and profession' .

High Court held that for computing deduction under clause (iv) of section 115JB(2), calculations are to be made with respect to adjusted book profit and not with respect to income assessable under head 'profits and gains of business and profession'.

CIT .v. Aarvee Denims & Exports Ltd. (2014) 220 Taxman 35 (Mag.) / (2013) 40 Taxmann.com 85 (Guj.)(HC)

S.115JB: Book profit–Lease equalization charges cannot be disallowed.

That lease equalisation charges could not be deleted from the profit and loss account for the purposes of computing book profits under section 115JB. (AY. 2001-02)

CIT, Large Taxpayers Unit .v. India Railway Finance Corporation Ltd. (2014) 362 ITR 548 (Delhi)(HC)

S.115JB:Book profit - Provision for diminution in value of assets which has been debited to profit and loss account is not required to be increased as per clause (i) of Explanation 1 to

section 115JB to compute book profit under section 115JB – Similarly, provision for doubtful debts debited to profit and loss account is not required to be increased as per clause (c) of Explanation 1 to section 115JB to compute book profit under section 115JB

The issue of provision for diminution in the value of assets and provision for doubtful debt, the High Court dismissed the appeal of the revenue after relying on the decision of CIT vs. Yokogawa India Ltd. (204 taxman 305) wherein it was held that if the adjustments of provision for bad and doubtful debts is reduced from the loans and advances or the debtors from the assets side of the balance sheet, the Explanation to Section 115JA and 115JB is not at all attracted. (AY. 2002-2003)

CIT .v. Kirloskar Systems Ltd (2014) 220 Taxman 1 (Karn.)(HC)

S. 115JB : Book profit-AO entitled to tinker with P&L A/c. if assessee's claim not permitted by accounting principles. [S.145,Companies Act, 1956]

The question that had arisen was whether the Assessing officer was entitled to disturb the net profit shown by the assessee in the profit and loss account prepared as per the Companies Act, 1956.in order to enable anybody to understand the implication of such deviation, it was made mandatory for the companies to disclose the financial implications of such deviation. Such kind of deviations are acceptable under the Companies Act, however, they are not always acceptable to the income-tax authorities. Under the income-tax, the Assessing officer is entitled to examine the said deviations, particularly when it has an impact on the book profit. There cannot be any dispute that it is the responsibility of the assessee to substantiate the legality of any item of expenditure/income found debited/credited in the profit and loss account by drawing support from any document or business practices or accounting requirements. It was evident that the assessee had passed the entry for prior period credits/charges in the assessment year only to ensure that the final book profit (surplus) was to be reduced. On making careful observations of the facts of the case, the said intention of the assessee was very much apparent and glaring. Besides, the assessee also could not substantiate the said claim with a legally tenable explanation. It was also not shown that the booking of such kind of entries are permitted under the accounting principles. When the assessee could not furnish legally tenable explanation and also could not show that it was in accordance with established accounting principles, then it could not be said that the financial statements had been prepared in accordance with the provision of the Companies Act, even if the management/auditors were silent on that point(ITA no. 375/Coch/ 2014,Dt. 17/10/2014.)(AY.2005-06)

Padinjarekara Agencies Pvt. Ltd. .v. ACIT (Cochin)(Trib.); www.itatonline.org

S.115JB : Book profit-MAT provisions do not apply to foreign companies.[S.90]

Intention of legislature was very clear that the MAT provisions are applicable only to domestic companies and not to the foreign companies. Even if for sake of argument ld. CIT(DR)'s contention is accepted still in view of the provisions of section 90(2), the assessee's claim for lower impost of tax will have to be accepted because the provisions of section 115JB are subordinate to section 90(2) and have no overriding effect on the said section.

The Bank of Tokyo-Mitsubishi UFJ Ltd. .v. ADIT (Delhi)(Trib.); www.itatonline.org

S. 115JB : Book profit–Provision for doubtful debts-Added back while computing book profit.

Tribunal held that in view of the amendment made by Finance (No. 2) Act 2009 with retrospective effect by inserting clause (i) in Expl. 1 to Section 115JB, the provision for doubtful debts and advances has to be added back while computing book profit under section 115JB. (AY. 2002-03)

Reliance Industries .v. Addl. ACIT (2014) 159 TTJ 349 / (2013) 55 SOT 8 (URO) (Mum.)(Trib.)

S.115JB:Book profit- Carbon credit- Receipt being capital in nature to be excluded in computation of book profit.[S.2(24),4]

Receipt of carbon credit being capital in nature to be excluded in computation of book profit. (AYs. 2007-08 to 2009-10)

Shree Cement Ltd. .v. ACIT (2014)100 DTR 33 (Jaipur)(Trib.)

S.115JB:Book profit -Sales tax deferred scheme - Benefit arising on premature payment of deferred sales tax at net present value could not be excluded while computing book profit.[S.41(1)]

The assessee did not include benefit arising on premature payment of deferred sales tax at net present value while computing book profit under section 115JB. The ITAT held that said amount cannot be excluded by applying Clause-(viii) in II Part to Explanation-1 of Sec. 115JB (2). (AY.2004-05)

ACIT .v. Spicer India Ltd. (2014) 146 ITD 272/(2013) 38 taxmann.com 317 (Pune)(Trib.)

S.115WB:Fringe benefits- Employer-employee relationship–Airport pick–up and drop-Guests-Employees pick-up and drop residence to place of work-Not liable to be treated as fringe benefit.

Where airline crew members for whom airport pick-up and drop had been incurred were not employees of assessee, expenditure incurred for same could not be treated as liable for fringe benefit tax under section 115WB(2)(D). Similarly, visiting guests of assessee could not be treated as employees of assessee and complimentary pick-up and dropping charges incurred on account of visiting guests also did not fall under purview of fringe benefit tax under section 115WB(2)(B). Further, expenditure on account of pick-up and drop of employees from their residence to place of work and returning them to their residence was not liable to be treated as fringe benefit Circulars & Notifications, Circular No. 8 of 2005, dated 29-8-2005. (AY.2009-10)

Peerless Hotels Ltd. v. Dy. CIT (2014) 61 SOT 24 (URO)/ (2013) 39 taxmann.com 171 (Kol.)(Trib.).

S. 119 : Instructions–CBDT–Condonation of delay-Matter was set-a-side. [S.234A, 234B, 234C]

The Petitioners had challenged orders of second respondent rejecting the petitions for waiver of interest u/s 234A, 234B, and 234C and order issued by Commissioner of Income tax refusing to condone the delay in filing of the returns for A.Y. 1990 – 91 to 1992 – 1993. The Court held that, on perusal of Circular No.670 dt. 26th Oct, 1993, it appears that when the Commissioner of income tax is satisfied that the returns were not filed due to reasons beyond the control of the assessee, he may refer the matter to the Board for reconsideration. In the instant case, for one year the Commissioner of Income-tax was satisfied that the delay in filing the return were not attributable to the petitioners. Therefore, he is not justified in extending the same to other years. The Court set aside the impugned order and remit the matter to the Commissioner of Income-tax to decide whether he will condone the delay or refer the matter to the Board for consideration. (AY. 1990-91 to 1992-93, 1994 – 95)

V.N. Parameswaran .v. ITO (2014) 220 Taxman 85 (Mag.)(Ker.)(HC)

S. 119: Instructions-CBDT-Circular-Assessment-Notice-Circular prescribing the time limit of three months from date of filing of return is binding on the Assessing Officer-Notice issued beyond prescribed period was held to be invalid.[S. 14(2),143(3)]

Return was filed by the assesse on 29-10-2004 and notice under section 143 (2) was issued on July, 14, 2005. Notice was not issued with the period of three months. Assessee contended that as the notice was issued beyond the limitation prescribed by the CBDT circular the assessment was bad in law. However the Tribunal held that the notice was issue within the prescribed period under section 143(2) hence the assessment was valid. On appeal by assesse the court held that the CBDT Circular Nos. 9 and 10 prescribing time limit of three months from date of filing return for issuance of scrutiny notice is binding on income-tax authorities. Since the return was filed on 29-10-2004 and notice u/s 143(2) in July 2005, the notice was not within a period of three months, and hence, not in legal exercise of jurisdiction. Order of Tribunal confirming the assessment was held to be not valid.Appeal of assessee was allowed. Court also made observation that when the department has set down a standard for itself, the department is bound by the standard and cannot act with discrimination.In case, it does that, the act of the Department is bound to be struck down under article 14 of the constitution.(AY. 2004-05)

Amal Kumar Ghosh.v. ACIT (2014) 361 ITR 458/105 DTR 351/269 CTR 213(Cal.)(HC)

S. 119 : Instructions–CBDT-Refund application-Exemption-Refusal ofcondonation of delay and denial of refund adopting hyper technical view was held to be not proper.[S.10(10C)]

In the return of income the assessee did not claim refund of tax deducted at source.The CBDT issued the circular /letter on May 8 , 2009, clarifying that the employees of the Reserve Bank of India who have opted for an early retirement scheme during year 2004-05 would be entitled to the benefit of exemption under section 10(10C) of the Act. Supreme Court also held that the amounts received by retiring employees of the Reserve Bank of India opting for the scheme were eligible for the exemption under section 10(10C).The assessee file revised return on September 8, 2011 claiming the benefit .However there was no response. The assessee file application for condonation of delay under section 119(2)(b) for claiming refund.The commissioner dismissed the application in view of instruction no 13 of 2006 dated 22-12-2006, on the ground that application was file beyond six years from the end of the assessment year for which the application was made.The asssesee filed writ petition. Allowing the petition the court held that the application for condonation of delay was rejected adopting a hyper technical view. The assesses case revised return filed should be considered as application for condonation of delay under section 119(2)(b) and revenue was directed to grant the refund.(AY.2004-05)

DevdasRama .v. CIT(2014) 362 ITR 335 / 104 DTR 73 / 222 Taxman 56 (Bom.)(HC)

S.124: Jurisdiction of Assessing Officers-Procedural irregularity, can be directed to be rectified by following the procedure. [S.120, 127]

Sections 120, 124, 127 govern the process of procedure for assessment and not the subject matter or its purpose-irregularity in procedure need not result in annulment. Appellate authorities have right to put the clock back and direct the ITO / AO to follow the procedure notwithstanding the difference between mandatory and directory procedural norms. It was held that where an assessment order was passed without making reference to Commissioner under section 124 it was not a nullity for want of jurisdiction but it results in an irregularity which can be rectified by order of remit and directing Assessing Officer to continue with proceedings from stage where error had occurred.

ACIT .v. S.S. Ahluwalia (2014) 101 DTR 292 (Delhi)(HC)

S. 124 :Jurisdiction of Assessing Officers -Provisions of sub section 3 of section 124 bar an assessee from raising question of jurisdiction before first appellate authority or Tribunal if such an objection has not been raised before assessing authority at very first stage.

The assessee's case was transferred from the jurisdiction of Lalitpur to Jhansi. The assessee was neither served nor issued any notice under Section 127 of the Act nor was any such notice served upon the assessee before the case was transferred from Lalitpur to Jhansi. The assessee appeared before the Deputy Commissioner of Income Tax, Circle 1, Jhansi who was the Assessing Officer (AO) in response to the notices issued by him under Section 143(2) and 142 (1) of the Act. The AO then passed the assessment order aggrieved by which the assesse preferred an appeal before the Commissioner of Income Tax (Appeals) (CIT (A)), Agra who partly allowed the appeal. On appeal to the Tribunal, the latter dismissed the appeal vide the impugned order. The assessee then appealed before the High Court which made an observation from a reading of the Assessment Order that no objection regarding jurisdiction was raised by the appellant before the AO at Jhansi. The assessee proceeded to challenge the same before the first appellate authority at the first instance. The High Court held that the provisions of sub-section (3) of Section 124 of the Act are thus attracted and the assessee is barred from raising the question of jurisdiction before the first appellate authority or the Tribunal if such an objection had not been raised before the assessing authority at the very first stage. (AY. 1997-98)

Bal Chand Jain & Sons .v. DCIT (2014) 221 Taxman 123 (All.)(HC)

S. 124 : Jurisdiction of Assessing Officers-The Tribunal is not a competent authority to adjudicate upon the jurisdiction of the AO when it is not raised before the Assessing Authority.

The assessee had filed its return of income in response to the notices under section 142(1) and section 148. Its case was transferred to the Deputy /Joint Commissioner (Asstt.) as the return of loss for the assessment year 1997-98 was more than Rs. 10 lakhs. During the assessment, the assessee claimed exemption under section 11 and subsequently under section 10(22) of the Act. The AO denied the exemption and the assessment was completed by determining a positive income. On appeal, the Commissioner (Appeals) confirmed the order of the AO. On second appeal, the Tribunal held that the

AO who framed the assessment/reassessment proceedings was not the competent authority and the reasons recorded for initiating the reassessment proceedings were unfounded. On appeal before the High Court, it was observed that the question of jurisdiction could have been raised before the AO within the prescribed period under section 124 (3)(a), but it was not raised. Even after assessment before the first appellate authority, any such plea was not put forward. Thus, it held that the Tribunal was not the competent authority to adjudicate upon the issue of jurisdiction for the first time when it was not raised in terms of section 124 before the assessing authority. (AYs. 1993-94 – 1995-96 & 1997-98)

CIT .v. All India Children Care & Educational Development Society (2014) 221 Taxman 5 (All.)(HC)

S. 127: Power to transfer cases–Reasons–reliance on report, contents whereof unknown to assessee-Transfer was held to be not valid.

Held, order of transfer of case from Kolkata to Kanpur was not valid as no reasons in support thereof had been given. Also, since the Commissioner had relied on a report, the contents whereof were not made known to the assessee, the order could not be accepted.

Chirag Vincom P. Ltd. .v. Dy.CIT (2014) 365 ITR 273 (Cal.)(HC)

S. 127: Power to transfer cases–Valid and cogent reasons-Transfer order stated that in above search operation, cash amount was found from petitioner's room and same was seized (Ss. 132, 153C).

Petitioner being daughter-in-law was living at residence of her in-laws in Meerut. The said premises was covered under search and seizure operation. Petitioner's case was ordered to be transferred from Kanpur to Meerut for integrated assessment. Transfer order stated that in above search operation, cash amount was found from petitioner's room and same was seized. Held, such reason could not be said to be irrelevant or not germane to issue; that was valid and cogent reason and hence transfer order was held to be valid.

Preeti Elhence .v. CIT (2014) 365 ITR 268 (All)(HC)

S. 127 : Power to transfer cases –'Opportunity of hearing-Breach of principle of natural justice-Order was set aside.

Assessee had been filing his returns in Mumbai. A search and seizure was conducted on 'S' group at Hyderabad. As the searched group was assessed at Hyderabad the assessee's case was proposed to be transferred to Hyderabad for purpose of co-ordinated investigation and administrative convenience.Assessee by a letter forwarded his objections to the proposed transfer of jurisdiction. Assessee also requested concerned authority to provide material and documents seized during search from possession of 'S' group of companies. Revenue authorities , without giving any response to said letter passed impugned order transferring jurisdiction of assessee's case. Assessee challenged the said order by filing the writ petition. By allowing the petition the court observed that, the impugned order was clearly in breach of natural justice and thus same deserves to be set-a-side.

Sachin Joshi v. CIT (2014) 224 Taxman 331 (Bom.)(HC)

S.127: Power to transfer cases–Coordinated investigation-Transfer from Mumbai to Delhi was held to be valid.

After considering the objections of assesse the CIT transferred the assesee's case from Mumbai to Delhi for co-ordinated investigation on the request of Dy.CIT at Delhi.The assesse challenged the said order by filing writ petition dismissing the petition the Court held that, transfer of case was held to be valid.

Aamby Valley Ltd..v. CIT (2014) 270 CTR 57/106 DTR 457 (Bom)(HC)

S. 127: Power to transfer cases–Coordinated investigation-Without giving any reasons, and without giving personal hearing- Transfer of case was held to be breach of natural justice and held to be invalid.

Court observed that the assesse does not have a right to be assessed by a particular place, nevertheless the power to transfer proceedings from one place to another under section 127 cannot be exercised

arbitrarily.In the present case neither any notice was issued to the assesse nor was any personal hearing granted to the assesse before passing the impugned order simply stating that the order of transfer is issued for the sake of "co ordinated investigation and assessment". On writ petition filed by the assesse the court held that, without giving any reasons, and without giving personal hearing, transfer of case was held to be breach of natural justice and held to be invalid.
Sunisha Impex (P) Ltd. v. CIT (2014) 270 CTR 63 (Bom.)(HC)

S. 127 : Power to transfer cases-Co-ordinated investigation-Held to be valid.
It was held that reason for transfer of a case for effective and coordinated investigation can never be said to be a vague nor insufficient reason, particularly in the light of the facts and circumstances of the present case wherein a proper show cause notice was issued, hearing was granted and a final order has been passed in the matter and, therefore, the impugned order cannot be said to be cryptic order or a vague order.
Ambika Solves & Ors .v. CIT (2014) 101 DTR 1/267 CTR 258 (MP)(HC)

S.127: Power to transfer cases–Reasons–Assessee to be given opportunity-Order passed without giving an opportunity was liable to be set aside.
The reasons for transferring the assessee's case from Mirzapur to Allahabad had to be spelt out in the order which had been passed u/s 127(2), which was not the case here. Therefore, the order transferring the case of the assessee was to be set aside and the assessee was to file her reply to the proposed transfer.
Chandra PrabhaKushwaha (Smt.) .v. CIT (2014) 361 ITR 66/225 Taxman 130(Mag)(All.)(HC)

S.127:Power to transfer cases–Moving court only after issue of notice-Assessee guilty of laches-Interim relief was held to be not maintainable.[S.148, Art.226]
The assessee's case was transferred from Mumbai to Hyderabad vide order dated August 31, 2012. The assessee filed a writ petition on February 11, 2013 but did not move the court for interim relief. Held, its conduct was indicative of its having accepted the order of transfer dated August 31, 2012. It was only when the Assessing Officer at Hyderabad issued four notices dated July 23, 2013, under section 148 seeking to reopen the earlier assessments that the petition was mentioned on August 12, 2013, and placed on board on August 20, 2013, for urgent interim relief and amendment. This was a clear case of laches on the part of the assessee. Therefore, no occasion arose to examine the assessee's grievance on the merits.(AYs. 2009-2010, 2010-2011, 2011-2012, 2012-2013)
Patel KNR JV .v. CIT (2014) 362 ITR 351/102 DTR 172/267 CTR 514 (Bom.)(HC)

S. 132 : Search and seizure – No addition in respect of gold sovereigns can be made when assessee's explanation vis-à-vis "jewelry" found at the time of search has been accepted by the revenue authorities.
The AO conducted a search in the premises of the assessee and conducted a block assessment for various assessment years. During the search certain documents, loose papers, cash, jewelry, etc. were found. The assessee submitted that the jewelry belonged to his mother and wife and had been acquired over a period of more than 40 years. The AO accepted the explanation given by the assessee but contended that gold sovereigns were not jewelry and since no explanation was given by the assessee in that respect, the AO added it to the income of the assessee. The CIT(A) and the Tribunal confirmed the findings of the AO.
The High Court observed that when the jewelry was being inventoried, the gold sovereigns had been included in it and that the term 'jewelry' was used as a loose term. The High Court accordingly held that since the explanation regarding jewelry had been accepted by the department, the remaining part relating togold sovereigns which were a part of 'jewelry' did not belong to the assessee and explanation thereof had to be accepted. (AY. 1988-1998 to 1997-1998)
Tilak Raj Sharma v. Dy. CIT (2014) 221 Taxman 123(Mag.)(All.)(HC)

S. 132 : Search and seizure–Validly -The warrant of authorization was issued merely on hypothecated grounds, which is not sustainable under the law.

Search and seizure proceedings were conducted in premises of a Government Officer on warrant issued by Director, Investigation. The satisfaction note was centered in respect of search conducted in premises of Dr. Yogi Raj Sharma about 9 months ago, from where a document had been found. During search, all documents, books and vouchers of assessee were taken away without verification. On writ, assessee challenged the issuance of warrant of authorization and contended that subsequent search and contended seizure proceedings were mala fide and out of prejudice. The High Court observed that the satisfaction note was in respect of three officers including assessee and the entire satisfaction note was centered in respect of the search conducted in the premises of Dr. Yogi and on the basis of a document it was recorded that petitioner had invested money in house and land property. The aforesaid money was received by him in respect of supply orders of medicines, medical equipments etc. The Court noted that the entire basis of recording satisfaction was the search conducted in the premises of Dr. Yogi. The said document does not bear the name of the petitioner, but on the basis of word 'ch', a conclusion had been recorded that it indicated the assessee. In absence of name, what evidence was there before the revenue to indicate that the word 'ch' indicated the petitioner, is not clear. The Court further observed that the search was carried out in the premises of Dr. Yogi in September 2007. At the relevant time, assessee was the Chief Health Secretary and this fact was within the knowledge of the respondents, but there is no explanation why the search was conducted after a period of near about 9 months. The document was seized from the premises of Dr. Yogi, but until and unless there was corroborating evidence, the respondents could not have formed the basis of issuing warrant of authorization. If there was some material with the Department that the assessee had purchased some house or land property, then there could have been definite evidence in this regard, but for a period of 8 months no information was collected and all of a sudden the warrant of authorization was issued. From the perusal of panchnama prepared during seizure, it appears that no objectionable document or undisclosed property was found except those which were declared in the earlier return. There is no other evidence available on record that the document related to the petitioner and the word 'ch', of which correctness is disputed by the assessee, indicted him. The Court held that, in absence of any cogent reasons in the present matter, warrant of authorization could not have been issued. Issuance of warrant of authorization is a serious action and for this authorization officer should have recorded his satisfaction. Though normally Court does not look for the reasons of satisfaction, but in the present case it appears that the warrant of authorization was issued merely on hypothecated grounds, which is not sustainable under the law.

Rajesh Rajora .v. UOI(2014) 220 Taxman 146 (Mag.)(MP)(HC)

S. 132 : Search and seizure – Authorization of search-No mention of assesses HUF-Addition was liable to be quashed.

A search was conducted at premises of assessee HUF and another HUF consisting of brothers and other relatives of assessee. Assessee challenged impugned search proceedings contending that warrant of authorization for impugned search was issued against 'KS', which belonged to other HUF and since assessee had no relation with 'KS', search proceedings initiated against assessee was invalid. Documents on record showed that before issuing warrant of authorization, department considered information which was available in respect of 'KS' and other associates and there was no mention of name of assessee. The Court held that merely because originally members of family of other group were engaged in electrical business of larger HUF and that assessee in its business of electrical goods was supplying goods to other group company, assessee could not be implicated. Further, issuance of authorization of search and seizure warrant without there being any information in possession about assessee and without recording satisfaction about not producing relevant books of account and other documents could not be sustained. Thus, in absence of compliance of requirement of section 132, authorization for search and seizure and consequent search and seizure in respect of assessee's properties was liable to be quashed.

Tejram Omprakash (HUF) .v. DIT (2014) 220 Taxman 85 (Mag.) (MP)(HC)

S.132: Search and seizure-Warrant of authorization–Reason to suspect need not be stated in notice-Notice valid. [S. 131(1A)]

Reason to suspect that income had been concealed or was likely to be concealed by assessees need not be stated in notice under s. 131(1A).Writ petition was held to be not valid.

Sumermal Jain .v. DCIT (2014) 360 ITR 553/225 Taxman 282/108 DTR 150/270 CTR 625 (Cal.)(HC)

S. 132B : Application of seized or requisitioned assets –Expl. 2 to S. 132B, though inserted w.e.f. 1.6.2013, is retrospective and seized cash cannot be adjusted against advance-tax liability.

(i) As per provisions of section 132B of the Act the assets seized u/s 132 or requisitioned u/s 132A may be adjusted towards the amount of any "existing liability". The Explanation 2 to section 132B of the Act inserted by the Finance Act, 2013 w.e.f. 1.6.2013 clarifies that for removal of doubts it is hereby declared that the "existing liability" does not include "advance tax" payable in accordance with the provisions of part C of Chapter XVII of the Act. In the Memorandum of Explanation the provisions of Finance Act, 2013 it has been stated that the amendment for insertion of Explanation-1 and Explantion-2 to the provisions of section 132B of the Act are propose to amend the aforesaid section was as to clarify the existing liability does not include advance tax payable in accordance with the provisions of part 'C' of Chapter XVII of the Act.

(ii) Therefore, the Explanation 2 to section 132B of the Act is a clarificatory provision which was inserted to clarify the intention of the legislature that the "existing liability" does not include advance tax payable in accordance with the provisions of Part 'C' of Chapter XVII of the Act. Explanation 2 attached to section 132B of the Act, is a clarificatory provision which is of retrospective effect, even if, the same was stated to be applicable from a particular date. We also hold that Explanation 2 to section 132B of the Act is retrospectively effective from the date of insertion of provision of section 132B of the Act w.e.f. 1.6.2002.

(iii) On the basis of foregoing discussion, we reach to a legal conclusion that the assets or cash seized u/s 132 of the Act is adjustable against the amount of any "existing liability" under the Act which does not include "advance tax" payable in accordance with the provisions of Part 'C' of Chapter XVII of the Act. (ITA No. 2557/Del/2012, dt. 17/10/2014.)

DCIT .v. Spaze Tower Pvt. Ltd. (Delhi)(Trib.);www.itatonline.org

S. 133A : Survey – Assessment without giving impounded documents-Matter remanded to the AO.

A survey was carried out at assessee's premises wherein certain documents were impounded. Thereupon, assessee filed a return declaring certain income. Assessee's claim was that return was filed on insistence of department and did not truly reflect its income for year under consideration. Assessee thus filed a revised return. Assessee also filed an application for supplying copies of impounded documents. Assessing Officer directed assessee to visit his office personally on a particular date and take copies of documents impounded. However, before date so fixed, Assessing Officer passed assessment order on basis of original return of income filed by assessee. Assessee thus filed instant petition challenging validity of assessment order. The Court held that, on facts, Assessing Officer passed impugned assessment order in undue haste which was not sustainable in law Therefore, matter was to be remanded back for disposal afresh.

Purvesh Mansukhbhai Shah .v. Addl.CIT (2014) 220 Taxman 154(Mag.) (Guj.)(HC)

S. 133A : Survey-Surrender-No addition can be made on the basis of a surrender simplicitor even if the surrender is during the course of survey proceedings. [S.143(3)]

The issue raised is infructuous inasmuch as even if the surrender is in order but the addition was not warranted on merits, it is only elementary that merely because the assessee has, under misconception of facts or law, surrendered an income, no addition can be made in respect of the same. We have also noted that as evident from the observations of the AO, there were no specific reasons for making the addition of Rs 10,00,000 save and except for the alleged surrender made by the assessee. The issue in appeal is also covered, in favour of the assessee, by a coordinate bench of this Tribunal in ACIT vs. Satya Narayan Agarwal (2004) 91 TTJ 481 wherein it is held that no addition can be made on the basis of a surrender simplictor even when surrender is made during the course of survey proceedings under section 133 (ITA No. 61/Agra/2013, dt. 18/07/2014. AY. 2008-09)

ITO .v. Ram Prakash (Agra)(Trib.)www.itatonline.org

S.133A: Survey–No corroborative evidence found to substantiate undisclosed income - stock increased by tampering with inventory sheet-report of handwriting experts not considered-video of survey proceedings not submitted-income from undisclosed income to be re-estimated.[Evidence Act,1881, S. 34].

The assessee was in the business of handicraft items. A survey was conducted u/s. 133A and statement of one of the partners was recorded. The stock was physically verified and a difference of Rs. 5 crore was found which was added to the total income of the assessee. On appeal to CIT(A), the addition was reduced to Rs. 3 crore.

On cross appeals to the Tribunal, it was observed that statement taken on oath cannot be the final basis for making an addition to the income of the assessee. The department had in the previous two assessment years accepted the trading records of the assessee and hence the same closing stock was the opening stock of the current assessment year which could not be disputed. There was tampering in the trading account which was confirmed by the handwriting experts but the report was neither considered by the AO or CIT(A). In absence of there being corroborative evidence with the department to substantiate the undisclosed income, the addition was deleted. (AY. 2008-09)

Unique Art Age .v. ACIT (2014) 29 ITR 547 (Jaipur)(Trib.)

S.133(6): Survey- Power–Call for information–No proceeding pending-Notice to call information from bank was held to be valid.

Power to call for information can be exercised in course of enquiry even where no proceedings are pending. Therefore, notice to banks calling for information as regards persons having cash transactions of over Rs. 1 lakh or having time deposits over Rs. 1 lakh was held to be valid.

Kathiroor Service Co-op Bank Ltd v. CIT (CIB) (2014) 360 ITR 243 /220 Taxman 41(SC)

S. 133(6):Survey-Power–Call for information–Notice to bank calling for information as regards persons having deposits-Held to be valid.

The petitioner challenged the notice issued by the ITO by way of writ. Dismissing the petition the Court observed that the Co-operative Bank should not feel shy to furnish the information sought by the Income tax department in order to ensure that transaction of the depositors are wholly transparent.The petitioner-bank had to furnish the information sought for by the Income-tax Department in order to ensure that the transactions of the depositors were wholly transparent. The petitioner was, however, free to move the authority for granting extension of time to furnish the particulars which shall be dealt with in accordance with law.Petition was dismissed.

Kulathupuzha Service Co-op Bank Ltd..v. ITO (Intelligence) (2014) 361 ITR 200 (Ker.)(HC)

S. 139 : Return-Interest-Due date for filing return-Non-Extension Of due date for filing ROI will cause "substantial hardship". CBDT must look into practical difficulties & take "just and proper" decision before 30.09.2014.[S.44AB,119]

The Petitioner filed a Writ Petition claiming that the action of the CBDT/ Government in issuing Notification dated 25.07.2014 to exercise the due date for filing the tax audit report u/s 44 AB but in not extending the due date for filing Income Tax Returns from 30.09.2014 to30.11.2014 was arbitrary. It was pointed out that great prejudice was being caused to the taxpayers by the said action of the CBDT. HELD by the High Court:

In view of the fact that the Madras High Court has already directed the CBDT to examine the representation of the assessees in general, before 30.09.2014, we feel it appropriate that the above representation of the Petitioners is also considered by the CBDT. Though we do not wish to express any view of the legalities of various issues involved, it does appear to us, from the arguments advanced, that there will be substantial hardship caused to the assessees, if the date of filing Return is not suitably extended. We hope and trust that CBDT will look into all these practical difficulties enumerated above and take a just and proper decision on the matter, before 30.09.2014, as already directed by the Madras High Court. In case the Petitioners are entitled to any further relief in view of the orders passed in various petitions filed in other High Courts, this order would not preclude the Petitioners from claiming the same. (WP No. 2492 of 2014, dt. 25/09/2014.)(AY.2014-2015)

The Chamber of Tax Consultants .v. UOI(2014) 271 CTR 155/109 DTR 219 (Bom.)(HC)

S.139:Return-Interest-Due date for filing return extended- Strictures passed against the CBDT for seeking to take advantage of its own wrong and disregarding genuine hardship of taxpayers. Due date for filing ROI extended to 30.11.2014 subject to charge of s. 234A interest.[S.44AB,119, 234A]

The Petitioner filed a Writ Petition claiming that the action of the CBDT/ Government in issuing Notification dated 25.07.2014 to exercise the due date for filing the tax audit report u/s 44 AB but in not extending the due date for filing Income Tax Returns from 30.09.2014 to 30.11.2014 was arbitrary. It was pointed out that great prejudice was being caused to the taxpayers by the said action of the CBDT. HELD by the High Court:

(i) We are not impressed by the stand taken by the Revenue urging inter alia that the format of the tax audit report nowhere requires certification of the Tax Consultants or Tax Auditors in relation to the information to be furnished for which Tax Audit is conducted. Though the filing of the return of income is the responsibility of the tax payer, that in no manner would make the Tax Auditors and the Consultants who are professionals any less concerned for correct computation of the income and true presentation of entire material before the Tax authorities;

(ii) The change of utility and non-availability of the new version till 20.08.2014 is the cause for the issue to have cropped up. The assesses cannot be put to the hardship nor can the professionals be made to rush only because the department chose to change the utility during the mid-year;

(iii) One of the main objectives of the computerization programme is to improve the efficiency and effectiveness of the tax administration. If the very computerization has caused genuine hardship to oneand all concerned, CBDT ought to have paid heed to the repeated requests of all concerned in exercise of its statutory powers;

(iv) It would have been desirable for the CBDT to have considered the request for extension of the due date as a very peculiar situation has arisen portraying the genuine hardship to the assessee and the tax consultants;

(v) Non-collection of tax for a period of two months and possible loss of Rs.220 crore in terms of interest for a period of two months in the event the self-assessed tax not paid, appear clearly as the reasons in the foundation for CBDT to deny such extension. The Revenue cannot be permitted to take advantage of its own error or delay, by putting forth magnified figures of loss and thereby also possibly in the process gaining interest for late filing of return in complete disregard to requirement of efficient management;

(vi) The CBDT ought to have responded to the representation. Instead, it chose not to respond but later before this Court in no uncertain terms has termed such a request impermissible on the ground that the grievances are not sustainable. Therefore, considering the larger cause of public good and keeping in mind the requirement of promotion of justice, we chose to exercise the writ of mandamus directing the CBDT to extend the date of filing of return of income to 30.11.2014, which is due date for filing of the TAR as per the Notification dated 20.08.2014. Such extension is granted with the qualification that the same may not result into non-charging of interest u/s 234A. (SCA No. 12656 of 2014, dt. 22/09/2014.)

All Gujarat Federation of tax Consultants .v. CBDT(2014) 271 CTR 113/109 DTR 177(Guj.)(HC)

S. 142A :Estimate by Valuation Officer – AO is empowered to refer the matter to DVO

The assessee company made an investment in the shopping complex and shown the investment value on the basis of report of an approved valuer. The AO referred to DVO and made addition for the difference in the values. The CIT(A) and the Tribunal deleted the addition in view of the decision of Smt. Amiya Bala Paul .v. CIT 262 ITR 470 (SC). On appeal the High Court observed that the ratio of the above case has been nullified by the retrospective amendment made u/s 142 A and remanded the issue back to the Tribunal for fresh adjudication. (AY. 1992 – 93, 93 – 94, 94 – 95)

CIT .v. Sangam Builders (2014) 220 Taxman 149 (Mag.) (All.)(HC)

S. 142A :Estimate by Valuation Officer- Reference to DVO without rejecting book of account is not justified.

During the assessment years under consideration, the A.O noticed that the assessee had constructed a building, where the cost of the building was shown on the basis of report of the approved valuer. The A.O. referred the matter to the DVO who estimated the cost. The A.O. made an addition u/s 69B being, difference between the reports of two valuers for both the assessment years under consideration. The said additions were deleted by the CIT(A) as well as by the Tribunal. The High Court observed that the assessee society was a beneficiary of Sections 11 and 12A of the Income Tax Act. The assessee submitted the books of accounts, vouchers, bills of buildings etc. to the AO which were examined by him with due application of mind but were never rejected. The reference to DVO without rejecting the books of account was not desirable. It stated that estimation was a question of fact and the Tribunal is a final fact finding authority. Hence there was no reason to interfere with the impugned order passed by the Tribunal (AY 2003-04 ,2004-05)

CIT .v. Institute of Literacy Development (2014) 220 Taxman 37 (Mag.) (All.)(HC)

S. 142A :Estimate by Valuation Officer–Section introduced w.e.f. 15.11.1972 – Proviso - could not validate reference already made in respect of assessments made before 30.9.2004.

Assessee constructed hospital at a cost of Rs.18 Lakhs. AO referred the matter of valuation to DVO and made certain additions. High Court held that at the time assessment was made, law as laid down by Supreme Court in case of Smt. Amiya Bala Paul .v. CIT (216 ITR 407) was applicable. Further, section 142A though introduced w.r.e.f 15.11.1972, proviso to section 142A clearly specifies that section 142A would not validate the action taken to refer the matter to DVO in respect of assessments completed prior to 30.9.2004. High Court relied upon the order of Allahabad High Court in case of CIT .v. Dr. A. .V. Kent (ITA No. 145 of 2004). (AY. 1995-96)

CIT .v. Dr. Renu Mahesh (Smt.)(2014) 220 Taxman 36 (Mag.) (All.)(HC.)

S.142A:Estimate by Valuation Officer-Search & seizure – Surrender of amount as cost of construction--Reference to valuation officer was justified.[S.69,69B, 153A]

When during search proceedings, assessee surrendered certain amount utilised by him towards cost of construction of building, it implied that cost of construction shown in the books was due to the fact that they were not properly maintained. Once that is so, the reference by AO to DVO u/s. 142A was justified. (AY. 2007-08)

Dr. Raghuvendra Singh .v. CIT (2014) 98 DTR 255/267 CTR 376(P&H)(HC)

S. 142(2A) : Special audit – Complexity of accounts and opportunity of being heard.

Proposal for special audit dt. 23rd Dec. 2011 sent by the AO did not disclose the consideration of the reply of the assessee. Approval of CIT also did not reflect application of mind to the facts of the case. Audit was also not communicated to the assessee. It was held that order of approval dt. 23rd Dec. 2011 and the letter dt. 29th Dec., 2011 be set aside and AO and the CIT were directed to reconsider the matter for directions for special audit under s. 142(2A) in accordance with law.

Kaka Carpets .v. CIT (2014) 101 DTR 33 / 43 taxmann. com 198 / 266 CTR 485 (All.)(HC)

S.142(2A): Special audit–Enquiry before assessment–AO need not examine books of account before directing special audit. **Question whether accounts are "complex" has to decided by AO & Court can interfere sparingly-Reference was held to be valid.[S.92CA]**

(i) The contention that the books of account were not called for and examined by the A.O. and therefore the directionfor special audit is bad in law is without merit. Sub-section (2A) of Section 142 does not require the "books of account" to be examined by the A.O. It empowers the A.O., with the previous approval of the Chief Commissioner or Commissioner of Income Tax, to direct the assessee to get the accounts audited if he is of the opinion that it is necessary to do so "having regard to the nature and complexity of the accounts of the assessee and the interests of the revenue……". It has been held by a Division Bench of this Court in Rajesh Kumar, Prop. Surya Trading Vs.Dy. CIT (2005) 275 ITR 641,(Del) that the expression "accounts" used in the section does not refer

merely to "books of account" of the assessee; it could include the books of account, balance sheets and all other records which are available to the A.O. during the assessment proceedings. It refers to the other records available with the A.O. not only in the course of the assessment proceedings but also at any stage subsequent thereto. It was held that the expression "accounts" cannot be confined to books of account as submitted by the assessee, as it would amount to giving an interpretation which completely defeats the very object of the section. It was further held that the fact that the accounts of the assessee are subject to audit under some other statute is also no ground to hold that in such a case the A.O. cannot direct a special audit. It was observed that in addition to the books of account, the A.O. may also take into consideration such other documents related thereto and which would be part of the assessment proceedings. This judgment was followed by another Division Bench of this court in Central Warehousing Corporation. In the light of these authorities, it is not possible to accept the contention that the A.O. cannot direct a special audit unless he examines the books of account. Writ petition was dismissed.(AY. 2008-09)

AT & T Communication Service India (P) Ltd. .v. CIT(2014) 362 ITR 97/100 DTR 161/266 CTR 457 (Delhi)(HC)

S. 143(1)(a) : Assessment – Intimation – Adjustments - Debatable issue. [S. 154]

Assessee kept certain security deposits and earnest money deposits, in order to ensure performance of timely supply of equipments. Security deposit, in most cases, was being adjusted towards various claims by customers and, accordingly, debit entry or credit entry was made. However, in case of disputed claims, receipts and payments were being debited or credited to profit and loss account as and when claims were settled. While processing assessment under section 143(1)(a), Assessing Officer made certain additions in respect of expenses and income relating to earlier year. The assessee filed a petition under Section 154 of the Income Tax Act and requested the AO to rectify the assessment, on the ground that the adjustments made were not in order. The claim made under Section 154 of the assessee was rejected. The CIT(A) stated that the assessee had made claims relating to earlier years and under mercantile system of accounting expenses relating to earlier year was not admissible in the subsequent year.

Hence the appeal was rejected. The Tribunal came to the conclusion that the claim of the assessee as regards the credit, expenses and income, being the subject matter of a debatable question, the claim could not be settled by way of a prima facie adjustment under Section 143(1)(a) of the Income Tax Act. It therefore allowed the appeal. The High Court observed that the nature of deposit maintained by the assessee and the claims from the customers were settled after protracted litigation and arbitration. It held that the relief on the merits of the claim could be considered only through the process of reasoning, given the limited scope of Section 143(1)(a) of the Income Tax Act, which is only a prima facie adjustment on a non-debatable issue. The High Court therefore agreed with the reasoning of the Tribunal that the AO was not correct in considering the claim under Section 143(1)(a). Thus, the matter could be gone into in the course of regular assessment. The High Court therefore rejected the plea of revenue and confirmed the order of the Tribunal. (AY. 1989-90)

CIT .v. Hackbridge Hewittic & Easun Ltd. (2014) 220 Taxman 171 (Mag.)(Mad.)(HC)

S. 143(2) : Assessment –Notice-Speed post-Notice u/s. 143(2) being served on assessee on next working day-Last day being Sunday-Due date for serving such notice considered valid. [S.282, General Clauses Act, S.10]

Notice u/s. 143(2) was served upon the assessee on 1-10-2012 though it had to be served by 30-9-2012 and consequently, assessment order was passed. The assessee filed petition and submitted that notice was invalid having been served beyond period prescribed in proviso to section 143(2). Accordingly, it prayed that consequent assessment be quashed and set aside. The department submitted that notice was in fact issued on 26-9-2012 by speed post and 30-9-2012 being Sunday, it was served upon assessee on very next working day and that, relying upon section 10 of General Clauses Act, notice was served within the period prescribed in section 143(2).

The High Court noted that the notice was in fact issued on 26-9-2012 which was sent by Speed Post and the last date for service of the notice under section 143(2) was 30-9-2012 which was postal holiday - Sunday and therefore, notice under section 143(2) came to be served upon the assessee on

the very next working day, i.e., on 1-10-2012 - Monday and, therefore, applying the logic of section 10 of the General Clauses Act and the relevant decisions, it cannot be said that the notice is barred by the period stipulated in section 143(2). Accordingly, dismissing the assessee's petition the High Court held that in the aforesaid facts and circumstances of the case, it can be said that there is sufficient compliance of section 143(2), more particularly, first proviso to section 143(2) and therefore, it cannot be said that the notice under section 143(2) is invalid and, consequently, it cannot be said that the assessment order is bad on the aforesaid ground.(AY. 2010-2011)

Gujarat State Plastic Manufactures Association .v. Dy.CIT (2014) 222 Taxman 182(Mag.) (Guj.)(HC)

S.143(2): Assessment-Block assessment-Non-service of s.143(2) notice does not render s. 158BC assessment order is in valid,if return is belated and assessee participated in assessment proceedings.[S.148,158BC, 292BB]

In the instant case, undisputedly the return was not filed under section 139(1) of the Act, it was rather a belated return as it was filed on 19.1.1995 and due date for filing of return was 31.10.1993. The return of the assessee was, however, processed under section 143(1) of the Act on 22.2.1995. Thereafter notice under section 148 of the Act was issued on 20.5.1998 and in response thereto the return was filed on 10.8.1998. Therefore, the return of income was not filed within the period specified under section 148 of the Act and as per aforesaid order of the Patna Bench of the Tribunal, the Assessing Officer was not under any obligation to get the notice served under section 143(2) of the Act. Moreover, the assessee has joined the assessment proceedings and represented its case by putting appearance before the Assessing Officer on different dates, therefore, it cannot be said that the Assessing Officer has framed assessment without affording valid opportunity of being heard to the assessee. Since the issue of issuance of notice under section 143(2) of the Act in the case of reassessment or the block assessment has already been examined by the Tribunal in the light of various judicial pronouncements and legal provisions of the Act, we find no justification to re-adjudicate the issue afresh.

(ITA no 244/LKW/2003 dt 23-09-2014(AY.1993-94)

Bharat Sewa Sansthan .v. DCIT (Luck.)(Trib.); www.itatonline.org

S.143(2):Assessment-Scrutiny-Notice-Fact that case is selected for scrutiny under CASS does not mean s. 143(2) notice & assessment order are void for non-application of mind by AO.

The assessee's case was picked up for scrutiny under CASS ("Computer assisted Scrutiny Selection") and the requisite notice u/s 143(2)(ii) was issued. The assessee claimed that u/s 143(2)(ii) it was incumbent upon the AO to apply his own mind and form "reason to believe" before issuing the notice and as this had not been done, the notice and the resultant assessment order were void. The CIT(A) rejected the claim. On further appeal to the Tribunal HELD by the Tribunal dismissing the ground.

The entire jurisprudence in respect of tax administration such as principle of natural justice etc. are with the sole object of ensuring that the tax payer is not unduly harassed by the tax department having almighty power of state. In order to make tax administration and collection friendly to tax payer, some steps have been taken by the tax administration/Government although much work is still to be done in this regard. Some of these steps are that it is made a rule that tax returns can be filed in a paper less manner in order to improve voluntary compliance by the tax payer and also to reduce the burden of filing voluminous documents along with the tax return. This is a big relief to the tax payer but this has to be ensured that there are some deterring measures so that no undue advantage is taken by any tax payer of this liberal policy of the Government. Even these deterring measures are to be such that they cause minimum harassment to the tax payer. Therefore, scheme had been devised that only very small percentage of total tax returns will be scrutinized by the department and generally it is about 2% to 3% of the total tax returns filed in a year. When it is seen that the return is to be filed by the assessee in paperless manner and still there has to be some deterring measure to prohibit the taxpayer from adopting the habit of tax evasion/avoidance, it was decided that there should be scrutiny in a small number of cases. Since the returns filed are paper less, some system has to be devised for selecting the case for scrutiny. When the return is filed without any paper, certain guidelines have to be formed for selecting some cases for scrutiny as deterring measure. These guidelines may be such that the person having income above a prescribed limit will be scrutinized in larger percentage compared to small tax

payers. It may be a policy that very small tax payers will not be scrutinized at all. If such a system is devised by the Department in a general manner without targeting a particular assessee, it cannot be said that such system of selecting a case for scrutiny is interfering with the independent decision of the Assessing Officer who is to select the case for scrutiny. Inspite of such guidelines, the ultimate decision is of the AO that a particular case is falling in such guideline and in this process, if the AO is taking help of computer in analyzing data disclosed by the tax payer in the return of income then it cannot be said that the decision for selecting the case for scrutiny is not independent decision of the AO. This is not the case of the assessee that there is any specific direction of any higher authority to select the case of this particular assessee for scrutiny. The guideline may be this as to what should be percentage of the cases to be selected for scrutiny in several different type of tax payers. The guideline may be that where search or survey has taken place, the number of cases to be selected should be high in percentage. Similarly, the guideline may be that if the assessee is claiming exemption/deduction of certain amount then also the percentage may be higher compared to those assesses who are not claiming any exemption/deduction. Such guidelines formed by the Department as a whole in general manner for the assesses all over the country, it cannot be said that such guideline is interfering with the independent decision of the AO for deciding the cases to be selected for scrutiny. If this view is taken then the departmental administration will be forced to adopt old system of selecting almost all cases for scrutiny which was causing very undue harassment to all the tax payers and wastage of the energy and efforts of the Department also. In the present system, the thrust is on voluntary compliance of the tax payer and by ensuring that some deterring measures are taken that too in a taxpayer friendly manner of promoting the assessee to file returns without attaching any paper and then selecting only very small number of cases for scrutiny with the aid of computer and certain generally formed guidelines. In our considered opinion, it cannot be said that the decision of the AO to select the case for scrutiny in this system is not an independent decision of the AO.(ITA No. 448/LKW/2012,dt. 05.09.2014.) (AY.2007-08)

U.P. State Industrial Development Corp.(UPSIDC) v. DCIT (Lucknow)(Trib.)www.itatonline.org

S.143(2): Assessment–Notice–Time limit for issue of notice as per proviso to 143(2) not followed - assessment order passed would be null and void.

On appeal, the Tribunalnoted that the assessee, as early as on 23.11.06 had vide its letter dated 22.11.06 intimated the AO of the change of address and had also raised a specific objection at the very first instance before the AO, that the notice u/s. 143(2) had not been served on it within the statutory time and hence it was barred by limitation. Accordingly, the ITAT held that the assessment order passed by the AO is void ab initio as the same was passed without the mandatory requirement of serving the notice u/s. 143(2) within the stipulated time provided. Consequently, the entire assessment and consequent additions made by the AO was quashed. (AY. 2006 – 07)

Abacus Distribution Systems (India) (P.)Ltd. v. DCIT (2014) 29 ITR 1/159 TTJ 156 (Mum)(Trib.)

S.143(3):Assessment-Scrutiny-CBDT instructions-After recording reasons the case was selected for scrutiny–Writ is not maintainable.[S.119, 142(1), 143(2)]

AO after recording reasons and approval of authority case was selected for scrutiny. The assessee filed writ petition, dismissing the petition the Court held that there was no violation of CBDT'S guidelines for selection of cases.(AY. 2010-11)

Ajay s/o Shantilal Lalwani (HUF) v. Dy.CIT (2014) 270 CTR 588 (Bom.)(HC)

S.143(3):Assessment-Method of accounting-Addition on the basis of e-mails recovered in the course of search proceedings of third party was held to be not valid.[S. 132, 145]

AO made addition on the basis that the assesse received additional sale consideration against sale of land on the basis of an e-mail recovered during the course of search action of third party. CIT (A) and Tribunal deleted the addition on the ground that no independent material was available to support such a claim. On appeal by revenue the Court held that finding recorded by appellate authorities did not suffer from any perversity, it did not require any interference.(AY. 2007-08)

CIT v. Alpha Impex (P) Ltd (2014) 224 Taxman 211(Mag) (Bom.)(HC)

S.143(3):Assessment-Breach of principles of natural justice—Alternative remedy-Show cause notice to comply less than 24 hours-Where there is a serious flaw in the decision-making process or prejudice is caused to a party on account of breach of principles of natural justice the Court enjoined to exercise writ jurisdiction. [S.80IA,246A, Constitution of India, Art, 226]

A Show cause notice was issued to the assessee, calling upon to show cause as to why its claim for deduction under Sec. 80IA should not be disallowed. The denial of benefit under Sec. 80IA was upon various grounds, such as commencement of business and fulfilling the eligibility criteria etc., u/s. 80IA. The assessee was given less than 24 hours to respond to the notice. The contention of the assessee is there was a breach of natural justice as in the present case there is no fear of the assessment getting time barred. In such circumstances it is incumbent upon the authority issuing such notice to grant reasonable opportunity to the assessee to respond to the notice. The court held that granting of an opportunity to respond to the show- cause notice in less that 24 hours is a flaw in the decision making process and therefore amenable to judicial review. The courts also observed that it has been times without number that justice must not be done but appear to have been done. The non consideration of the assessee's response to the notice by making it impossible for the assessee to file a reply for the consideration of AO does cause prejudice to the assessee leading to palpable injustice, thereby warranting to exercise of writ jurisdiction. Impugned order passed by the AO under sec. 143(3) in breach of natural justice was set aside by the Hon'ble Court and restored to the AO for fresh disposal after considering the assessee's reply and granting assessee a personal hearing. The Court also observed that in fact non-exercise of writ jurisdiction in appropriate cases would amount to abdication of Court's obligation to ensure that justice is done. Therefore , the alternative remedy would not by itself bar the exercise of writ jurisdiction, if the facts of the case so deserve. (WP No .3359 of 2013 dt 24-12-2013) (AY. 2005-06)

Vodafone India Ltd. v.UOI (2014) 97 DTR 441(Bom.)(HC)

S. 143(3) : Assessment – principals of natural justice –opportunity to cross examine.

Assessing Officer initiated reassessment proceedings and made addition to assessee's income based on a sales tax assessment order which was restored back by the Sales Tax Appellate Tribunal. The Tribunal found that no authenticated document providing information was collected from car manufacturer, nor was same furnished to assessee nor assessee was given opportunity of cross examining the officer. The High Court upheld the order of the Tribunal holding that where an assessee was not provided with opportunity to cross examine person providing information that lead into addition to income, and hence fresh adjudication was required.

Panchvati Motors (P.) Ltd. .v. ACIT (2014) 220 Taxman 39 (Mag.) / (2013) 39 taxmann.com 185 (P&H)(HC)

S. 143(3) : Assessment – No additions can be made on the basis of disclosure regarding on-money receipt in the subsequent years - in absence of any other incriminating material. [S. 132]

A search u/s. 132 was carried out at the premises of the son of the assessee and a diary containing details vis-à-vis sale of the plots of land was found which were disclosed by the assessee in the returns of income for A.Y.s 2006-07 and 2007-08. Subsequently the AO reopened assessment for the A.Y. 2005-06 with respect to sale of plots of land in A.Y. 2005-06 and applied the same ratio of profit to sales as that of A.Y. 2006-07 and 2007-08 and made additions to the profits as disclosed by the assessee. The CIT (A) and the Tribunal deleted the addition made by the AO.

The High Court dismissing the departmental appeal noted thatwhile confirming the order passed by the CIT(A), the Tribunal has observed that evidence found regarding the receipt of the on-money is in respect of subsequent year although, the project is same. If extra prices were commanded by the assessee in the assessment years 2006-07 and 2007-08, it cannot be valid basis to say that the same price was commanded by assessee in assessment year 2005-06 also without any incriminating material or corroborating material. This should also be kept in mind that the present year is the first year of the project and subsequent years are second and third year of the project, the project commands extra price in the market and therefore, it may be possible that in the first year i.e. in the present year, the assessee sold some of the plots on a lower prices. (AY. 2005-2006)

CIT .v. Jayaben Ratilal Sorathia (2014) 222 Taxman 64 (Mag.) (Guj.)(HC)

S.143(3):Assessment-Survey-Retraction-Commissioner (Appeals)- Powers-lawyer cannot improve the case of the litigant on the facts unlike the case of a question of law-Addition deleted by the CIT(A) was held to be not valid-Order of Tribunal confirming the addition was up held.[S.133(1), 133(4),133A]

Retraction of an admission is purely a matter of fact, which must be made available before the court or tribunal which then can consider it. Admission is a very important piece of evidence, unless it is explained or retracted.When a case is not made out before the Commissioner (Appeals), he should not make his own case basing on a lawyer's argument. A lawyer cannot improve the case of the litigant on the facts unlike in the case of a question of law. Such an act is without jurisdiction. The assessee had not made any attempt before the Commissioner (Appeals) to explain why its admission should not be accepted. Instead of retracting the admission, the assessee had invited the Assessing Officer to act upon it to pass assessment order and, accordingly it was done and the tax was duly paid. This was a voluntary act of the assessee and if the assessee accepted the liability, there was no scope to collect further evidence or make any enquiry. Thus, the exercise of power by the Commissioner (Appeals) of evaluating the legal implication of admission was not called for because no case was made out factually. The Tribunal had taken a correct decision in restoring the addition of Rs. 20 lakhs.Order of Tribunal was upheld.(AY. 1998-99)

Kermex Micro Systems (India) Ltd. .v. Dy.CIT (2014) 362 ITR 13 (AP)(HC)

S.143(3):Assessment–Appellate Tribunal-Power to allow claim not made in the return-Claim by way of revised computation claiming exemption dividend from mutual fund-Entitle to claim-Assessment proceedings not adversarial.[S.10(33),73,139(5),251, 254(1)]

The assessee did not claim deduction or business loss in the return of income declaring taxable income of Rs. 1,72,910. Subsequently, notice for scrutiny assessment under s. 143(2)(ii) was issued. During the course of the assessment proceedings, the assessee filed a revised computation of income claiming that dividend of Rs. 80,48,977 from the units of mutual fund was exempt under s. 10(33) and loss on sale of units amounting to Rs. 85,18,583 was a business loss and not speculative loss. The claims were rejected by the AO and CIT (A). Held, the Tribunal was justified in reversing the order of lower authorities.

Courts have taken a pragmatic view and not a technical view as what is required to be determined is the taxable income of the assessee in accordance with the law. In this sense, assessment proceedings are not adversarial in nature. Tribunal has power to allow a claim which is not made in the return.(AY.2001-02)

CIT .v. Sam Global Securities Ltd. (2014) 360 ITR 682 /105 DTR 41(Delhi.)(HC)

S.143(3):Assessment-Order giving effect to quashed order of Commissioner - AO's action of giving effect to a quashed s. 263 revision order termed "assault on rule of law"&"contempt of court".

The CIT passed an order u/s.263 and held that the assessment order was erroneous and prejudicial to the interests of the revenue. This was set aside by the Tribunal. However, despite being aware of the Tribunal's order quashing the s. 263 order, the AO passed an assessment order to give effect to the s. 263 order. The CIT(A) quashed the assessment order. On appeal by the department to the Tribunal HELD dismissing the appeal:

By the by, we are very much astonished to observe that the AO has passed a revised assessment order even after knowing that the revision order passed by the CIT has been set aside by the Tribunal. The action of the AO could be treated as assault on the rule of law. His action amounts to contempt of court as well. The Revenue could have preferred to file an appeal before the High Court against the order of the Tribunal setting aside the revision order passed by the CIT. If such an appeal has been already filed, well and good. Otherwise, Revenue has no remedy when the Tribunal has set aside the revision order of the CIT. The said order no more exists and the AO has no substratum to build a second round of revised assessment. We do not think that all these matters are unknown to the Assessing Authority. But giving due consideration to the explanations offered by the learned senior officers appearing for the Revenue and also for the reason that the AO might have prompted to act in

haste, only in public interest, we do not proceed further in this matter. But we wish that before jumping into such controversial games, the AO ought to have taken advice from his seniors. (ITA No. 1173/Bang/2009, A. Y. 2002-23, Dt. 22/04/2010)
DCIT v. SAP Labs India Pvt. Ltd. (Bang.)(Trib.) www.itatonline.org

S. 144 : Best-judgment assessment–Revision-Assessees uneducated persons not properly represented before Assessing Officer – Commissioner dismissing revision petitions from assessments and refusing to recall his order - High Court affirming - Supreme Court - No interference with assessment but no interest or penalty to be charged.[S. 264]
The assessees having failed to appear before the assessing authority, the latter completed the assessmentsunder section 144 of the Income-tax Act, 1961. The assessees did not file an appeal, but instead filed a memorandum of revision under section 264 of the Act before the Commissioner who dismissed it as no one attended the office on the fixed date. An application to recall the order was dismissed on the ground that there was no provision under the Act for recalling an order passed under section 264 thereof. On a writ petition contending that the Commissioner should have considered the matter on the merits, the High Court dismissed the petition holding that in the absence of any material to show that the assessment order was not correctly framed, the Commissioner, in the absence of the assessee, was left with no option but to dismiss the revision petition. On appeal to the Supreme Court, it was held that the assessees, who were not very educated persons, unfortunately could not be properly represented before the Assessing Officer and, therefore, the assessment was made for the assessment years 1998-99. The assessment for the assessment year 1998-99 was over and the assessment order had become final. In these circumstances, the court would not interfere with the assessment order. However, no penalty proceedings were to be initiated and no interest was to be recovered from the assessees if the tax was paid within 60 days. (AY. 1998-1999)
Tripal Singh .v. CIT (2014) 365 ITR 511 (SC)

S. 144 : Best judgment assessment-Cash credits–Civil construction-Assessment on reasonable basis-Outstanding balances of creditors-Deletion was held to be justified.[S.44AB,68]
Since the assessee failed to produce its books of account, the AO issued a notice to show cause why addition should not be made of unconfirmed credits and proposed to disallow 50 per cent. of the expenses. Accordingly, the AO made addition of Rs. 1.25 crores as unconfirmed creditors and disallowed 50 per cent. of the expenses in the sum of Rs. 9.16 crores. The Commissioner (Appeals) called for a remand report from the AO and noted that most of the balances of the creditors were verified and confirmed. He held that the AO was justified in carrying out a best judgment assessment u/s 144 but the best judgment assessment should be based on pragmatic and reasonable considerations and that the AO had acted unreasonably in adding the entire sundry creditors' balances and disallowing 50 per cent of the expenses which would result in an unreasonable profit margin of 50 per cent. Moreover, the assessment of the assessee for the assessment year 2005-06 had been completed u/s 143(3) at a net profit rate of 3.1 per cent. and for the assessment year 2008-09, the net profit declared by the assessee was 4.5 per cent. Considering the totality of facts and circumstances, he held that a net profit rate of seven per cent.would be fair, having regard to the rate adopted in the case of the assessee itself and the nature of the civil construction business. (AY. 2008-09)
CIT .v. Jogendra Singh and Co. (2014) 361 ITR 78 (All.)(HC)

S. 144C : Reference to dispute resolution panel-Transfer pricing-Non-passing of draft assessment order after adjustments made by the TPO renders proceedings null & void.[S.92CA]
Under Section 144C(1) of the Act, with effect from 1st October 2009, the Assessing Officer has to mandatorily issue a draft assessment order if there is a proposed variation to the return which are prejudicial to the eligible assessee. The fact that the petitioner is an eligible assessee is not in dispute. While so, under Section 144C(2) of the Act, the eligible assessee has the option, either to accept the variation or to file their objections before the DRP and such option has to be exercised within 30 days. On such objections filed by the assessee, the DRP shall issue appropriate direction for the guidance of the assessing officer under Section 144C(5) of the Act. It is only thereafter, the AO is bound to pass a final order of assessment in compliance with the directions issued by the DRP under Section 144C(3) of the Act. In the present case, without following the above mandatory procedures, the AO has passed

the order of assessment on 26.03.2013 and subsequently issued a corrigendum on 15.04.2014 to rectify the mistake committed in passing the final order of assessment inter alia to treat it as a draft assessment order. This course of action adopted by the second respondent is contrary to the mandatory provisions contained in the Act and the corrigendum issued by the AO could not cure the defect. The very fact that the assessing officer has signed the order of assessment and also assessed the amount payable by the assessee has become complete and it cannot be simply treated as a draft assessment order or rectified by issuing the corrigendum. In fact, pursuant to the order of assessment under Section 143(3), demand was also made for payment of the amount and such demand has not been withdrawn by the second respondent even after issuing the corrigendum. Even as per the website of the department, the demand made to the petitioner company continues till date and therefore, the final order as well as the corrigendum issued by the second respondent are vitiated by errors apparent on the face of the record and they are legally not sustainable.(W.P. No. 1526 and 1527 of 2014, dt. 29.04.2014.)

Vijay Television Pvt. Ltd. .v. DRP (Mad.)(HC);www.itatonline.org

S. 144C : Reference to dispute resolution panel - The DRP shall give clear and speaking directions to the AO for passing the assessment order and the statute ensures that the said power is not delegated to the AO.

A perusal of the above shows that the provisions of section 144C provides the entire mechanism for making a reference to the DRP; the power of the DRP and also the procedures which have to be followed to issue the direction to the AO are fully set out therein. On a perusal of the statutory provisions it can be seen that (a) where the objections have been filed by the assessee the DRP has to issue directions to the AO for his guidance so as to enable him to complete the assessment; (b) such directions can be given after considering the various factors which have been elaborated in sub-section (6); (c) the DRP has also been conferred with the power to make an enquiry and to issue any directions as per sub-section (7); (d) sub-section (8) places a limitation on the powers of the DRP to either confirm, reduce or enhance the variation proposed by the AO in the draft assessment order. The statue does not stop there, it further clarifies that the DRP does not have any power to set aside any proposed variation or issue direction for further enquiry and passing of the assessment order thereby meaning the DRP has to come to a clear cut direction to be given to the AO; (e) sub-section (9) address the procedures where the DRP members differ we are not concerned in the present proceedings with the same; (f) sub-section (10) makes the direction given by the DRP binding on the AO; (g) sub-section (11) enunciates the rules of fair play and natural justice by ensuring that in the eventuality a direction under sub-section (5) which is pre-judicial to the interests of the assessee or the Revenue has been given in such an eventuality an opportunity of being heard has to be granted to the assessee or the AO by the DRP; (h) the sub-section 12 gives the limitation within which the direction under sub-section (5) is to be given effect to by the AO; (i) sub-section (13) mandates the AO to pass an order in conformity with the direction of the DRP without providing an opportunity to the assessee.

PGS Geophysical .v. ADIT (Delhi)(Trib.);www.itatonline.org

S. 144C : Reference to dispute resolution panel-Transfer pricing- rule of natural justice DRP was required to adjudicate objections filed by assessee-Matter set aside.[S.92C]

Assessee raised objections before DRP against addition made in draft assessment order on account of TP adjustment.Assessee filed application before DRP to withdraw objections raised before it. DRP rejected application for withdrawing of objections and directed A.O. to pass assessment order in consonance with draft assessment order. Tribunal held that since DRP was of view that assessee did not have option to withdraw objections, as per rule of natural justice DRP was required to adjudicate objections filed by assesse.Matter was set aside to the DRP with a direction to adjudicate all the issues on the objections filed by the assessee as per law by way of speaking order after giving the assessee a reasonable opportunity of hearing. (AY. 2006-07)

Truetzschler India (P.) Ltd. .v.Dy.CIT (2014) 146 ITD 679 / (2013) 37 taxmann.com 139 (Mum.)(Trib.)

S.144C:Reference to dispute resolution panel -Non-Speaking order-Matter set aside.

It is obligatory for DRP, a quasi-judicial authority, to ascribe cogent and germane reasons for arriving at a conclusion, when its order is called in question before a superior or an appellate forum.DRP dismissed the appeal of assessee by way of non speakingorder, matter was remitted back to DRP.(AYs. 2007-08 to 2009-10)

Starwood Asia Pacific Hotel and Resorts (P.) Ltd. .v. Addl.CIT(2014) 146 ITD 790 / (2013) 35 taxmann.com 425 (Delhi)(Trib.)

S.144C: Reference to dispute resolution panel – NO debit to Profit and loss account still addition was confirmed by DRP-Tribunal deleted the addition- Accountability- ITAT hauls up AO & DRP for *"blatantly frivolous & unsustainable"* additions. Suggests that accountability mechanism be set up to put a check on AO. Rationale for existence of ineffective DRP questioned.

Pursuant to a scheme of arrangement the assessee transferred its telecom infrastructure assets to Bharti Infratel Ltd for Nil consideration with the result that the WDV of the said assets amounting to Rs. 5,739 crore was written off by debiting the P&L A/c. A corresponding amount was credited to the P&L A/c from the 'business restructuring reserve' with the result that there was no net debit to the P&L A/c. The AO & DRP noted that there was no effect on the P&L A/c but still held that an addition of Rs 5,739 crore had to be made to the assessee's income. On appeal by the assessee to the Tribunal, HELD by the Tribunal allowing the appeal:

… if an action of the AO is so blatantly unreasonable that such seasoned senior officers well versed with functioning of judicial forums, as the learned DRs are, cannot even go through the convincing motions of defending the same before us, such unreasonable conduct of the AO deserves to be scrutinized seriously. At a time when evolving societal pressures demand greater degree of accountability in the governance also, it does no good to the judicial institutions to watch such situations as helpless spectators. If it is indeed a case of frivolous addition, someone should be accountable for the resultant undue hardship to the taxpayer -rather than being allowed to walk away with a subtle, though easily discernable, admission to the effect that yes it was a frivolous addition, and, if it is not a frivolous addition, there has to be reasonable defence, before us, for such an addition.

… Whichever way one looks at these entries, the inescapable conclusion is that the addition made by the AO is wholly erroneous and devoid of any legally sustainable merits.

…. The fact that even such purely factual issues are not adequately dealt with by the DRPs raises a bigquestion mark on the efficacy of the very institution of Dispute Resolution Panel. One can perhaps understand, even if not condone, such frivolous additions being made by the AOs, who are relatively younger officers with limited exposure and experience, but the Dispute Resolution Panels, manned by very distinguished and senior Commissioners of eminence, will lose all their relevance, if, irrespective of their heavy work load and demanding schedules, these forums do not rise to the occasion and do not deal with the objections raised before them in a comprehensive and effective manner.

… While we delete the impugned addition of Rs 5739,60,05,089, we also place on record our dissatisfaction with the way and manner in which this issue has been handled at the assessment stage. Let us not forget that the majesty of law is as much damaged by not rendering justice to the conduct which cannot be faulted as much it is damaged by a wrongdoer going unpunished; not giving relief in deserving cases is as much of a disservice to the cause of justice and the cause of nation as much a disservice it is , to these causes, by granting undue reliefs. The time has come that a strong institutional check is put in place for dealing with such eventualities and de-incentivizing this kind of a conduct.(ITA No. 5816/Del/2012. order dt. 11/03/2014. A. Y. 2008-09)

Bharti Airtel Limited .v. ACIT(2014) 101 DTR 154/161 TTJ 428(Delhi)(Trib.)

S. 145 : Method of accounting – Profit being low cannot be a ground for rejection of books of accounts.

The assessee company was engaged in the manufacture and sale of sugar.The assessee conducted its business through commission agents and made necessary entries in books of account only on receipt of sale consideration. The AO rejected the books of accounts on the ground that the assessee had shown a low sale / profit amount. The CIT(A) upheld the Assessment Order however the Tribunal deleted the same.

The High Court observed that the books of account were properly audited, checked and no specific error was detected and that the sales were fully verifiable since the copies of challans, mandi tax vouchers, transport bills, etc. were also made available to the AO. The High Court following other decisions on the subject held that profit being low by itself cannot be a ground for rejection of the books of account and thereby dismissed the departmental appeal.

Dy. CIT .v. Hanuman Sugar (Khandsari) Mills (P.)Ltd. (2014) 221 Taxman 156 (All.)(HC)

S : 145 : Method of accounting-Rejection of books of account- Finding of fact and no question of law arises.

Assesse during the relevant year assesses Gross Profit rate was 4.73% as against 8.14% in the immediately preceding year and assessee failed to produce stock Register of production & sale of mustard cake . AO rejected the trading results by applying GP rate @ 6% invoking the provisions of S.145(3). Both CIT(A) & Tribunal sustained the addition. On further appeal in HC, HC held contentions of lower authorities as findings of fact and held that all the authorities had categorically pointed out that assessee did not maintain stock register and further specific finding of lower authorities could not alter the position by the contrary observation of the Chartered Accountant in its Audit Report cannot said to be correct. Further AO had pointed out several deficiencies while making the assessment coupled with the fact for which there was no appeal explanation. Rejection of books of account after invoking provisions of S.145(3) was clearly a finding of fact and no substantial question of law arises out of the order of the Tribunal.

Mukesh Oil Mills (P) Ltd. v.ITAT (2014) 264 CTR 196 (Raj)(HC)

S.145:Method of accounting -Cash basis-FDRs interest –Mutual funds- Offering the income on receipt basis was held to be justified.[S.5]

Assessee was maintaining accounts on actual receipt basis. He had shown interest income from fixed deposit receipts and mutual funds on receipt basis. Tribunal observed that interest income must be taken on receipt basis.Order of Tribunal was held to be justified. (BP.1987-88 to 1995-96)

CIT v. Singh K.P. (Dr.) (2014) 97 DTR 289(All) (HC)

CIT v. Sudha Singh (Dr.)(Smt.) (2014) 97 DTR 289(All) (HC)

S.145:Method of accounting- Rejection of Accounts-Non maintenance of stock register-Rejection was held to be not justified.[S.145(3)]

The assessee is engaged in manufacturing and trading of bed sheets, cotton clothes, general clothes and quilts. During the year under consideration, he had shown gross profits of Rs. 8,28,531 and a total turnover of Rs. 1,11,55,235 while giving GP rate at 7.43%. The AO proceeded to complete the assessment while taking the total income at Rs. 17,42,360/-as against the returned income of Rs. 2,30,830. The AO observed that the assessee has not maintained the stock register and quantified and qualified details of the goods could not be verified and sales were also not verifiable. The AO rejected the books of accounts and invoked the provisions of sec.145(3) of the Act, estimated the gross profit per cent on the estimated turnover of Rs.1.20 Crs., resulting into the trading addition of Rs. 1,91,439. Court held that when the CIT(A) has deleted the addition in the trading result on the relevant consideration and finding was affirmed by Tribunal,no substantial question of law arises. (AY. 2005-06)

CIT v. Babulal Agarwal (2014) 97 DTR 284(Raj.) (HC)

S. 145 : Method of accounting – Valuations of stocks - small and numerous stock items.

The AO made addition of Rs.9, 04,632/- as the value of tools and spares for one month since such stock was not reflected in the closing stock of the previous year. The assessee has taken a stand that the items of spares are small in nature and numerous and, that the valuations takes long time. The assessee had been following the same method of accounting since the assessment year 1983-84. It also pointed out that stock of the company is of 15 days. The CIT(A) reduced to the stock of 15 days instead of one month &reduced to 50% of Rs.9,04,632/-. Tribunal deleted the total addition made. The High Court held that the items may be small in nature, may be numerous but each item which is in stores of the assessee is required to be valued, therefore, the assessee cannot be permitted to assert that the stock of spares is not required to be valued in the closing stock. The High Court therefore

stated that the valuation by the CIT(A) was in tune with the reply filed by the assessee i.e. maintaining average stock of 15 days. Therefore the order passed by Tribunal was unjustified and the same was set aside. (AYs. 1994 – 95 & 1995 - 96)

CIT .v. Majestic Auto Ltd. (2014) 220 Taxman 41 (Mag.)(P&H)(HC)

CIT .V. Majestic Auto Ltd. (2014) 220 Taxman 42 (Mag.)(P&H)(HC)

S.145 : Method of accounting-Undisclosed investments-Unaccounted consumption of raw materials - Estimation of profit at 35% of extra consumption was held to be reasonable.[S.69B]

There was unaccounted consumption of raw materials. However, there was no direct evidence of unaccounted sales outside the books of account. Profit estimated at 35% of such extra consumption of raw materials. Order of Tribunal was confirmed.(AY.2007-08, 2008-09)

CIT .v. Leo Formulations P. Ltd (2014) 363 ITR 322/225 Taxman 386 (Guj.)(HC)

S. 145 : Method of accounting –Business loss –Securities held by bank-Valuation of securities-Loss on account of depreciation in value of securities held as stock is not notional & is allowable as business loss.[S.28(i), 263]

A method of accounting adopted by the taxpayer consistently and regularly cannot be discarded by the Departmental authorities on the view that he should have adopted a different method of keeping the accounts or on valuation. Financial institutions like bank, are expected to maintain accounts in terms of the RBI Act and its regulations. The form in which, accounts have to be maintained is prescribed under the aforesaid legislation. Therefore, the account had to be in conformity with the said requirements. The RBI Act or the Companies Act do not deal with the permissible deductions or exclusion under the Income Tax Act. For the purpose of the Income Tax Act, the method of valuation followed by the assessee was to value the investments at cost or market value whichever was lower. The assessee was entitled to claim a deduction for the depreciation in the value of the securities held by it. The fact that the securities were not sold to a third party did not mean that the loss was notional.(ITA No 250 of 2012, dt. 10/07/2014.) (AY.2005-06)

CIT .v. HDFC Bank Ltd(2014) 107 DTR 395(Bom.)(HC)

S. 145 : Method of accounting – Method of valuation accepted by department for earlier assessment years cannot be disallowed for current year.

The assessee made provisions for defective stock at the end of the year at varying rates based on the type of stock. The AO did not accept the assessee's contention and held that there was no method to justify the reduction in the value of the stock as was done by the assessee. The CIT(A) and the Tribunal however, deleted the addition made by the AO.

The High Court dismissing the departmental appeal observed that the revenue had accepted similar claims in the previous assessment years and a consistent valuation method was adopted by the assessee which was also accepted by the revenue. The High Court therefore held that it would be improper to allow the revenue to change its position only for one year, which would upset the method of valuation of the stock for a particular year thereby resulting in a distorted version of the profits and also that the method of valuation of closing stock could be disturbed only if it is found that the method followed is such that true profits and gains cannot be deduced therefrom. (AY. 1997-1998)

CIT .v. Samsung India Electronics Ltd. (2014) 222 Taxman 21 (Mag.)(Delhi)(HC)

S. 145 : Method of accounting – Rejection of accounts –Special audit- Audited books of account not rejected or matter not referred to special audit – AO not entitled to compute average interest on advances and make additions. [S. 142(2A)]

The assessee a cooperative bank is incorporated under the Regional Rural Bank Act, 1976. During the course of the assessment proceedings, the assessee had produced audited books of accounts before the AO, which were examined by him. The assessee was further asked to give details of the interest received from various categories of borrowers on advances given in a particular proforma. The assessee, however, did not submit the reply in the proforma due to which the AO averaged the interest on an ad-hoc basis arbitrarily on all kinds of advances. The Tribunal observed that the AO did not

examine the books of account before arriving at the finding of charging of lower interest and also did not refer the matter for special audit.
The High Court dismissing the departmental appeal held that unless the audited books of accounts were rejected or the matter was referred to special audit the AO was not entitled to average the interest on the advances and to add difference of the interest averaged by him on such advances.(AY. 2009-2010)
CIT .v. Regional Kisan Gramin Bank (2014) 222 Taxman 134 (Mag.) (All.)(HC)

S. 145 : Method of accounting - Valuation of stock - Merely because two different methods had been employed, one for the valuation of stock and the other for costs of production, books of accounts could not be rejected if the methods adopted had been followed consistently.
The assessee had been valuing finished goods at market value taking sale price of items in month of April of following accounting year while raw material and semi-finished goods were valued on a cost basis in its books of account. The AO rejected the books of accounts as the assessee was following two different methods. On an appeal before the High Court, the latter held that there was no other discrepancy in accounts; hence, the books of accounts could not be rejected. (AY. 2003-04)
CIT .v. Sanspareils Greenlands (P) Ltd. (2014) 221 Taxman 193 (All.)(HC)

S.145:Method of accounting-Valuation of closing stock–Cess paid– Not includible in value of closing stock.
Valuation of closing stock was to be made excluding the amount of cess paid by the assessee.
CIT .v. McLeod Russel (India) Ltd. (2014) 361 ITR 663 (Cal.)(HC)

S.145: Method of accounting-Valuation of closing stock–Land in dispute before civil court– Adverse impact on market value-Addition on account of undervaluation of closing stock was not proper.
Land purchased by assessee was in dispute before civil court. The dispute had an adverse impact on market value of land. Assessee reduced the value of closing stock and there was no change in method of valuation. The Department accepted the value as value of opening stock in subsequent year. Held, addition on account of undervaluation of closing stock is not proper. (AY. 2006-07)
CIT .v. Satish Estate P. Ltd. (2014) 361 ITR 451/106 DTR 100/226 Taxman 11(Mag.)(P&H)(HC)

S. 145: Method of accounting–Estimation of profits–Depreciation is not allowable on estimated net profit.[S.32, 144]
When the net profit is determined on estimate basis after rejecting the books of account, then no deduction including depreciation is allowed. (AYs. 1994-1995 to 2003-2004)
CIT .v. Sahu Construction P. Ltd. (2014) 362 ITR 609 (All.)(HC)

S.145: Method of accounting-Valuation of stock – Change in method – Undervaluation of stock-Method followed consistently-Deletion of addition was held to be valid.
No addition could be made on account of undervaluation of stock in the current year due to finding by Tribunal that changed method was more scientific and that no addition was made in prior years on account of undervaluation of stock. The changed method was more scientific and did not result any evasion of payment of tax. (AY.1998-99)
CIT .v. Dhampur Sugar Mills Ltd. (2014) 360 ITR 82 (All.)(HC)

S.145: Method of accounting-Valuation of stock - Drugs in stock not saleable-Nil valuation was held to be justified.
Assessee sold its drug manufacturing unit but retained certain stock. On finding that drugs in stock were not saleable, valuation of stock at "nil" was held to be justified. (AY. 2001-02]
CIT .v. Wintac Ltd. (2014) 360 ITR 614/ 221 Taxman 87 **(Karn.)(HC)**

S.145:Method of accounting-Rejection-Estimate of income- Tribunal has to be pass reasoned order after dealing with arguments of both the parties. [S.254(1)]

Court observed that arguments advanced /points urged deserve to be dealt with, reasons from affirmation have to be indicated though in appropriate cases they may be briefly stated. Recording of reasons is part of fair procedure and reasons are harbinger between the mind of the maker of the decision in the controversy and the decision or conclusion arrived at and they always substitute subjectivity with objectivity. Court set aside 81 matters to Tribunal by observing that the judgements of Tribunal being stereo typed, non speaking, unreasoned, arbitrary and whimsical. The court also observed that the authorities should make an honest and fair estimate of the income even in a best judgement assessment and should not act arbitrarily. Reduction by Tribunal of estimated addition by AO without any facts or comparable cases or past history was not sustainable; Matter is remanded for reconsideration. (AY.1995-96)

CIT .v. Ram Singh and others (2014)266 CTR 122/99 DTR (Raj.)(HC)

S. 145 : Method of accounting-Stock in trade-Change of method of accounting to value the stock of its investments / securities at lower of cost or market value is valid.[S.28(i)]

A premise which can be drawn is that for the purposes of valuation of the closing stock it is permissible for the assessee to value it at the cost or market value, whichever is lower. In-fact, the Hon'ble Supreme Court in the case of Chainrup Sampatram vs. CIT, (1953) 24 ITR 481 (SC) held that the assessee is entitled to value the closing stock either at cost price or market value, whichever is lower. In the present case, Revenue does not dispute that the method of the valuation adopted by the assessee, namely, valuing the stock either at cost price or market value whichever is lower, is a generally accepted method of valuation. No doubt, there are no statutory rules for the valuation of closing stock but the ordinarily accepted method of commercial accounting support the valuation of closing stock based on the lower of the cost or market value. Therefore, the departure from the erstwhile method of valuation of closing stock by the assessee is quite appropriate, and in fact is line with a method approved by the Hon'ble Supreme Court in the case of ChainrupSampatram (supra). In-fact, the only basis for the Revenue to challenge the bona-fides of the change is that the change has been effected only for the purpose of assessment of taxable income and is not incorporated in the account books. The aforesaid plea of the Revenue, in our view, is quite misplaced because it is well understood that assessee is a banking company and is statutorily mandated to maintain its books of account in terms of the RBI guidelines. On the other hand, the assessment of taxable income has to be based on the principle of law and cannot be guided merely by the treatment meted out to a particular transaction in the account books. In-fact, this aspect of the controversy has also been answered by the Hon'ble Karnataka High Court in the case of Corporation Bank Ltd. (supra) by relying on the judgement of the Hon'ble Supreme Court in the case of Kedarnath Jute Mfg. Co. Ltd. vs. CIT, (1971) 82 ITR 363 (SC).(ITA No. 1505/PN/2008. Dt. 17.09.2014.) (AY.2005-06)

ACIT .v. Bank of Maharashtra (Pune)(Trib.);www.itatonline.org

S.145:Method of accounting-Even if assessee is following mercantile system, income cannot be assessed if its collection/ receipt is not certain- "real income" v. "hypothetical income" .

The assessee advanced funds to various parties on which it was entitled to receive interest. However, owing to the financial difficulties of the borrower, the assessee did not receive any interest. It accordingly did not offer any interest income to tax. However, the AO & CIT(A) held that as the assessee was following the mercantile system of accounting, the said interest had accrued to it and was chargeable to tax notwithstanding the inability of the borrower to pay the same. On appeal by the assessee to the Tribunal HELD allowing the appeal:

(i) To arrive at the real income, accrual basis cannot be a justifying factor and the commercial and business realities of the assessee, should be considered. The interest income has been recognized in the books of accounts only to the extent of actual collection, which is the recommended/ recognized method as per Accounting Standard 9 of ICAI which lays down that when uncertainties exist regarding the determination of the amount or its collectability, the revenue shall not be treated as accrued and hence shall not be recognized until collection. The recognition of revenue on accrual basis presupposes the satisfaction of two conditions (a) The revenue is measurable (b) The revenue is collectable with certainty. The interest income has been admittedly recognized only on receipt basis. The contention of the revenue that the loan agreements have interest clause permitting the assessee to charge interest at the rate of 14% is not tenable. The terms of the agreements, which enabled the

assessee company to demand interest were only enabling provisions and those enabling provisions did not guarantee the collection of overdue interest. They only gave a cause of action to the applicant;
(ii) The method of accounting, as followed by the assessee, does not create any income. The method of accounting only recognizes income. Income cannot be taxed on hypothetical basis, and it is only the real income that is to be brought to tax. When the principal itself is overdue and not collected, there is no basis for making out a case that interest income would be collectable with certainty. Even where an assessee is following the mercantile system of accounting, it is only accrual of real income which is chargeable to tax, that accrual is a matter to be decided on commercial belief having regard to the nature of business of the assessee and character of the transaction. Accordingly, for the purpose of determining whether there has been accrual of real income or not, recourse is to be made to ascertain the nature of business and character of the transaction and the realities and peculiarities of the situations.(ITA No. 468/Hyd/2009, AY. 2005-06, dt. 05.09.2014.)(AY.2005-06)
Maruti Securities Ltd. .v. ACIT (Hyd.)(Trib.)www.itatonline.org

S. 145: Method of accounting -Search and seizure-Books of account not rejected-Unaccounted cash consideration found in the courses of search and credited by the assessee in the books of account was to be assessed as income and not the net profit of 20% offered by the assesse.[S.132, 145(3)]
Assessee was engaged in business of real estate development. During search conducted at business and residential premises of assessee, incriminating documents were found evidencing receipt of sale consideration in cash for sale of plots, which was duly accepted by assesse. Assessee credited impugned sum to its profit and loss account which was accepted by auditor. However, in its return of income, assessee first excluded impugned sum from net profit and thereafter added 20 per cent thereof. AO taxed entire sum credited as income of the assesse .Books of account was not rejected. In appeal CIT (A) directed AO to apply net profit rate of 30 per cent. On appeal by revenue the Tribunal held that there was no evidence to establish that the assesse firm had incurred any expenditure to earn the impugned sum, CIT(A) still allowed 70 percent of the impugned sum as expenditure ignoring the fact that the claim for such deduction was not only inconsistent with the assessee's own audited books of account but also the statutory provisions contained in the income-tax Act. CIT (A) assumed that the assesse must have spent unaccounted money for purchasing land and developing it before selling them. No evidence was found even at the time of search that the assesse had incurred any expenditure over and above reflected in the books .The Tribunal also observe that it is an open shut case of bogus claim for deduction to the extent of 80 percent of the impugned sum to evade payment of legitimate tax due to the State. Order of CIT(A) was reversed and the order of AO was affirmed. (AY. 2010-11)
ACIT v. Rushabh Vatika (2014) 149 ITD 46 / (2013) 35 taxmann.com 383 (Rajkot)(Trib.)

S. 145 : Method of accounting – Estimation of production.
The assessee had produced sale bill of minimum rate where as the AO took sale bill of maximum rate for working out the gross profit. The CIT(A) applied rate of 22 per cent as against 18 per cent shown by assessee and directed to allow interest and remuneration to the partners. The Department and the assessee both challenged the order of CIT(A). The Tribunal deleted the addition sustained by the learned CIT(A) on account of estimation by applying the GP rate at the rate of 22 per cent. The Tribunal dismissed the appeal of the Department and allowed the appeal of the assessee. (AY. 2009-10)
ITO .v. Bharat Int. Udhyog (2014) 159 TTJ 1 (UO) (Jodh.)(Trib.)

S.145: Method of accounting-Mercantile-Accrual of income- Income is taxable in the year when right to receive accrues-Commission [S.4].
It further observed that though the Schedule VI requires income accrued but not due as part of profit , for income tax purpose ' income accrued but not due ' is a contradiction terms , since what was not due could not have accrued. What is not due cannot be subjected to legal action to enforce recovery and hence , income in legal sense could not be treated as accrued so as to require its inclusion in taxable income. Appeal of revenue was dismissed. (AY. 2009-10)
ACIT .v. Vinay Vasudeo Kulkarni (2014) BCAJ–June P 26 (Pune)(Trib.)

S.145: Method of accounting–Advance/token money received during an earlier year - to be considered as income only in the year in which work was performed.

The assessee, a proprietor was in the business of sale of rights. The AO disallowed an amount of Rs. 10 lakhs shown in 'current liabilities' which was an advance received for purchase of negative rights which was to be adjusted on signing a formal agreement, on the ground that the assessee was following cash system of accounting. The CIT(A) confirmed the order of the AO.

On appeal by the assessee, the Tribunal observed that the amount of advance could not partake the character of income and was to be returned by the assessee. Accordingly, the Tribunal allowing the appeal held that if advance received was considered as income of the assessee in the year of receipt, the AO was to verify whether the work was completed in the year under consideration, and thus remanded the matter back to the file of the AO. (AY. 2008-09)

Robin Nanabhai Bhatt .v. ACIT (2014) 29 ITR 531 (Mum.)(Trib.)

S.145:Method of accounting- Rejection of accounts- Unverifiable expenses and non-maintenance of stock register-Provision for foreseeable losses is allowable as allowable.[S.37(1)]

Assessee, engaged in numerous construction projects throughout the country, successfully explained the discrepancy pointed out by AO regarding non-maintenance of day-to-day stock register and the same was accepted by the CIT(A); its books of account could not be rejected. The volume of expenses had increased during the relevant year vis-à-vis earlier year or that some of the balances remain un-reconciled could not be a ground for rejecting the books of account.

Though AS-7 is not notified by the Central Government, it does not preclude assessee from following the same. Assessee made provision for foreseeable losses as per AS-7. The same is allowable as deduction in computing business profits. (AY. 2004-05)

ACIT .v. ITD Cementation India Ltd. (2014) 98 DTR 452/146 ITD 59/160 TTJ 628(Mum.)(Trib.)

S.145:Method of accounting-Rejection of accounts-Audited account books maintained consolidated books of account in electronic form cannot be rejected without pointing out specific defects.

Assessee was in the business of infrastructure development. It maintained the consolidated books of account in electronic form. Whichwere audited.A.O. rejected books of account of assessee by invoking provisions of section 145(3), by observing that (i) assessee was not maintaining day-to-day stock register, (ii) it had not furnished details of closing stock, (iii) there was substantial increase in all expenses debited to profit and loss account, (iv) expenses claimed by assessee were unverifiable, and (v) true and correct income of assessee could be ascertained only after assessee produced complete books of account with supporting documents Books of account were audited. Auditor had not given any adverse comments in maintenance of books of account or stock register. Maintenance of books is accordance with provisions of law. (AY. 2004-05)

ACIT .v. ITD Cementation India Ltd. (2014) 146 ITD 59 / (2013) 36 taxmann.com 74/160 TTJ 628/98 DTR 452 (Mum.)(Trib.)

S. 145A : Method of accounting-Since there was an apparent contradiction in proposed draft order and final order without explaining any reason for same, matter required examination

Assessing officer in draft assessment order had proposed to decrease income of assessee by difference of addition made under section 145A in closing stock of earlier assessment year and unutilized Cenvat credit for assessment year under consideration. DRP directed AO. to make corresponding adjustment on account of Cenvat credit in opening stock as well. A.O.made an addition as against it was proposed to be decreased in total income in draft order. ITAT held that since there was an apparent contradiction in proposed draft order and final order without explaining any reason for same, required examination of the same. There is an apparent contradiction in the proposed draft order and the final order without explaining the reasons for the same. Further, the assessee is following exclusive method of accounting and not including the amount taxed in the purchase as well as in sales. Matter remanded.(AY. 2006-07)

Cabot India Ltd. .v.Dy.CIT (2014) 149 ITD 802 / (2013) 158 TTJ 840 / 33 taxmann.com 110 (Mum.)(Trib.)

S.145A:Method of accounting–Valuation -Cenvat credit-Inclusive method-Method of valuation is explained.[S.43B]

Assessee submitted that it followed inclusive method of accounting, which is tax neutral. AO made addition of outstanding balance in unutilized Cenvat credit account which was confirmed by CIT(A).On appeal Tribunal held that whether provision was tax neutral was no argument for not observing same, as tax neutrality would have to be established with reference to accounts as being maintained. Only booking of profit against excess recovery of excise through sales would brought outstanding balance in UCC account at par with excise components in closing inventory. Provision became tax neutral only when duty was paid on value addition under section 43B. To bring it in conformity with section 145A the Tribunal observed as under (1) Increase the value of opening stock by the amount of excise duty, if any, suffered thereon; (ii) State the closing stock, similarly at values inclusive of excise duty thereon , and not by adding the debit amount outstanding in the UCC A/.C; and (iii), carry forward the closing stock, so valued as, the value of the opening stock for computing the profits u/s 145 r.w.s. 145A for the following year. (AY.2007-08)

Hercules Pigment Industry .v. ITO (2014) 146 ITD 31 /(2013)35 taxmann.com 650 (Mum.)(Trib.)

S. 147: Reassessment–Survey-Notice on the basis of survey statement – No independent material–Statement retracted later-Reassessment was held to be not valid.[S. 133A,148]

The sole basis for issuance of the notice was the statement made during the course of survey by the son of the assessee. The reasons did not give any further details as to what was the amount which had been accepted by the son of the assessee and how the statement would bind the assessee. In the absence of any independent material, the record did not reveal how such statement of the son of the assessee would form a valid basis for reopening the assessment of the assessee. Any notice of the reopening issued under section 148 would be required to be tested at the touchstone of the reasons recorded by the Assessing Officer. As could be noticed from the record, the very basis on which the Revenue had sought to reopen the assessment was not sustainable. (AY. 1999-2000)

CIT .v. Shardaben K. Modi (2014) 365 ITR 169 (Guj.)(HC)

S. 147: Reassessment–After four years–Condition precedent – Material facts disclosed in return-Reassessment was held to be invalid.

A notice of reassessment was issued beyond four years on the ground that the assessee had set off the loss of MEK and Foods division against profit on sale of assets of the assessee from which the assessee received Rs. 7.51 crores and the remainder was credited to the P&L account instead of taking the entire amount. Held, the in the notes to return, the assessee clearly stated the reason for doing so. Thus, there was no failure on part of the assessee to disclose truly and fully all material facts. Also, there was no hint in the recorded reasons that there was any such failure on part of the assessee. Hence, notice was liable to be quashed. (AY.1997-98)

Gujarat Carbon & Industries Ltd. .v. CIT (2014) 365 ITR 464 (Guj.)(HC)

S. 147: Reassessment–Fresh information–Nexus between information received and escapement–Rational connection-Notice was held to be valid.[S.148]

The AO recorded satisfaction on the basis of information received that donations and expenditure on salary and other expenses of trust were not genuine. Held, prima facie the AO had material to form such belief in good faith and that the assessee had failed to disclose fully and truly all material facts. Since the material had rational connection and had relevant bearing on formation of belief, notices were held to be valid. (AY. 2002-03 – 2006-07)

Rohilkhand Educational Charitable Trust .v. CCIT(2014) 365 ITR 233 (All.)(HC)

S. 147 : Reassessment-Reasons recorded-After four years-The reasons must specifically indicate as to which material fact was not disclosed by the petitioner in the course of its original assessment.[S.148]

In the reasons supplied to the petitioner, there is no whisper, what to speak of any allegation,that the petitioner had failed to disclose fully and truly all material facts necessary for assessment and that because of this failure there has been an escapement of income chargeable to tax. Merely having a reason to believe that income had escaped assessment, is not sufficient to reopen assessments beyond the four year period indicated above. The escapement of income from assessment must also be occasioned by the failure on the part of the assessee to disclose material facts, fully and truly. This is a necessary condition for overcoming the bar set up by the proviso to section 147. If this condition is not satisfied, the bar would operate and no action under section 147 could be taken. We have already mentioned above that the reasons supplied to the petitioner does not contain any such allegation. Consequently, one of the conditions precedent for removing the bar against taking action after the said four year period remains unfulfilled.(W.P. (C) 747/2014, dt. 17.10.2014.)

Global Signal Cable (I) Pvt. Ltd..v. DCIT (Delhi)(HC);www.itatonline.org

S. 147:Reassessment-Audit objection-If AO contests the audit objection but still reopens to comply with the audit objection, it means he has not applied his mind independently and the reopening is void.[S.148]

To satisfy ourselves, whether the reassessment proceedings have been initiated at the instance of the audit party and solely on the ground of audit objections. On a perusal of the files, the noting made therein and the relevant documents, it appears that the assessment is sought to be reopened at the instance of the audit party, solely on the ground of audit objections. It is also found that, as such, the AO tried to sustain his original assessment order and submitted to the audit party to drop the audit objections. if the reassessment proceedings are initiated merely and solely at the instance of the audit party and when the Assessing Officer tried to justify the Assessment Orders and requested the audit party to drop the objections and there was no independent application of mind by the Assessing Officer with respect to subjective satisfaction for initiation of the reassessment proceedings, the impugned reassessment proceedings cannot be sustained and the same deserves to be quashed and set aside. (SCA No. 7140 of 2014, dt. 30/07/2014)

Raajratna Metel Industries Ltd. .v. ACIT (Guj.)(HC);www.itatonline.org

S.147: Reassessment-Recorded reasons-Cannot be improved in the affidavit- Change of opinion-The formal reasons given in support of reopening the case cannot be added to or subtracted from or improved in the affidavit-in-opposition.[S.148]

In Hindustan Lever Ltd. Vs. R.B. Wadkar, Assistant Commissioner of Income-Tax And Others (No.1) reported in 268 ITR 322 (Bombay) and Aroni Commercials Ltd. Vs. Deputy Commissioner of Income-Tax And Another reported in (2014) 362 ITR 403(Bom.) both Division Bench judgments of the Bombay High Court that the formal reasons given in support of reopening the case cannot be added to or subtracted from or improved in the affidavit-in-opposition. In this case also the reasons dated 05th February, 2013 have been sought to be improved in the affidavit-in-opposition which is not permissible on the basis of the above decisions. Furthermore, what is more important is that the assessment was sought to be reopened on a mere change of opinion, the change of opinion being with regard to estimation of the indexed cost of acquisition on 1st April, 1981. It has been declared in the formal reasons that the justification for reassessment was to be found the view of the Income Tax Officer Chennai. On the face of the records the department was acting on a change of opinion. It is settled law that an assessment cannot be reopened on a change of opinion.

Asiatic Oxygen Limited .v. DCIT (Cal.)(HC);www.itatonline.org

S.147:Reassessment-"Escapement of income" should be given a strict construction.[S.148]

In my opinion "escapement of income" should be given a strict construction. Not only should it not be used to justify a change of view it should not be used to reopen an assessment on facts, information, documents which were before the Assessing Officer or could have been easily found by him while making the assessment. Otherwise, there would be no finality of assessment. It will go on and on and might become a tool in the hands of the department to cause harassment to the assessee.

Debashis Moulik .v. ACIT (Cal.)(HC);www.itatonline.org

S.147 : Reassessment-Within four years-Non receipt of convertible foreign exchange within six months-No query was raised by the AO in the original assessment proceedings-Reassessment was held to be valid.[S.10AA,148]

The assesse is a 100 percent Export –Oriented Unit (EOU). The assesse claimed deduction under section 10AA. The said claim was allowed under section 143 (3). Reassessment notice after recording the reasons that excess claim was allowed in the original assessment. The assesse challenged the notice by way of writ. Dismissing the petition the court held that grounds /reasons recorded for reopening the assessment were not the issue which were considered by the AO while passing the assessment and therefore it is permissible for the AO to reopen the assessment on the basis reasonable belief that income chargeable to tax has escaped assessment on these grounds and the same did not stem change of opinion.(AY.2008-09)

Eleganza Jewellery Ltd. .v. CIT (2014) 269 CTR 475 (Bom.)(HC)

S. 147 : Reassessment – Within four years – Change of opinion – Original assessment completed after raising queries on the issue reopened – Reopening suffers from change of opinion – Held reopening invalid.[S.115WG, 115WH]

Where the assessing officer proposed to reopen the assessment of the assessee within four years from the end of the assessment year, on the very same issues on which he had raised quires while framing the original assessment. Reopening was held to be invalid as the reopening suffered from change of opinion. Further, the court held that a fringe benefit assessment can be reopened only under the special provisions of section 115 WG and 115 WH and not under general provisions of section 147 of the Act. (AY. 2008 – 09)

CIT v. P. G. Foils Ltd. (2014) 102 DTR 26 / (2013) 215 Taxman 104 (Mag.)/356 ITR 594 (Guj.)(HC)

S. 147 : Reassessment – Reason to believe – Absence of new tangible material – Tangible material that can lead to 'reason to believe' must be material that is attributable to the assessee and not material that is attributable to change opinion of the A.O. in respect of the material already available prior to the original assessment.

The A.O. framed original assessment proceedings after taking into account all the materials which were called for by him, after the search proceedings taken against the assessee, including details of investment made in various companies. Thereafter, assessment proposed to be reopened alleging undisclosed investments made by the assessee. On writ filed by the assessee the High Court held that, reason recorded did not constitute valid reason for reopening assessment in form of tangible material discovered by the Revenue authorities after completion of original assessment. (AY. 1991 – 92)

Ralson India Ltd. v. Dy. CIT (2014)366 ITR 103/ 102 DTR 234 / 44 taxmann.com 210 (Delhi)(HC)

S. 147 : Reassessment – Change of opinion – When material is available before the A.O. while framing assessment under section 144 read with section 153 A of the Act – It is assumed that all the material was examined and verified by the A.O. – Notice issued by the A.O. thereafter on mere suspicion amounts to mere change of opinion.[S.144, 148, 153A]

When material is available with the A.O. while passing assessment order under section 144 read with section 153 A of the Act, it is assumed that the A.O. while assessing the income of the assessee had examined and verified the material collected during the search operation. Thereafter, notice under section 148 of the Act issued by the A.O. simply for his verification and to clear his doubts and suspicions and to re – examine the material available on record while passing original assessment order was liable to be quashed. (AY. 2010 – 11)

Mukesh Modi v. Dy. CIT (2014)366 ITR 428/102 DTR 273 / 267 CTR 409 /45 taxmann.com 468 (Raj.)(HC)

S. 147 : Reassessment–Reason to believe–Explanation submitted by the assessee that the receipt disclosed in return for earlier year which was furnished after issuance of notice under section 147 for the year–Held reassessment valid.

Explanation of the assessee that the receipt of Japanese Yen alleged to have been escaped assessment for the current year had been disclosed in the return for earlier year filed after issuance of notice under section 148 for the year, could not invalidate the reassessment proceedings. (A.Y. 2006 – 07)
Canon India (P) Ltd. & Anr. .v. ACIT (2014) 102 DTR 420 (Delhi)(HC)

S. 147:Reassessment-After expiry of four years-If "reasons to believe" are not based on new, "tangible materials", the reopening amounts to an impermissible review.[S. 68.148]
In AY 2006-07 the AO passed an assessment order u/s 143(3). Thereafter, after the expiry of four years from the end of the AY, he issued a notice u/s 148 reopening the assessment on the ground that the records showed that an amount of Rs. 25L had to been added to the capital account for which the assessee had offered no explanation and that the same constituted undisclosed income u/s 68. The assessee challenged the reopening on the ground that there was no failure on its part to make a disclosure of material facts and the reopening was based on change of opinion. The department relied on the Full Bench verdict in Usha International 348 ITR 485 and argued that as the AO did not apply his mind at all to the question regarding the said capital contribution, it could not be said that there was a "change of opinion". HELD by the High Court allowing the Petition:
(i) In the recorded reasons, no details are provided as to what such information is which excited the AO's notice and attention. The reasons must indicate specifically what such objective and new material facts are, on the basis of which a reopening is initiated u/s 148. This reassessment is clearly not on the basis of new (or "tangible") information or facts that which the Revenue came by. It is in effect a re-appreciation or review of the facts that were provided along with the original return filed by the assessee;
(ii) The foundation of the AO's jurisdiction and the raison d'etre of a reassessment notice are the "reasons to believe". Now this should have a relation or a link with an objective fact, in the form of information or facts external to the materials on the record. Such external facts or material constitute the driver, or the key which enables the authority to legitimately re-open the completed assessment. In absence of this objective "trigger", the AO does not possess jurisdiction to reopen the assessment. It is at the next stage that the question, whether the re-opening of assessment amounts to "review" or "change of opinion" arises. In other words, if there are no "reasons to believe" based on new, "tangible materials", then the reopening amounts to an impermissible review. Here, there is nothing to show what triggered the issuance of notice of reassessment – no information or new facts which led the AO to believe that full disclosure had not been made.(W.P. No. 1320/2014, dt. 14.08.2014.)(AY.2006-07)
Madhukar Khosla v. ACIT (Delhi) (HC) www.itatonline.org

S. 147:Reassessment-International taxation-Fact that TPO has examined international transactions in payer's hands and found them to be at arm's length does not mean the PE of payee cannot be assessed.[S.148]
The assessee, a South Korean company, entered into transactions with its wholly owned subsidiary named LG Electronics India Pvt. Ltd relating to sale of raw materials, finished goods and received royalty, fees for technical services, etc. The assessee did not file any return of income. The subsidiary deducted TDS as per the provision of the Double Taxation Avoidance Agreement between India and Korea (DTAA) on such payments. The AO conducted a survey which according to him showed that the Indian subsidiary company did not function as an independent corporate entity and is totally dependent on the assessee. He found that that the employees of the assessee were using the office of the subsidiary as a front for conducting their own business and, consequently, held that the office of the Indian company was functioning as a permanent establishment and was a fixed place of business available to the assessee as per article 6(1) of the DTAA. He accordingly issued a notice u/s 148 seeking to assess the income of the assessee. The assessee filed a Writ Petition to challenge the s. 148 notice inter alia on the ground that (i) as the Indian subsidiary had disclosed the international transactions and the same had been evaluated for transfer pricing purposes the AO was barred from , there was no fresh material and (iii) there was no application of mind by the AO before issuing the s. 148 notice. HELD by the High Court dismissing the Petition:
(i) There is a rational and live nexus between the reasons recorded and the belief that income had escaped assessment. Once the AO comes to the conclusion that the assessee has a permanent

establishment and is carrying out its business activities through this permanent establishment for the purpose of supply of raw materials and finished products and that the permanent establishment was available to the employees of the assessee, who were either permanently stationed or came to India for business purposes, we are of the view that the AO has given valid reasons to believe that income had escaped assessment;

(ii) The contention that there was no fresh material before the AO is patently erroneous. The analysis made from the survey report and the documents so impounded has led the AO to reasonably believe that income had escaped assessment on account of the fact that the petitioner was carrying on business operation in India through a permanent establishment. The contention that there was no application of mind is also patently erroneous because the reasons clearly show that an in-depth study and analysis was made and reasons were recorded in detail;

(iii) The contention that as the Indian subsidiary had, in terms of s. 92E, disclosed all the transactions with the assessee relating to purchase of raw materials, finished goods etc and the TPO had found then to be at arm's length, the AO was precluded from drawing any inference that any further income of the assessee from the same transactions was chargeable to tax had escaped assessment is erroneous and cannot be accepted. The TPO's order will not come in the way for the reason that the TPO's order is in relation to the transactions between a subsidiary company and the petitioner. The situation becomes different when the subsidiary company also works as a permanent establishment of the petitioner. Once a permanent establishment is established, the petitioner becomes liable to be taxed in India on so much of its business profits as is attributable to the permanent establishment in India. The order of the TPO is in relation with the subsidiary company and not in relation with the permanent establishment of the petitioner. The transfer pricing analysis is to be undertaken between the petitioner and its permanent establishment which has not taken place as yet. Once a transfer pricing analysis is done, the computation of income arising from international transaction has to be done keeping in mind the principle of arm's length price. Once this is done, there is no further need to attribute profits to a permanent establishment. However, where the transfer pricing analysis does not take into account all the risk taking functions of the enterprise and it does not adequately reflect the function performed and the risk assumed by the petitioner, the situation would be different and, in such a situation, there would be a need to attribute profits to the permanent establishment for those functions/risk that have not been considered. This is precisely what was considered in DIT (international Taxation) Morgan Stanley& Co. (2007) 292 ITR 416 (SC) (WP No. 1366 of 2012, dt. 05.08.2014.)

LG Electronics Inc. v. ADIT (All.)(HC) www.itatonline.org

S. 147:Reassessment-Recording of reasons is mandatory before issue of notice-Information-Statement recorded-Parties denied –Reassessment was held to be valid on the basis of information received in the assessment year 2010-2011.[S.148]

During the assessment proceedings for the assessment year 2010-11, AO noticed that some of the some of the parties who have received the payments denied the services rendered. On the basis of said information after recording reasons the AO issued notice under section 148. Reasons were recorded before issue of notice, however the recorded reasons were furnished after four and half months.Court held that no prejudice has been caused to the assessee on account delay in supplying the reasons for reopening the assessment. The Court held that facts revealed to the AO during the assessment proceedings for 2010-11 constituted 'information' contemplated by section 147 and said information has direct nexus and/or link with the tax liability for assessment year 2006-07 and assessment year 2008-09, that the material in the hands of AO is prima facie sufficient for him to form a belief that income has escaped assessment,therefore the issue of notices were not an outcome of change in opinion of the successor AO but is based on tangible material received during assessment proceedings in subsequent year. Notice for reassessment was held to be valid. (AYs. 2006-07, 2008-09)

Debashu Services (P) Ltd..v. Dy.CIT (2014) 107 DTR 41/270 CTR 36(Bom.)(HC).

S.147:Reassessment-Notice-After expiry of four years-Recording of reasons-No failure on the part of assesse-Export business-Subsequent Court decisions by itself would not give jurisdiction to the AO to reopen an assessment beyond four years unless coupled with a failure to disclose truly and full all material facts-Reassessment was quashed.[S. 80HHC,148]

Deduction claimed under section 80HHC was allowed under section 143(3). Reassessment notice was issued on the ground that since the assesse did not have profit from export and deduction on incentives was not available. The said notice was challenged by writ petition. Allowing the petition, the court observed that reasons recorded do not indicate even remotely any failure on the part of the assesse to disclose any material facts which is necessary for assessment. Subsequent Court decisions by itself would not give jurisdiction to the AO to reopen an assessment beyond four years unless coupled with a failure to disclose truly and full all material facts-Reassessment was quashed .(AY.1998-99)

Allanasons Ltd. v.Dy.CIT (2014) 107 DTR 62/225 Taxman 166 (Mag) (Bom.)(HC)

S.147:Reassessment-Notice-After expiry of four years-Survey-Bogus purchases–Writ petition was held to be not maintainable.[S.133A,148,Constitution of India, Art.226]

The assesse is in the business of trading in various industrial products. The assessment for the relevant year was completed under section 143(3).During scrutiny assessment for the assessment year 2008-09 it was noticed that suppliers were been proved to be bogus biller during the course of search/ survey by the investigation wing. Additions were made by the AO which is pending before the CIT (A).For the relevant assessment year after recoding the reasons , the AO issued the notice under section 148.The notice was challenged by way of writ petition. The Court dismissed the petition by observing that it was only on account of survey proceedings under section 133A and also during assessment proceedings for the assessment year 2008-09 that information was obtained that certain purchases were made from non-existing /bogus dealers and satisfaction of the AO to form a reasonable belief that income chargeable to tax has escaped assessment is not unreasonable belief that income chargeable to tax has escaped assessment is not unreasonable , the court also observed that one would necessarily have to read the reasons as a whole to find out whether or not there has been a failure to disclose truly and fully all necessary facts for assessment, hence writ petition was not maintainable.(AY.2005-06)

Nickunj Eximp Enterprises (P) Ltd..v. ACIT (2014) 107 DTR 69/270 CTR 494 (Bom.)(HC)

S.147:Reassessment-Notice-After expiry of four years- Weighted deduction-Change of opinion-Reassessment was held to be not justified. [S.35(2AB),37(1),148]

The assessment was completed under section 143(3)allowing the claim of the assesse for deductions claimed towards legal and professional charges incurred for filing patent applications .Reassessment notice were issued on the ground that these expenses were capital in nature and thus the assesse had failed to disclose fully and truly all material facts. The assesse challenge the said notice by filing writ petition. Allowing the petition the court held that it was found that all material facts with reference to deductions claimed by assesse were disclosed in original assessment proceedings and the same were duly considered by Assessing Officer. Further, no details were presented as to which fact or material was not disclosed by assesse that led to its income escaping assessment, thus reassessment was based on mere change of opinion.(AY.2005-06)

Lupin Ltd..v. ACIT (2014) 224 Taxman 225(Mag.)(Bom.)(HC)

S.147:Reassessment-After expiry of four years-Allocation of expenses-Industrial undertakings-There was full and true disclosure reopening was based on change of opinion-Held to be not valid.[S.80IB]

Assessee, engaged in business of manufacturing of chemicals, had two manufacturing units-one at Tarapur and another at Silvasa. Assessee claimed deduction under section 80-IB in respect of its Silvasa unit. Said claim had been examined and reduced by Assessing Officer in assessment. Thereafter, assessment was sought to be re-opened on ground that assessee had suppressed expenses incurred in respect of Silvasa unit by debiting expenses to its Tarapur unit which had resulted in increasing profit of Silvasa unit and, thus, assessee had enjoyed excessive deduction under section 80-IB. The assesse challenged the said reassessment notice , allowing the petition the Court held that issue of allocation of expenditure was very much available before Assessing Officer while examining quantum of deduction under section 80-IB in original assessment, initiation of reassessment was bad in law. Reassessment was based on change of opinion which was not permissible. (AY. 2006-07)

Lalitha Chem Industries (P).Ltd. .v.Dy.CIT (2014) 97 DTR 107 /225 Taxman 225 (Mag.)(Bom.)(HC)

S. 147 : Reassessment - No new material to hold that income has escaped. [S.115JB, 143(3)]
Assessment had been framed u/s 143(3) of the Act. Subsequently, case was reopened on account that assessee has wrongly claimed depreciation which was lower than brought forward loss while as per the provisions as contained in Section 115JB of the Act the same was required to be adjusted from the lower of brought forward loss or unabsorbed depreciation. Assessment order was re-framed. CIT(Appeals) and Tribunal allowed the appeal on account that assessee has disclosed all material facts and assessing officer after considering the material facts passed assessment order u/s 143(3). On appeal by revenue to High Court, held that
It is a case in which after filing of the return by the assessee the matter was scrutinized and on thorough examination of the facts, the initial assessment order was passed. There was no new material before the assessing officer to record a finding that on the basis of some new material, he had formed an opinion that it was a case of escaped assessment and the assessee had not disclosed the fact truly and rightly. On the basis of the material on which the assessment order was passed, the assessing officer could not form another opinion that the original assessment order was an escaped assessment and case deserves to be reassessed under section 147, then it was a case of change of opinion and not a case for reassessment (AY 2001-02, 2002 - 03)
CIT .v. Fujistu Optel Ltd. (2013) 359 ITR 67 / 261 CTR 446 /40 Taxmann.com 25 / (2014) 220 Taxman 34 (Mag.) (MP)(HC)

S. 147 : Reassessment –Housing project-Earlier year in favour of the assessee - Assessing Officer could not reopen assessment on merit on same ground in succeeding assessment year. [S.80IB(10)]
Assessee claimed deduction under section 80-IB(10) which was allowed by Assessing Officer. Assessing Officer reopened assessment beyond period of four years from end of relevant assessment year on ground that as per amendment inserted subsequently in section 80-IB(10) deduction claimed by assessee was not allowable. In assessee's own case for assessment year 2006-07 in tax appeal No. 1119 of 2011, High Court held that deduction allowed under section 80-IB could not be withdrawn on basis of amendment to section 80-IB introduced subsequently with prospective effect. Following same, Tribunal deleted disallowance made by Assessing Officer. Revenue contended that Tribunal had not dealt with aspect of reopening of proceedings. The Court held that non-dealing of Tribunal with legality of reassessment did not lead to raising any substantial question of law. Where issue was squarely covered in favour of assessee for preceding assessment year, Assessing Officer could not reopen assessment as same ground in succeeding assessment year (AY. 2007-08)
CIT .v. Kalpatru Sthapatya (P.) Ltd. (2014) 220 Taxman 157 (Mag.) (Guj.)(HC)

S. 147 : Reassessment –Change of opinion-Deduction claimed u/s 80IA allowed in assessment made u/s 143(3) – Reopening of assessment for purpose of 'verifying' or 'verification' – Reassessment is not valid.[S. 80IA]
Assessee was engaged in the business of construction of infrastructure facilities. Assessee claimed deduction under section 80-IA which was allowed in assessment completed under section 143(3). Assessing Officer reopened the assessment on the ground that during the assessment proceedings, it remained to be verified whether the assessee was owner of the infrastructure facility for which the deduction under section 80-IA was claimed. On filing writ petition, High Court allowing the writ petition held that, once the Assessing Officer on the basis of material before him had applied his mind and granted deduction in the assessment order, it was not permissible for him to exercise powers under section 147 on the same material on the ground that certain aspects were not considered. The connotation of word 'to be verified', 'verification' is to re-examine the existing material. Verification is always with reference to the details already considered once. When one wants to verify his decision, it means that one reviews the decision. Re-assessment powers cannot be exercised to merely review the earlier assessment on the special ground that something was omitted from consideration or particular conclusion was imprecisely or wrongly arrived at. (AY. 2007 – 08)
J. .V. Agrawal . .v. ITO (2014) 220 Taxman 32 (Mag.)(Guj.)(HC)

S. 147 : Reopening– Proviso– Beyond four years-Deduction at source- Failure to disclose material facts- Reassessment was bad. [S. 40(a)(iii),143(3)]

Assessment was completed u/s 143(3). After four years from the end of the assessment year, assessment was reopened on the ground that assessee had made payments of salary to its employee rendering services abroad without deduction of tax at source and thus, salary was not allowable in view of section 40(a)(iii). High Court held that from the reasons recorded for reopening the assessment as well as the concurrent finding of fact recorded by the CIT(A) and ITAT, it is evident that there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. As per the proviso to Section 147 of the Act, assessments beyond four years from the end of the relevant assessment year can be reopened only if there is failure on the part of the assessee to disclose all material facts. Therefore, in the facts of the present case, the decision of the Tribunal in holding that the reopening of the assessment was bad cannot be faulted. (AY. 1989-90)

CIT vs. Petroleum India International (2014) 220 Taxman 11 (Mag.) (Bom)(HC.)

S. 147 : Reassessment – Change of opinion – Cash credits-Notice was issued without application of mind –Reassessment was bad in law.[S.68,133(6), 143(3),148]

The assessment of the assessee for assessment year in question was completed under section 143(3). Subsequently, the assessment was reopened on the ground that the assessee was part of a racket providing bogus accommodation entries which was allegedly masterminded by one Tarun Goyal and that the assessee had introduced his own money in the garb of share application money/share capital etc. through above accommodation entry provider companies. The High Court observed that, in the course of assessment proceedings under section 143(3), a questionnaire had been issued by the Assessing Officer to the assessee on 18-2-2009 to furnish details of share capital introduced and share money received. There was no response by the assessee of this questionnaire till December, 2009. It is an admitted position that the said information had been circulated to all the Assessing Officers on 30-4-2009 which included the Assessing Officer of the assessee. In other words, the Assessing Officer of the assessee had received the said information with regard to the alleged accommodation-entry providing companies. Thereafter, on 9-11-2009 the assessee furnished a reply to the earlier questionnaire which had been issued on 18-2-2009. In that reply, the assessee gave details of share capital raised by it. Those details included the sums received from the aforesaid alleged accommodation entry providers. Alongwith the said reply dated 9-11-2009, confirmation from the said parties were also furnished. A similar reply was again furnished on 27-11-2009. Despite the furnishing of these details, the Assessing Officer, in order to further verify and confirm the said facts, issued notices under section 133(6) to the said companies directly, on 27-30-11-2009. All the aforesaid five parties responded to those notices and reaffirmed their respective confirmations, which they had earlier provided to the Assessing Officer. It is only subsequent thereto that the assessment was framed on 30-12-2009. In the backdrop of these facts, it is difficult to believe the plea taken in the purported reasons that the said information was 'neither available with the department nor did the assessee disclose the same at the time of assessment proceedings'. From the aforesaid facts it is clear that the information was available with the department and it had been circulated to all the Assessing Officer. There is nothing to show that the Assessing Officer did not receive the said information. There is nothing to show that the Assessing Officer had not applied his mind to the information received by him. On the contrary, it is apparently because he was mindful of the said information that he issued notices under section 133(6) directly to the parties to confirm the factum of application of shares and the source of funds of such shares. Therefore, the very foundation of the notice under section 148 is not established even ex facie. Consequently, it cannot be said that the Assessing Officer had the requisite belief under section 147 and, as a consequence, the impugned notices are liable to be quashed.(AY. 2007 – 2008)

Pardesi Developers Infrastructure (P.) Ltd. .v. CIT (2014) 220 Taxman 18 (Mag.) (Delhi)(HC)

S. 147 : Reassessment -Export oriented unit – Transfer of business and assets to sister concern-Reason to believe-Reassessment notice was valid. [S.10B,148]

The assessee purchased the assets and business of a sister concern who could not claim 10B deduction after the specified period and claimed deduction under section 10B. The AO reopened the assessment holding that he had reason to believe that on account of transfer of business and assets to the undertaking, no new undertaking had come into being and the assessee was not entitled to the benefit of section 10B. In a earlier writ before the High Court, the observed that where the revenue rejected elaborate written objection filed by assessee against reasons recorded by AO for initiating reassessment for disallowing claim of deduction under section 10B by merely saying that reasons already attributed were just and reasonable, reassessment would be unsustainable and directed the AO to pass an order assigning reasons in accordance with law. Thereafter the AO passed a detailed order considering the objections. In the second writ petition before the High Court, the assessee submitted that the testimony given by an employee of the assessee had retracted from his statement, and hence not a relevant material. The Court held that since the Deputy Commissioner has applied his mind to that aspect of the matter and held that it is a question of fact as to whether there was any coercion or otherwise when the statement was recorded it could be answered only after an enquiry. Further 'Reason to believe' did not mean that the AO should have finally ascertained the fact by legal evidence. It only meant, the examination that was required to be made on the basis of information that the AO had received and if he discovered or found satisfaction that the taxable income had escaped assessment, he would have 'reason to believe'. The High Court dismissed the writ petition filed by the Assessee. (AY. 2006-07)

Jeans Knit (P.) Ltd. .v. Dy. CIT (2014)367 ITR 773/ 220 Taxman 130 (Mag.) / (2013) 38 taxmann.com 148 (Karn.)(HC).

Jeans Knit (P.) Ltd. .v. Dy. CIT (2014) 220 Taxman 127 (Mag.) / (2013) 38 taxmann.com 112 (Karn.)(HC).

S. 147 : Reassessment – After expiry of four years – No failure on part of assessee to disclose truly and fully all relevant material facts-Reassessment was not valid. [S.80HHC, 143(3), 148]

Assessment order u/s 143(3) of the Act was passed wherein deduction u/s.80IB and 80HHC of the Act claimed by the assessee-company was duly considered upon by AO and was allowed. On the premise that assessee could not have claimed deduction both under section 80HHC as well as 80IB of the Act, notices for both the assessment years were issued for reopening the assessment under section 148 of the Act. Thereby, reassessment order was passed denying the deduction. On appeal CIT(Appeals) set aside the orders on the contention that the reopening was invalid as there was no failure on part of the assessee to disclose truly and fully all relevant material facts. The Tribunal held that, reopening u/s 147 is invalid in view of the proviso to the Section after the expiry of four years from the end of relevant assessment year as there is no omission or failure on the part of the assessee company in putting fourth its claim in its entirety before the AO. On appeal by revenue to High Court, Tribunal's order was upheld. (AYs. 2000-01, 2001-02)

CIT .v. Bilag Industries (P.) Ltd. (2014) 220 Taxman 162 (Mag.) / (2013) 40 Taxmann.com 459 (Guj.) (HC)

S. 147 : Reassessment-Income from House Property – Failure by assessee to clarify why rental income was shown as business income-Reassessment was held to be valid. [S. 22,28(i)]

Till assessment year 2007-08 the assessee reflected rental income as business income, but from assessment year 2008-09 declared the rental income as income from house property. The Assessing Officer sought to re-open the assessment for the relevant assessment years. The High Court held that in spite of many opportunities assessee had failed to clarify as to why rental income had been shown as business income till 2007-08 and as income from house property thereafter, and hence reopening of assessment could not be held to be contrary to law. (AY. 2006-07, 2007-08)

Crimson Properties (P.) Ltd. .v. ITO (2014) 220 Taxman 112 (Mag.) / 41 taxmann.com 28 (Bom.)(HC)

S. 147 : Reassessment-After expiry of four years-No failure to disclose material facts necessary for assessment – Re-opening not valid. [S.44BBB, 148, 151]

Income from offshore supply contracts were considered and accepted to be exempt in the original assessment proceedings. Notice was issued u/s.148 after four years. No allegation that there was any failure to disclose material facts necessary for assessment. Re-opening held to be invalid (AY.2004-05)

Atomstroy export .v. Dy. DIT (IT) (2013) 363 ITR 612 (Bom.)(HC)

S. 147 : Reassessment – Reason to believe – Absence of new tangible material-Reassessment was held to be not valid. [S.143(3), 148]

Where Notice under s. 148 is based upon stale information which was available at the time of the original assessment and in fact appears to have been used by the AO during the completion of proceedings under s. 143(3) – it was held that Reopening was not sustainable. (A.Y. 2005-06)

Rasalika Trading & Investment Co. (P) Ltd. .v. Dy. CIT (2014)365 ITR 447/ 101 DTR 28 / 43 Taxmann.com 371(Delhi)(HC)

S. 147 : Reassessment-Retrospective amendment-Rectification of mistake-In case of retrospective legislative amendment, rectification under section 154, as well as reopening of assessment under section 147 are permissible as they are not mutually exclusive. [S. 154]

On a writ filed by the Assessee, the High Court held that the retrospective legislative amendment constitutes tangible material permitting reopening of assessment. Also, the amendment of law can even permit action for the rectification of an assessment on the ground of a mistake apparent from record.

Ester Industries Ltd. .v. UOI (2014) 221 Taxman 22 (Delhi)(HC)

S. 147 : Reassessment – Notice-Change of opinopn-Writ- Petition challenging lack of jurisdiction to issue notice on the ground that it is based on 'change of opinion' & preconditions of section are not satisfied is maintainable-Mere issuance of notice by revenue is no bar for assesseee to move writ jurisdiction-Reassessment on same issue is change of opinion hence not valid.Assessment completed after enquiry and replies furnished by assesse could not be reopened. [S.148, Constitution of India Art 226]

The assessee filed a Writ Petition to challenge a notice issued u/s 148 to reopen the assessment. The department relied on the judgement of the Madras High Court in JCIT vs. Kalanithi Maran and argued that a Writ Petition to challenge a notice issued u/s 148 was not maintainable. HELD by the High Court rejecting the plea:

The argument, based on JCIT vs. Kalanithi Maran, that this Court should not exercise its writ jurisdiction under Article 226 of the Constitution of India and the petitioner should be left to avail of the statutory remedies available under the Act is not acceptable. The decision of the Madras High Court in Kalanithi Maran proceeded on the basis that the dispute urged before it were with regard to adjudicatory facts and not with regard to jurisdictional facts as raised in this petition. The Madras High Court itself points out that that when an assessment sought to be reopened by an Officer who is not competent to do so or where on the face of it would appear that the reopening is barred by limitation or lacks inherent jurisdiction, the court would certainly entertain a challenge to the reopening notice in its writ jurisdiction. The Madras High Court itself drew a distinction between the adjudicating facts and jurisdictional facts. It was in the above context that challenges to the reopening notice u/s 147 and 148 of the Act was not interfered with by the Madras High Court as the challenge before it appears to have been with regard to adjudicating facts as contrasted with the jurisdictional facts raised in this case. Jurisdictional facts are those facts which gives jurisdiction to enter upon enquiry, while adjudicatory facts come up for consideration after validly entering upon enquiry i.e. having jurisdiction. In this case, the challenge is based on lack of jurisdiction in issuing the impugned notice by the AO on the ground that the pre-condition for issuing notice u/s 147 of the Act is not satisfied i.e. notice should not be on account of the change of opinion. It is only when jurisdictional facts are satisfied will the AO acquire the authority to deal with the matter on adjudicatory facts. The decision of the Madras High Court is of no avail in the facts of the present case. It may be pointed out that there could be occasions where jurisdictional facts could itself be a matter of factual enquiry. i.e. leading of evidence and appreciation of facts. In such a case even if the challenge is with regard to

jurisdictional facts, yet the Court in its discretion may not entertain the petition as it could be best left for determination before the authorities under the Act.Assessment completed after enquiry and replies furnished by assesse could not be reopened. (AY. 2007-08)

Aroni Commercials Ltd. .v. ACIT(2014) 367 ITR 405/270 CTR 483/108 DTR 81(Bom.)(HC)

S. 147 : Reassessment-Export- Retrospective amendment of law- Assessment on the basis of the retrospective amendment of section 80HHC of the Act by the Taxation Law (Amendment) Act, 2005 is bad as the said amendment is struck down in Avani Exports vs. CIT (Guj.)(HC).[S.80HHC, 143(1), 143(3)]

The assessment order which was sought to be reopened by the Assessing Officer was only an intimation under section 143(1) of the Act and not a regular assessment under section 143(3) of the Act. Therefore, proviso to section 147 of the Act would not apply, but in the light of the judgment of the Hon'ble Gujarat High Court in the case of Avani Exports vs. CIT through which retrospective amendment was quashed, the assessment cannot be reopened on the basis of the said retrospective amendment. Since the basis for reopening of the assessment has been quashed by the Hon'ble High Court of Gujarat, the issue of reopening either before or after four years from the end of the relevant assessment year becomes irrelevant. Therefore, in the light of the aforesaid judgment of the Hon'ble Gujarat High Court in the case of Avani Exports vs. CIT, we hold that reopening, on the basis of the retrospective amendment of section 80HHC of the Act by the Taxation Law (Amendment) Act, 2005, is illegal and we accordingly hold that the assessment framed consequent thereto is also illegal and deserves to be annulled.(ITA No. 380 to 384 /Lkw/2012, Dt. 18.09.2014.) (AY. 2001-02 to 2004-05 & 2006-07).

ACIT .v. Northern tannery (Luck.)(Trib.);www.itatonline.org

S. 147 : Reassessment-Notice-Non-issue of s. 143(2) notice renders s. 147 assessment void. S. 292BB does not apply. If there is a conflict of judicial opinion, the view in favour of the assessee must be taken. Respondent can raise an additional ground in a Cross-Objection. [S.143(2), 292BB]

In the reassessment proceedings, after having considered the asssessee's submissions, the AO had concluded the re-assessments making certain additions. While doing so, however, no notices u/s 143(2) of the Act were issued to the assessee, even though notice u/s 142(1) of the Act was ordered to be issued on 14.11.2011.It is, therefore, explicit that there is always a requirement of issuing of a notice u/s 143(2) of the Act in a case of an assessment u/s 147 of the Act. Relaxation has been given for issuance of such a notice where a notice u/s 148 was issued between 1.10.1991 to 30.9.2005. In other words, notice issued u/s 148 of the Act on or after 1.10.2005; a notice u/s 143(2) has to be issued within the time stipulated in 143(2) of the Act.

Further, the provisions of s. 292BB of the Act are not applicable in the case of non-issuance of a notice u/s 143(2) of the Act.

Further, we notice that there is a judgment of Hon'ble jurisdictional High Court in favour of the revenue, namely, CIT v. Madhya Bharat Energy Corporation Ltd reported in (2011) 337 ITR 389 (Del) which states that the non issuance of notice u/s 143(2) does not vitiate the assessment. However, there are also two subsequent judgments of Hon'ble jurisdictional High Court directly in favour of the assessee, as regards the service of notice u/s 143(2). The Hon'ble H.C. held that service of notice u/s 143(2) is mandatory.

The Hon'ble Guwahati High Court in CIT v. PurbanchalParbahanGosthi (1998) 234 ITR 663 (Gau) has stated that there is no distinction between an appeal and a cross objection except for the time limit for filing the appeal being 120 days and that of CO being 30 days. Therefore, the learned DR's objection that even a pure question of law cannot be taken up in a cross objection is without any merit.Non-issuance of a notice u/s 143(2) of the Act as alleged by the assessee-firm had vitiated the conclusion of the assessments u/s 147 read with s. 143(3) of the Act

DCIT .v. Silver Line(Delhi)(Trib.);www.itatonline.org

S. 147 : Reassessment-Reopening on the possibility that the assessee AOP may or may not be a taxable unit is based on surmise and presumption & is invalid-DTAA-India-Denmark.[S.148,Art 14]

(i) The assessee is a FUND and a resident of Denmark. Along with its return of income, in India, the assessee had submitted 'Tax Residency Certificate' issued by the Danish Authorities in order to claim the benefit of Article 14 of India-Denmark DTAA. From the plain reading of the `reasons recorded', it is seen that the Assessing Officer first of all, is not clear whether the assessee is tax resident of Denmark or not, and secondly, whether AOP-Trust is taxable unit in Denmark or not. This is evident from the reasons where he observes that, there is a possibility that AOP is not a taxable unit under the tax laws of Denmark and because of this, there is possibility of loss of revenue.

The reasons recorded by the A.O. clearly shows that the reopening has been done merely on some kind of a possibility for which he himself is not sure. There is even no reference to any material that assessee's claim for benefit under Article 14 of DTAA is false or incorrect. He is even not sure whether assessee is a tax resident when TRC was there in the return of income. It appears that the reopening is merely pretence to examine, whether the assessee is a taxable unit or not and whether there could be possibility of loss of revenue. Once the Tax Residency Certificate was there in the record, then there could not have been any ground for presumption that the assessee is not a taxable entity in Denmark. He has not referred to any other information or material that the assessee is not a tax resident of Denmark and there was loss of revenue because the assessee has falsely claimed the benefit under Article 14 of the DTAA. The reasons as recorded by the A.O. falls in the realm of surmises and presumption de hors any material fact having live link nexus with the formation of `reasons to believe' that income chargeable to tax has escaped assessment. Thus, we are of the opinion that on the face of the "reasons recorded", the Assessing Officer cannot assume jurisdiction to reopen the case in the case of the assessee. Thus, the entire proceedings initiated vide notice u/s 148 is bad in law anddeserves to be quashed.

(ITA No. 3721/Mum/2014dt. 31.10.2014.) (AY. 2006-07)

Investerings Foreningen Bank Ivest .v. DDIT (Mum.)(Trib.); www.itatonline.org

S. 147 : Reassessment-Change of opinion-Failure to record detailed reasons in assessment order does not justifys. 147 action. There is a statutory presumption that AO has applied his mind while passing assessment order-Reopening was held to be bad in law. [S.143(3), 148,Evidence Act,1872, S. 114]

Section 147 of the Act, as substituted w.e.f. 01.04.1989 does not postulates conferment of power upon the AO to initiate reassessment proceeding upon his mere change of opinion. Further, if 'reason to believe' of the AO is founded on an information which might have been received by the AO after the completion of assessment, it may be a sound foundation for exercising the power under section 147 r.w.s. 148 of the Act. It cannot be accepted that only because in the assessment order, detailed reasons have not been recorded, an analysis of the materials on the record by itself may be justifying the AO to initiate a proceeding u/s. 147 of the Act. When a regular order of assessment is passed in terms of section 143(3) of the Act, a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of section 114(e) of the Indian Evidence Act, 1872, judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the AO to reopen the proceeding without any thing further, the quasijudicial function to take benefit of its own wrong. Reassessment was held to be bad in law. (ITA No. 1650/Kol./2014, Dt. 14.10.2014.)(AY. 2007-08)

Munshi Mini Rice Mill .v. ITO (Kol.)(Trib.);www.itatonline.org

S.147 :Reassessment-Survey-Sale of units without construction-No new material-Reassessment was held to be invalid. [S.80IB(10),133A, 143(3), 148]

The assessee is engaged in business of real estate, claimed deduction under section 80-IB in relation to development and construction of a housing project.AO allowed deduction under section 80-IB in scrutiny assessment. Subsequently, post Survey Action on the assessee AO reopened assessment on the ground that survey action revealed that assessee had completed construction of only 28 residential

units out of 47 units for which sanction was obtained and that balance plots were sold without construction, which made assessee ineligible for deduction under section 80-IB(10).Tribunal observed that, the AO had allowed the claim of the assessee under s.80-IB(10) of the Act "upon scrutiny". The AO noticed that the assessee sold houses as well as plots in the instant year as well as in the past year; assessee had executed only one housing project and claim of deduction under s. 80-IB(10) of the Act was with respect to the "eligible profits of business". As per the discussion made by the AO in the assessment order on the basis of the computation of income and other accompanying documents filed by the assessee, it is quite clear that the AO was aware that in the housing project being executed, assessee had not only sold houses on which the deduction under s. 80-IB(10) of the Act was claimed, but also sold open plots on which no deduction under s. 80-IB(10) of the Act was claimed. In this background, the assertion of the AO in the reasons recorded that the survey action on 28th May, 2008 revealed that assessee had sold certain plots out of the project which therefore led to an inference that assessee violated the condition of s. 80-IB(10) of the Act, is suspect. As noted earlier, AO was aware that assessee had sold open plots also and concluded that the assessee was eligible for the claim of deduction under s. 80-IB(10) of the Act in relation to "eligible profits of business" of "Nath Regency" project, there was no fresh tangible material which came to knowledge of the AO after the completion of assessment on 13th Sept., 2006, which establishes ineligibility of assessee's claim for deduction under s. 80-IB(10) of the Act. The survey action under s. 133A of the Act on 28th May, 2008 cannot be said to have revealed a fact situation which was not in the knowledge of the AO on the basis of the material before him. Re-Opening was held to be invalid. (AYs.2003-04 to 2005-06)

Nath Developers .v. ACIT (2014) 61 SOT 8(URO)/(2013) 40 taxmann.com 137 (Pune)(Trib.)

S.147: Reassessment–Protective assessment-Retracted statement cannot form the basis of reopening- Protective assessment without substantive assessment is not permissible. [S. 143(3)]

(i) The statement of Shri Subodh Gupta, CA. was recorded during the course of survey in his personal capacity. The statement was later retracted. A retracted statement recorded during survey cannot be a basis of assumption of jurisdiction u/s 147 of the Act.

(ii) The AO has not made any specific allegations against the assessee. He intended to make a protective assessment on the assessee. However, while there can be a substantive assessment without any protective assessment, there cannot be a protective assessment/addition without a substantive assessment/addition. As no substantive assessment/addition was made in the hands of Subodh Gupta, the protective reassessment assessment on the assessee is not permissible.(ITA No. 1502/Del/2013, dt. 27.06.2014.)(AY. 2004-05)

G.K. Consultants Limited .v. ITO (Delhi)(Trib.) www.itatonline.org

S. 147: Reassessment– Wtit-Alternative remedy-Order passed by AO on the objections of assesse would in effect be a challenge to a notice issued under section 148 and such preliminary order, which does not have a stutory flavour not deciding the disputes bwetween the parties, cannot be challenged by invoking the extrodinary jurisdiction of High Court, hence notice and order on objections cannot be challenged in a Writ Petition.[S.148, Art. 226]

The Court had to consider whether an order passed by the AO on the objections of an assessee can be assailed before the Court under Article 226 of the Constitution of India. HELD by the High Court in the negative:

(i) A challenge to an order passed on the objections of the assessee is in effect a challenge to a notice u/s 148 of the Act. Such an order passed by the AO is only at the stage of process of determination and not a determination by itself. The process of assessment is not required to be challenged before Court of law, as it is a still born child. Therefore, the assessee cannot have a legal right as there is no legal injury suffered by them at that stage. A Writ can be filed to the limited extent in cases where an assessment is sought to be reopened by an Officer who is not competent to do so or where on the face of it would appear that the reopening is barred by limitation or lacks inherent jurisdiction i.e. cases where no adjudication is required on facts (CIT v. ChhabilDassAgarwal (2014) 1 SCC 603) followed);

(ii) As held in G.K.N. Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19 (SC), once a notice u/s 148 is issued, the assessee has to file a return and can seek the reasons for issuing notice. The AO is bound to furnish the reasons within a reasonable time and the assessee is entitled to file objections over

which the AO has to pass a speaking order. The Supreme Court adapted a novel method to make way for the statutory authorities to deal with the adjudication covering assessments. In other words, in clear terms, the Supreme Court has indicated that an assessee is not required to run to the Court before the passing of the assessment order by challenging a notice issued u/s 148. However, in order to provide an element of fairness in the process of adjudication and create an atmosphere of transparency, a mechanism, which was not found in the Statute was evolved by asking the AO to pass a reasoned order. It is only a part of the procedural law. Such an order is only a preliminary order, which can only be said to be an expansion of the reasons which are supposed to be assigned u/s 148(2) of the Act. It neither creates a right nor takes away the one accrued. It is not an adjudication in the strict sense of the term. It is only meant for the purpose of understanding the basis of the notice. Therefore, GKN Driveshafts has to be understood to mean that a pre-adjudication proceedings not deciding the issues shall not be put into challenge while exercising the discretionary power under Article 226 of the Constitution of India, which in the process, takes away the right of the AO to proceed further. Therefore, the Order passed, as directed by the Supreme Court, cannot be termed as a substitute to the assessment order. To put it differently, it does not take away the power of the AO to decide the issue on the plea of the assessee or on a consideration of the records. It is to be remembered that the AO was directed to pass orders only on the objections given by the assessee. The further fact that such an order is required to be passed before proceeding with the assessment would make the said position clear. Furthermore, if the order on the objections can be entertained, then the Supreme Court would not have directed the appeals to be disposed of by the appellate authority instead of setting them aside. This also indicates that the assessee could raise all the pleas including those considered against him by the AO while passing orders on his objections. Hence, such a preliminary order, which does not have a statutory flavour not deciding the dispute between the parties, cannot be challenged by invoking the extraordinary jurisdiction before us. The Supreme Court merely provided safeguards to the assessee at the pre-adjudicative stage. The decision has been given to make sure that the AO complies with s. 148(2) in letter and spirit. There is no certainty in the order passed by the AO. If the order passed is set aside, it would only mean the notice issued u/s 148 is liable to be interfered with. The object of the decision of the Supreme Court is not only to avoid interference by the Courts but not to give way for it. Any other interpretation would make the entire remedial mechanism provided under the Act as redundant.

(iii) Calcutta Discount Co.Ltd. v. ITO (1961) 41 ITR 191 (SC) was rendered was much prior to the judgment in G.K.N. Driveshafts (India)Ltd. v. ITO(2003) 259 ITR 19 (SC). Further, the then fact situation at the time of rendering the said judgment is no longer in existence today.

(iv) The legislative intent is to allow the AO to go through the process of assessment. Even u/s 147, a Court of law cannot presume a lack of jurisdiction, when a fact in issue requires an adjudication. It has to be exercised in terms of sections 139, 143(2) and 143(3). Therefore, considering the scheme of the enactment, particularly, with reference to sections 147 to 153 of the Act, we are of the view that an order passed on the objections of the assessee over adjudicating facts is not open to challenge by way of filing a writ petition.(Writ Appeal Nos. 347 to 349 of 2014, dt.04.07.2014.)(AY. 2008-09 , 2009-10)

KalanithiMaran .v. JCIT (2014)366 ITR 453/ 107 DTR 1/270 DTR 296(Mad.)(HC)

S.147:Reassessment-Change of opinion-Failure to disclose material facts-Bald statement that assessee has failed to make a full & true disclosure of material facts not sufficient. Details must be given as to which fact was not disclosed.[S.148]

It is true that the reasons for initiating re-assessment proceedings do in fact state that there was a failure on the part of the Petitioner to disclose fully and truly all material facts necessary for its assessment. However, merely making this bald assertion was not enough. In Hindustan Lever Ltd. v/s R.B. Wadkar (2004)268 ITR 332 it was held that the AO must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence. On facts, there are no details given by the AO as to which fact or material was not disclosed by the Petitioner that led to its income escaping assessment. There is merely a bald assertion in the reasons that there was a failure on the part of the Petitioner to disclose fully and truly all material facts without giving any details

thereof. This being the case, the impugned notice is bad in law and on this ground alone the Petitioner is entitled to succeed in this Writ Petition.(Writ Petition No. 2468 of 2011, dt. 12/06/2014.)
Bombay Stock Exchange .v. DDIT(E)(2014) 106DTR121 (Bom.)(HC)

S. 147:Reassessment–Notice-After expiry of four years- Failure by assessee to file return - Conditions must be reflected in notice itself.[S.148]
Before any notice is issued after the expiry of four years, the officer concerned must be satisfied that there has been an escapement in assessment of income, which is chargeable to tax and that this is because of the failure on the part of the assessee to make a return u/s 139 of the or in response to a notice issued u/s 142(1)/ 148 for not disclosing the material facts. These conditions must be reflected in the notice itself. In the absence of the conditions, exercise of jurisdiction in issuance of the notice under the provision is patently illegal. On a writ petition challenging the notice issued after four years from the end of the relevant assessment year 2005-06:
Held, allowing the petition, that nothing had been disclosed or shown even in the subsequent stages to satisfy the conditions. Therefore, the first notice dated March 30, 2012, was set aside as well as the consequential steps being order dated January 15, 2013, issued by the Deputy Commissioner. However, it would be open for the Revenue, if so advised, to proceed in accordance with law taking impartial decision by taking note of the records, if there existed a strong ground for issuance of such notice. (AY. 2005-06)
Tecumseh Products India P. Ltd. .v. ACIT (2014) 361 ITR 429 (AP)(HC)

S. 147: Reassessment–Objections–Assessing Officer is bound to dispose the objections by passing a speaking order. [S.148]
When a notice under section 148 is issued, the proper course of action for the noticee is to file a return and if he so desires, to seek reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of the reasons, the notice is entitled to file objections to issuance of noticee and the Assessing Officer is bound to dispose of the objections by passing a speaking order. (AY. 2006-07)
Samsung India Electronics P. Ltd. .v. DCIT (2014) 362 ITR 460 (Delhi)(HC)

S. 147: Reassessment–Change of opinion–Estimate by Valuation Officer-Investment in construction of building-Reference to Valuation Officer-Opinion of valuation officer not information for reopening assessment-Reassessment was not valid.[S.142A,148]
During assessment proceedings, matter of valuation of property was referred to Valuation Officer but assessment order was passed before receipt of his report. After receipt of report, reassessment proceedings were initiated on the basis of the valuation report. Held, the reasons recorded were contrary to facts on record which showed non-application of mind. Hence, reassessment notice was held not valid. (AYs. 2005-2006, 2006-2007)
MahashayChunnilal Charitable Trust .v. DCIT (2014) 362 ITR 314/101 DTR 209/225 Taxman 250 / 267 CTR 334 (Delhi)(HC)

S. 147: Reassessment–Within four years-Reassessment at the instance of audit party–AO convinced with reasons-AO applied his mind-Reassessment was valid.
Held, ground for reopening assessment was brought to the notice of the Assessing Officer by audit party but the Assessing Officer, on application of mind, was convinced with such reason. Therefore, it could not be said that the Assessing Officer acted at the instance of the audit party. There was no dispute that the issue in reassessment required reconsideration. Hence, reassessment was held valid. (AY. 2001-02)
N.K. Industries Ltd. .v.ITO(OSD) 362 ITR 502 (Guj.)(HC)

S.147: Reassessment–Reassessment at the instance of audit party– AO not convinced with reasons-Reassessment was not valid. [S.148]
The audit party objected that non-charging of interest on advances resulted in short levy of tax. However, the Assessing Officer did not accept the objections but still issued notice solely on basis thereof. Held, notice was not valid. (AYs. 2001-02)

N.K. Roadways P. Ltd. .v. ITO (OSD) (2014) 362 ITR 522 /226 Taxman 64(Mag.)(Guj.)(HC)

S. 147: Reassessment–Change of opinion–Order after enquiry-Capital gains and business income-Assessment order did not record reasons for accepting assessee's stand is not relevant-Reassessment was not valid.[S.28(i), 45, 148]

Assessment was completed after full enquiry and after calling for explanation of assessee why income from sale of plots should be treated as capital gains and not business income. Held, reopening of assessment to assess income as business income was not permissible and that the assessment order did not record reasons for accepting assessee's stand was not relevant. (AY.2008-09)

Spunpipe and Construction Co. .v. ACIT (2014) 362 ITR 559 (Guj.)(HC)

S. 147: Reassessment–Change of opinion–Matter examined-Reassessment was not valid.[S.40(a)(ia),148]

The Assessing Officer framing a scrutiny assessment had not overlooked TDS aspect of the matter but, having enquired with the assessee and having concluded that deduction of tax at source though required, was not deducted, for some reason did not apply the provisions of section 40(a)(ia) but instead made an ad hoc disallowance. Whatever be the legality of such assessment, the fact remained that, in the scrutiny assessment, the Assessing Officer had thoroughly and fully scrutinised the assessee's claim. Any re-examination of such a question at this stage would only amount to change of opinion. The notice was not valid and was liable to be quashed. (AY. 2007-08)

Transwind Infrastructure P. Ltd. .v. ITO (2014) 362 ITR 67 (Guj.)(HC)

S. 147: Reassessment-After expiry of four years-Profits on sale of shares assessed as capital gains-No failure on part of assessee-Reassessment was not valid.[S.28(i), 45,148]

Beyond the period of four years, if any notice of reopening of assessment is issued in the absence of any failure on the part of the assessee to disclose fully and truly all material facts, it would have no validity. In the original assessment proceedings, if the Assessing Officer, had examined the claim in detail after raising queries which were fully answered by the assessee, such action of reopening cannot be sustained in such circumstances. (A.Y. 2006-07)

VinodDhudalal Shah .v. ACIT (2014) 362 ITR 345 (Guj.)(HC)

S. 147: Reassessment–After expiry of four years-Write back of amount-No failure on part of assesse-Reassessment was held to be not valid.[S.41(1),148]

Assessee created a provision at a time when its income was exempt from tax which was subsequently written back and this fact was disclosed in the return. Held, notice seeking to tax the amount after four years was not valid. (A.Y. 2005-06)

National Dairy Development Board .v. DCIT (2014) 362 ITR 79 (Guj.)(HC)

S. 147: Reassessment–Absence of tangible material–Audit objection-Resjudicata-Principle of consistency-Assessee as business income-Assessed as capital gains—Reassessment was not valid.[S.28(i), 45, 148]

Original assessment of profits on sale of shares was completed as capital gains. Similar assessments were completed even for prior and subsequent years. Held, notice on the basis of audit objection to assess the amount as business income was held not valid. Though the principle of resjudicata is not applicable to tax matters as each year is separate and distinct, nevertheless where the facts are identical from year to year , there has to be uniformity and consistency in treatment. High court decision binding on Income tax authorities under its jurisdiction. Ratio of CIT v.GopalPurohit (2011) 336 ITR 287 (Bom)(HC) is followed.(AY. 2008-2009)

Aroni Commercial Ltd..v. DCIT (2014) 362 ITR 403 (Bom.)(HC)

S. 147: Reassessment–No limitation on number of times notice can be issued-Notice to tax guaranteed return and bonus on key man insurance-Proceedings dropped–Second notice to tax same sum- Two notices on same ground–Not permissible.[S. 148]

In the return of income the assessee stated that guaranteed return and bonus on key man insurance being contingent receipts were not offered to tax. Notice was issued under section 148. The assessee

filed detailed reply and after considering the reply proceedings were dropped. Once again notice was issued to tax the said sum. The assessee once again made the detailed representation to drop the proceedings. The AO did not drop the proceedings.The assessee filed the writ petition. Allowing the writ the court held that Subject to limitation of not being permissible on change of opinion, there is no limitation on the number of times notice u/s.148 can be issued. When earlier reassessment proceedings were dropped, it amounts to inference that the AO is of the view that the additions are not sustainable, and hence, notice u/s.148 on the same ground is not permissible. The second notice was quashed. (AY. 1997-98)

Kunal Organics P.Ltd. .v. Dy.CIT (2014) 362 ITR 530/225 Taxman 403 (Guj.)(HC)

S.147: Reassessment-Retrospective amendment-Within four years-Works contract-Reopening, even within 4 years, solely on the basis of a clarificatory retrospective amendment, is not permissible. [S.80IA(4)]

In AY 2005-06 the assessee claimed deduction u/s 80IA(4) which was allowed u/s 143(3). Thereafter, within 4 years, the AO reopened the assessment on the basis that the retrospective amendment to s. 80IA(4) w.e.f. 1.4.2000 prohibited deduction to an assessee who was carried on business is in the nature of a works contract. The assessee challenged the reopening on the ground that the retrospective amendment was merely clarificatory of the existing law and amounted to a 'change of opinion'. HELD by the High Court allowing the plea:

In Katira Construction Ltd. v. UOI (2013) 352 ITR 513 (Guj) it was held that the Explanation to s. 80IA(4) was purely explanatory in nature and did not mend the existing statutory provisions. If an Explanation is added to a statute for the removal of doubts, the implication is that the law was same from the beginning and the same is further explained by way of addition of the Explanation. Therefore, it is not a case of introduction of new provision of law by retrospective operation, but when all the materials regarding activities of the assessee are available on record and the benefit of the provision is already made available to such assessee, reassessment proceedings cannot be initiated only on account of addition of such Explanation. On facts, as the AO had conducted a detailed scrutiny before allowing the s. 80-IA(4) deduction, the reopening based only on the retrospective insertion of the Explanation is on mere "change of opinion" (SLP No. 5848 of 2010, dt. 09/04/2014.)(AY.2005-06)

Sadbhav Engineering Ltd. .v. DCIT (2014) 223 Taxman 229(Mag.)/105 DTR 33(Guj) (HC)

S.147: Reassessment-Reason to believe-Guidelines laid down to streamline procedure for reopening of assessments-Commissioner was directed to issue circular to all the Assessing Officer of Gujarat State to follow the guidelines laid down by Gujarat High Court. [S.148]

(i) In large number of cases pertaining to reopening of assessments, we have noticed that different stages of the assessees demanding reasons recorded by the AO, supplying of such reasons, the assessees raising objections and the AO disposing of such objections, consume considerable time. In many cases, the last stage of disposing of the objections raised by the assessee is reached only a few weeks, and in some cases even days, before the assessment would be time-barred. This situation is quite unsatisfactory, both from the point of the assessee as well as the department. In the last minute rush, the AO frames assessment in a most hurried manner. In the process, important and valid grounds raised by the assessee are often times lost sight of. Additions are thus made which could have been avoided forcing the assessee to prefer appeal which could have been avoided, further creating needless strain on the system. On the other hand, sometimes additions were made without full and proper scrutiny. The additions which should have otherwise stood the test of appellate scrutiny fail the test.

(ii) It can thus be seen that there are four important stages once the AO issues notice for reopening of the assessment. Such stages are: (i) the assessee if he so wishes, may demand the reasons recorded by the AO after filing return in response to notice u/s 148 of the Act, (ii) the AO supplying such reasons to the assessee, (iii) the assessee raising objections to the notice for reopening and (iv) the AO disposing of the objections raised by the assessee. With a view to streamlining this procedure, and to ensure, as far as possible, the AO is not faced with the unenviable task of completing the assessment proceedings in a few days left before the same became time barred, we would like to give certain directions of general implication which, we would expect, are followed by all concerned. While doing

so, we are conscious that these stages are provided by the Supreme Court in GKN Driveshafts (India) Ltd v. ITO (2003) 259 ITR 19 (SC) and we would be giving directions only to the extent the said judgment already does not provide for. We have noticed that considerably long time is consumed sometimes by the assessee demanding the reasons recorded by the Assessing Officer and sometimes the AO complying with such a request of the assessee. It is an accepted proposition that the reasons recorded by the AO are not confidential and the assessee whose assessment is being reopened has a right to know such reasons. We therefore thought that these two stages can be substantially eliminated by giving suitable directions. The further stage is of the assessee raising objections which often times is done after much delay and the last stage comes where the AO deals with such objections. This is yet another problem area where unduly long time is consumed by the AO. Under the circumstances, following directions are issued:

(1) Once the AO serves to an assessee a notice of reopening of assessment u/s 148 of the Income-tax Act, 1961, and within the time permitted in such notice, the assessee files his return of income in response to such notice, the AO shall supply the reasons recorded by him for issuing such notice within 30 days of the filing of the return by the assessee without waiting for the assessee to demand such reasons.

(2) Once the assessee receives such reasons, he would be expected to raise his objections, if he so desires, within 60 days of receipt of such reasons.

(3) If objections are received by the AO from the assessee within the time permitted hereinabove, the AO would dispose of the objections, as far as possible, within four months of date of receipt of the objections filed by the assessee.

(4) This is being done in order to ensure that sufficient time is available with the AO to frame the assessment after carrying out proper scrutiny. The requirement and the time-frame for supplying the reasons without being demanded by the assessee would be applicable only if the assessee files his return of income within the period permitted in the notice for reopening. Likewise the time frame for the AO to dispose of the objections would apply only if the assessee raises objections within the time provided hereinabove. This, however, would not mean that if in either case, the assessee misses the time limit, the procedure provided by the Supreme Court in GKN Driveshafts (India) Ltd would not apply. It only means that the time frame provided hereinabove would not apply in such cases.

(5) In the communication supplying the reasons recorded by the AO, he shall intimate to the assessee that he is expected to raise the objections within 60 days of receipt of the reasons and shall reproduce the directions contained in sub-para 1 to 4 hereinabove giving reference to this judgment of the High Court.

(6) The Chief Commissioner of Income Tax and Cadre Controlling Authority of the Gujarat State, shall issue a circular to all AOs for scrupulously carrying out the directions contained in this judgment.(AY. 2008-09)(SCA No. 3955 of 2014, dt. 31/03/2014.)

Sahkari KhandUdyog Mandal Ltd. .v. ACIT(2014) 106 DTR 182 (Guj.)(HC)

S.147: Reassessment-Return accepted u/s 143 (1)-Notice under section 148 on the basis of same material and nothing more-Reassessment was not valid. [S. 143(1), 148]

Along with the return filed the assessee also attached the note forming part of the return filed clearly mentioned and described the nature of the receipt under non –compete agreement. The return was processed under section 143(1). Subsequently notice under section 148 for reopening of the assessment. On appeal Tribunal held that there was no tangible material and that it was mere circumstances that advance tax paid by assessee did not amount to admission by the assessee. The Tribunal allowed the appeal of assessee and held that reopening was not valid. On appeal by revenue the Court up held the order of Tribunal. The court held that the reasons for notice u/s 147 nowhere mentioned that the revenue came up with any other fresh material warranting reopening of assessment. The Court held that mere conclusion of the proceedings u/s 143 (1) ipso facto did not permit invocation of powers for reopening the assessment. (AY. 1999-00)

CIT .v. Atul Kumar Swami (2014) 362 ITR 693 (Delhi)(HC)

S.147: Reassessment-Notice-After expiry of four years-No finding that Assessee failed to disclose fully and truly all material facts-Notice was not valid. [S.148]

Since no satisfaction was recorded by AO that income has escaped assessment by reason of failure on part of assessee to disclose fully and truly all material facts necessary for its assessment, notice was not valid. (AY.2005-06)

General Motors India P. Ltd. .v. DCIT (2014) 360 ITR 527 /226 Taxman 80 (Mag)(Guj.)(HC)

S.147: Reassessment–Arbitration award–Denial of exemption u/s.10A-Issue was subject matter of appeal-Reasons to believe were silent and there was no mention thereof or allegation in the grounds recorded by the AO-Reassessment was held to be not valid. [S.10A, 148]

The AO denied the exemption under s. 10A in respect of the arbitration award of Rs. 43.49 crores. The assessee filed an appeal against the order and the matter was pending before the Tribunal at the impugned time. The AO issued notice under s. 148 was issued to the assessee on the ground that in the audit note the narration given under the head legal expenses, i.e., purchase of stamp papers for arbitration work on March 29, 2007, and invoice dated March 30, 2007, of Rs. 43.49 crores clearly indicated that the receipts of Rs. 43.49 crores were with regard to arbitration award and not for the purposes of sale of software. The assessee objected that the purchase of stamp paper had nothing to do with the invoice dated March 30, 2007, for payment of Rs. 43.49 crores and the payment against the invoice was received by the assessee in advance in the month of January, 2007. On a writ petition:

Held, allowing the petition, that the receipt of Rs. 43.49 crores it was claimed by the assessee was for sale of source code. The payment was from a related enterprise. The transaction clearly was a subject matter of the original assessment order dated December 31, 2010, and an addition of Rs. 43.49 crores was made by the AO. The CIT (A) had observed that there was no connection between the arbitration award and the receipt. It was not indicated or stated in the reasons to believe that the stamp paper purchased for arbitration work was connected with the receipt. The reasons to believe were recorded on March 28, 2012, which was after the order passed by the CIT (A) on March 15, 2011. Questions did arise about the genuineness of the receipt as the company making the payment was a related party incorporated in the USA. However, on these issues, the reasons to believe were silent and there was no mention thereof or allegation in the grounds recorded by the AO. Hence, the reassessment notice was quashed.(AY.2007-08)

Nuwave E Solutions (P.) Ltd. .v. ACIT (2014) 360 ITR 351 (Delhi.)(HC)

S.147: Reassessment-Assessee engaged in business of marketing agricultural produce within notified area of Market Committee - Punjab Mandi Board finding assessee concealed its sales-Reassessment was held to be valid.[S.148]

The assessee was engaged in the business of marketing agricultural produce within the notified area of the Market Committee. The assessment of the assessee was reopened by issuance of notice under s. 148 on the basis of information that the Punjab Mandi Board had passed an order that the assessee had concealed its sales. The AO made an addition of Rs. 61,42,981. The Commissioner (Appeals) held that as the order passed against the assessee by the Punjab Mandi Board had been set aside the order passed by the AO was not warranted. The Tribunal held in favour of the assessee.

Held, that the order passed under the Punjab Agricultural Produce Markets Act, 1961 (PAPM Act), which was the foundation of the order passed by the AO had been set aside. Therefore, there was no reason to hold that the orders passed by the Commissioner (Appeals) or the Tribunal setting aside the order passed by the AO suffered from any error of law or jurisdiction as would require interference. However, fresh proceedings under the PAPM Act had led to the passing of a fresh order against the assessees holding them liable for payment of additional market fee, interest, etc. The AO would be required to reconsider these orders to ascertain whether any income had escaped assessment or the assessee was guilty of evasion of tax.(AY.2002-03)

CIT .v. PiaraLal Kashmiri Lal (2014) 360 ITR 190 (P&H)(HC)
CIT .v. R.J. Traders (2014) 360 ITR 190 (P&H)(HC)

S.147: Reassessment-Notice-After expiry of four years-All materials were on record-Reassessment was not valid.[S. 44AB, 148]

Allowing the writ petition the court held that all material on the basis of which the AO formed a reasonable belief that income has escaped assessment were on record during the assessment proceedings and assessment was completed under section 143(3). Details were also furnished under

section 44AB along with the return. As there was no failure on the part of assesse to disclose material facts necessary for assessment, reassessment was held to be in valid.(AY. 2006-07)

Talati & Panthaky Associated (P) Ltd. .v. Dy.CIT (2014) 102 DTR 259/362 ITR 362 (Bom.)(HC)

S.147:Reassessment-Proviso-Failure to disclose material facts-Reassessment was justified.[S.148]

Assessee was registered u/s 12AA & S/80G of the Act. The assessment for A.Y: 2003-04 & 2006-07 were completed u/s 143 (3) of the Act. The assessee' s contention in writ petition was that the trust was engaged in imparting & spreading education by establishing various educational institutions & running hospital to give treatment &relief to the weaker section of the society . The AO reopened the assessment for 2 Yrs & has recorded satisfaction for 'reason to believe' based on information received that donations & expenditure on salary & other expenses were not genuine, those were fictitious expenditures to be taxed , as they are not for the purposes & object of the trust & has thus escaped from assessment to tax . Dismissing the writ petition, the court held that the AO had material & had rational connection & relevant bearing on such formation of belief for issuing valid notices for reassessment , the sufficiency of which was not justifiable issue at that stage & was to be examined in the proceedings of reassessment & for the AY.2003-04 ,the additional ground of limitation also did not merit consideration , as AO had material available with him that on the failure of the assessee to have disclosed fully & truly all material facts , the income chargeable to tax had escaped assessment . AO was having sufficient material to form belief on good faith that there was failure on the part of the assessee to disclose fully & truly all material facts necessary for his assessment. (AY.2002-03 to 2006-07)

Rohilkhand Educational Charitable Trust .v. Chief CIT (2014) 365 ITR 233/ 99DTR 115/222 Taxman 243(All.)(HC)

S.147: Reassessment-Court can examine existence but not adequacy of reasons. AO is only required to provide material on which he relies to reopen the assessment.[S.148]

(i) It is important to restate an accepted, but often neglected, principle, that in its writ jurisdiction, the scope of proceedings before the Court while considering a notice under Section 147/148 is limited. The Court cannot enter into the merits of the subjective satisfaction of the AO, or judge the sufficiency of the reasons recorded, but rather, determine whether such opinion is based on tangible, concrete and new information that is capable of supporting such a conclusion. This was recognized by the Supreme Court in Phool Chand Bajrang Lal and Ors. v. ITO (1993) 203 ITR 456 (SC);

(ii) The law only requires that the information or material on which the AO records his or her satisfaction is communicated to the asseseee, without mandating the disclosure of any specific document. While the 2G SpectrumReport has not been supplied in this case on grounds of confidentiality, the reasons recorded have been communicated and do provide – independent of the 2G Report – details of the new and tangible information that support the AO's opinion. These facts are capable of justifying the satisfaction recorded on their own terms, as discussed above. In this context, there is no legal proposition that mandates the disclosure of any additional document. This is not to say that the AO may in all cases refuse to disclose documents relied upon by him on account of confidentiality, but rather, that fact must be judged on the basis of whether other tangible and specific information is available so as to justify the conclusion irrespective of the contents of the document sought to be kept confidential. In cases such as the present, however, where the information and facts communicated by the AO are themselves in accordance with the minimum requirement under Section 147/148, the petitioner cannot compel the disclosure of other documents that the assessee may have also relied upon.(AY. 2009-10)

Acorus Unitech wireless Pvt. Ltd.v.ACIT(2014) 362 ITR 417/223 Taxman 181 (Mag.)/102 DTR 177(Delhi)(HC)

S.147:Reassessment-Full and true disclosure –Quantum of receipt was disclosed-Change of opinion-Reassessment was not valid.

Assessee had made full and true disclosure at the time of original proceedings about the method of accounting adopted by him and the quantum of receipts disclosed. There was change of opinion. Therefore, reopening was not sustainable. (AY. 2006-07)

Select Vacations (P) Ltd v. ITO & Anr. (2014) 98 DTR 137/221 Taxman 159(Delhi)(HC)

S.147:Reassessment-Settlement of cases–Maintainability of application–Pendency of assessment before AO-No assessment proceedings were pending-Abatement of proceedings before Settlement Commission-Rejection of application-Reassessment notice was valid.[S.148, 153,245A(b), 245C & 245D]

Time-limit to make assessment order in regular proceedings for A.Y. 2007-08 to 2009-10 had already expired before the date on which the application for settlement was made. On the date of filing of the application before the Commission no assessment proceedings was pending with AO. Therefore, the application was not maintainable.

The decision of the Settlement Commission rejecting the application for A.Y. 2007-08 to 2009-10 was upheld. In view of s. 245A, proceedings before the Commission abated in respect of those years. AO was entitled to issue notices u/s.148. (AYs. 2007-08 to 2009-10)

Shriniwas Machine Craft (P) Ltd. .v. ITSC & Ors. (2014)361 ITR 313/ 98 DTR 161/265 CTR 113(Bom.)(HC)

S.147:Reassessment-When there was detailed scrutiny with regard to an issue -Reassessment of the same issue was not possible. [S.40(a)(ia), 148, 194C, 194H]

The Assessee was engaged in manufacture and sale of tea. It had filed its return of income, which was selected for scrutiny. During the scrutiny assessment, the AO raised a specific query for selling and distribution expenses incurred by the assessee and the details of trade discount given under the incentive scheme. The AO concluded the assessment without making any disallowance. Thereafter, the AO issued notice u/s. 148 and passed an order holding that the discount given under the scheme was nothing but commission and tax should be deducted, and, accordingly, disallowed the expenses u/s.40(a)(ia) of the Act. The tribunal upheld the action of the AO. On an appeal, the High Court held that at the time of the original assessment u/s 143(3) detailed scrutiny of the very same issue was made and hence amounted to a change of opinion and was therefore liable to be quashed. (AY. 2006-07)

Gujarat Tea Processors & Packers Ltd. .v. DCIT (2014) 220 taxman 426 (Guj.)(HC)

S.147:Reassessment-Business expenditure-Year of allowability-"In absence of "reason to believe" the reassessment initiated by the AO was set aside. [S.143(3)]

The Assessee filed its return of income which was duly scrutinised u/s 143(3) of the Act. Thereafter, the AO issued a notice for reassessment recording reason to believe that the assessee had debited a sum in profit and loss account on account of prior period expenses which had not been crystallized during the relevant year and that, as a result, these expenses should be disallowed. The Assessing Officer placed reliance on notes to accounts filed along with the return. On writ filed by the Assessee, the High Court held that the words 'reason to believe' indicated that the belief had to be that of a reasonable person based on reasonable grounds emerging from direct or circumstantial evidence and not on mere suspicion, gossip or rumour. The reason to believe recorded did not refer to any material that came to the knowledge of the Assessing Officer from which the Assessing Officer could have formed a reasonable belief that the expenditure referred to had not crystallized during the relevant year. The recorded reasons to believe that income had escaped assessment were not based on any direct or circumstantial evidence and were in the realm of mere suspicion. Therefore, in absence of adequate reason to believe, the reassessment was set aside and the proceedings initiated pursuant to notice u/s 148 were quashed. (AY. 2002-2003)

SMCC Construction India Ltd. .v. ACIT (2014) 220 Taxman 354 (Delhi)(HC)

S.147:Reassessment–Business expenditure-R&D expenses-Notice-Reassessment based on internal audit objection not valid. [S.35AB, 37(1), 148]

The AO allowed R&D expenses incurred by the assessee in respect of in-house research as revenue expenditure. Subsequently, the audit party raised the objection that the assessee should only be allowed to claim 1/3rd of the R&D expenses in the year as per Section 35AB. The High Court held that reassessment proceedings were initiated solely at the instance of the audit party; the same was a colourable exercise of jurisdiction by the Assessing Officer and therefore, could not be sustained. (AY. 2004-05)

CIT .v. Shilp Gravures Ltd. (2014) 220 Taxman 382 (Guj.)(HC)

S.147:Reassessment-Direction of CIT(A)-Direction in another assessment year-Reopening was held to be bad in law.[S.148]

The court held that notice for reassessment was issued only on the account of the directions contained in the order passed by the CIT(A) in the appeal filed by the assessee pertaining to another year cannot be sustained. (AY. 2007-08)

Pramod Kumari Singal .v. ITO (2014) 99 DTR 386 (MP)(HC)

S.147:Reassessment-Non filing of return-Reassessment was held to be valid-Failure to communicate reasons not prejudicial to assesse and does not affect validity of proceedings. [S.90]

Assessee had notfiled returns of income and were not subjected to regular assessment under section 143(3). Assessee adopted MAP procedure and income of the two assessments has been partly taxed in India , therefore the reassessment was held to be valid.Failure to communicate reasons not prejudicial to assesse and does not affect validity of proceedings.(AYs. 2000-01 to 2006-07)

CIT .v.eFunds IT Solution(2014)364 ITR 256/99 DTR 257 (Delhi)(HC),
DIT(IT) .v.eFunds Corporation & Ors(2014) 99 DTR 257 (Delhi)(HC)

S.147:Reassessment-Tax evasion petition-Abuse of law to settle personal vendetta between top-level IRS officers cannot be the reason for reopening of assessment.[S.148]

Surprisingly one month after the first respondent wrote to the petitioner conceding that there was no basis for the tax evasion petition, he invited the petitioner to cross-examine the complainant, if so advised. Such a procedure is unknown to the Act. Instead of terminating the proceedings initiated under Section 148 of the Act by dropping them the first respondent chose inexplicably to keep those proceedings alive. This is illegal and impermissible in law. This amounts to nothing but harassment of the petitioner. There appears to be some vested interest in keeping the proceedings against the petitioner pursuant to the notice dated 31.03.2011 alive. The tax evasion petition and the present proceedings seem to be the result of a personal vendetta between two officers of the Indian Revenue Service (IRS) (the complainant being one of them). This unfortunately has resulted in multiple proceedings before this Court. 7. The respondents have to act in accordance with law and not under any pressure. The AO, being a responsible officer should not be party or pressurized by someone to personal vendetta. Being statutory officers they have to act independently and in accordance with law.(AY. 2004-05)

Pradyot K. Misra .v. ACIT(2014) 101 DTR 59/362 ITR 24(Delhi)(HC)

S.147:Reassessment-Objection not raised before the AO –Cash credits -New issues raise first time before the Court-Assessee is not entitled to challenge validity of reopening on a ground not stated in objections to AO.[S. 68,148]

Just as the revenue cannot improve upon its case for reopening before the Court but must stand or fall by the reasons recorded for reopening the assessment, the same test would be applicable in case of an assessee i.e. it must stand or fall by its objection to the grounds for reopening of assessment. It is not open to the assessee to urge fresh objections before the Court which the AO had no occasion to deal with, unless of course the notice to reopen is ex-facie without jurisdiction not requiring consideration of any argument such as beyond limitation.(AY.2007-08)

Crown Consultants Pvt. Ltd..v. CIT(2014) 102 DTR 77/362 ITR 368/224 Taxman 81 (Mag)(Bom.)(HC)

S.147:Reassessment-Proceedings of original records were not found-High Court alarmed at shoddy record-keeping by department and allegations of tampering-Reopening was quashed-Direction was given to keep proper records.[S.148, 149]

(i) We have examined the original record but did not find the proceedings or order sheets relating to original proceedings on record. This is a serious lapse, and it is apparent that the proceeding sheets in the respondents‟ custody and charge, have been removed. The record belongs to the respondents and was in their custody and charge. It was/is their duty and obligation to maintain the records properly and as per law and to ensure their sanctity and accuracy. The records cannot and should not be interpolated or changed. This High Court has in some cases earlier adversely commented about record maintenance by the Revenue as it is unacceptable and faulters on the principle of good governance. Facts mentioned above do not disclose a commendable situation and in fact the situation appears to be alarming and perilous. This requires urgent effective remedial steps. Failure to maintain records has resulted in serious allegations being made that the papers/documents have been tempered or removed etc. The papers/documents on record are not serially numbered and indexed. We also note that it is not a practice of the department to give acknowledgement of papers submitted during the course of assessment proceedings;

(ii) In the present case reassessment proceedings have been initiated after four years from the end of the relevant assessment year and as per the first proviso to Section 147 of the Act, it has to be shown that there was failure on the part of the assessee to disclose fully and truly all facts necessary for the assessment. In the "reasons to believe" it is mentioned that absence of "crucial information" relating to income and expenditure on account of activities of the petitioner in India had resulted in improper computation of income for the assessment year 2003-04. Thus, as per the reasons to believe itself, in case the petitioner had furnished statement showing income and expenditure from Indian activities in the course of the original assessment proceedings, there was no lapse or failure on the part of the assessee i.e. the petitioner. Once it is held that the said details were furnished vide letter/reply dated 22nd March, 2006, the reassessment notice, would fail and faulter. Letter/reply dated 22nd March, 2006 enclosing the details would go to the very root and falsify the averments made in the reasons to believe. The said reasons would be factually incorrect and reassessment notice bad and contrary to the first proviso to Section 147 of the Act. The Court also observed as under " It is the duty and obligation of the Department to maintain the records properly and in accordance with law and to ensure their sanctity and accuracy. The records could not should not be interpolated or changed . When proceedings or hearing are held , orders or proceedings sheets should be available.Failure to maintain records results in serious allegations being made that the papers and documents have been tampered with or removed.the papers and documents on record must be serially numbered and indexed."(AY.2003-04)

BBC World News Limited .v. ADIT(2014) 362 ITR 577/226 Taxman 122(Mag.) (Delhi)(HC)

S.147:Reassessment-After expiry of four years-Reason must indicate material facts-Intimation-Even S.143(1), Intimation cannot be reopened in the absence of new information.[S.143(1),148]

The reassessment is not on the basis of new information or facts that have come to the fore now, but rather, a re-appreciation or review of the facts that were provided along with the original return filed by the assesse. The record does not show any tangible material that created the reason to believe that income had escaped assessment. Rather, the reassessment proceedings amount to a review or change of opinion carried out in the earlier A.Y. 2005-06, which amounts to an abuse of power and is impermissible. In response, it is argued that since the return was processed under Section 143(1) for the A.Y. 2005-06, which involves a mere intimation, rather than an application of mind or true assessment of the return, a less stringent threshold must be taken in terms of 'reasons to believe' that income has escaped assessment or not. This precise argument, however, has been considered and rejected by this Court in CIT v. Orient Craft Ltd. [2013] 354 ITR 536 (Delhi)(AY.2005-O6.)

Mohan Gupta (HUF) .v. CIT(2014)366 ITR 115/ 104 DTR 186 (Delhi)(HC)

S.147:Reassessment–Mere change of opinion–no fresh information–Reopening is bad in law.

The assessee was engaged in the development and sale of computer software. The AO initiated reassessment proceedings and bought to tax the amount which was set off against interest receipts as 'income from other sources', in the absence of declaration u/s. 10A(8) of the Act. The CIT(A)

quashed the reopening as the reopening was on a mere change of opinion and no new facts were bought on record to substantiate the same.
On appeal by the department, the Tribunal relying on the decision of the Delhi High Court in the case of CIT v. Usha International Ltd. (2012) 348 ITR 485 held that the CIT(A) was right in quashing the reopening proceedings as there was indeed no new material brought on record and the AO had merely a change in opinion. (AY. 2002-03)
ITO .v. Object Connect India Pvt. Ltd. (2014) 29 ITR 518 (Hyd.)(Trib.)

S.147: Reassessment–Change of opinion–Absence of new material or information-Reassessment is not valid.
AO reopened the assessments originally completed u/s. 143(3) not on the basis of any new material or information which had come into his possession after the completion of the original assessments but by fresh application of mind to the same material and same set of facts, the initiation of reassessment proceedings was based on a mere change of opinion of the AO which is not permissible in law. (AY. 2003-04 to 2008-09)
SIRO Clinpharm (P.) Ltd. .v. Dy.CIT (2014) 98 DTR1 / 65 SOT 149 / 49 taxmann.com 62 (Mum.)(Trib.)

S.147: Reassessment-Reason to believe–Recovery of pen drive by police forwarded to IT department-Reassessment is valid.[S.148, Evidence Act, 1872, Criminal Procedure Code, 1973]
A pen drive was recovered by police and forwarded to IT department containing various accounting entries having correlation with activities of the assessee. This could validly form the basis for AO to entertain reason to believe the income chargeable to tax has escaped assessment. The assessee has raised various objections regarding irregularities committed by Police while carrying out the search and seizure of the alleged pen drive and taking print outs as per the CrPC , IPC , Indian Evidence Act and cyber laws. Tribunal held that which have no effect on recording of reasons for forming a belief about escapement of income. Income-tax proceedings are non-adverserial in nature and the entire exercise is directed to ensure a fair and proper assessment on the assessee. It is the trite law that technical rules of Evidence Act AND Cr PC are not applicable to these proceedings. Thus the reasons for reopening the assessments were properly recorded by AO. (AY. 2001-02 to 2003-04)
Chetan Gupta .v. ACIT (2014) 98 DTR 209 (Delhi)(Trib.)

S.147:Reassessment–Notice sent wrong address-Not valid.[S.148, 282]
Notice u/s. 148 sent on a wrong address and served on a person who was neither employee nor authorised agent of assessee was not valid and therefore, the consequent assessment was held to be bad in law.. (AY. 2001-02)
Chetan Gupta .v. ACIT (2014) 98 DTR 209(Delhi)(Trib.)

S.147(a):Reassessment-Short term capital gains-Omission and failure on part of assessee to disclose short term capital gains- Reassessment was held to be valid.[S.2(42A),148]
Tribunal held that sale of bonus shares ought to be taxed as short term capital gains as the date of acquisition to be taken from the date of allotment and from the date of allotment of original shares.The Court held that following the ratio in CIT v.Chunilal Khushal das (1974) 93 ITR 369 (Guj.)(HC) and Maneklal Premchand (Deceased) v.CIT (1990) 186 ITR 554 (Bom.)(HC), affirmed the view of Tribunal. View of Tribunal on reassessment and merit was upheld.(AY. 1978-79)
CIT .v. D.V. Paranjape (2014) 367 ITR 173/226 Taxman 169 (Bom.)(HC)

S.148:Reassessment- Deduction at source-Failure to deduct or pay –If no income arose to the recipient then notices to payer for TDS default u/s.201 & disallowance under section 40(a)(ia) are bad in law-DTAA-India-South Korea [S.40(a)(ia)195,201(1), Art 7]

(a) The key to the decision is the answer to the question whether any income arose or accrued to Samsung Electronics Ltd, Korea ("SEC") through its PE in India in respect of the sales made in India. If the answer is in the affirmative, both the notices would be good notices; if the answer is in the negative, both the notices would be bad. The answer in our opinion should be in the negative, because

even as per the revenue, as reflected in the order passed by the DRP in the reassessment proceedings of SEC, no income accrued to SEC in India. In this regard, the DRP rejected the specific request made by that assessing officer in his remand report that the petitioner be treated as the permanent establishment (PE) of SEC and the income of SEC be computed on that basis. The DRP however held that as regards attribution of income to the "fixed place PE", a rough and ready basis would be to 10% of the salary paid to the expat-employees of the petitioner as the mark-up, as was done by the assessing officer in the draft assessment order. The remuneration cost in respect of such employees seconded to the petitioner amounted to Rs. 10,72,24,310; this was taken as the base and a mark-up of 10% had been applied by the assessing officer and the income was taken as Rs.1,07,22,431/-. This was approved by the DRP in its order dated 29-9-2012; the other claims made by the assessing officer in the remand report were rejected;

(b) Thus the basis of both the notices (section 148 and 201) has been knocked out of existence by the DRP's order in the reassessment proceedings of SEC for the same assessment year. On the date on which notices were issued to the petitioner under Sections 148 and 201(1)/(1A), there was an uncontested finding by the revenue authorities (i.e., the DRP) in the case of SEC that SEC cannot be taxed in respect of the sales made in India through the petitioner on the footing that the petitioner is its PE. If no income arose to SEC on account of sales in India since the petitioner cannot be held to be its PE in India, two consequences follow: (i) the payments made by the petitioner to SEC for the goods are not tax deductible under section 195(2) and hence they were rightly allowed as deduction in the original assessment of the petitioner and (ii) the assessee cannot be treated as one in default under section 201(1) and no interest can be charged under section 201(1A). It needs mention here that the notice under section 201 is a verbatim reproduction of the remand report of the assessing officer in SEC's case filed before the DRP. Notices issued to assesse under section 148 and 201(1) /201(IA) was held to be liable to be quashed. (AY. 2006-07).

Samsung India Electronics Pvt. Ltd. .v. DDIT(2014) 364 ITR 103/105 DTR 106/225 Taxman 195(Delhi)(HC).

S.148: Reassessment- Writ-Return-Assessee is bound to furnish a return in response to a Section 148 notice. The reasons for reopening can be given only thereafter. A writ involving disputed factual issues cannot be entertained [S.9, 127,139,142(1),147, Art. 226, Constitution of India]

The petitioner did not file any returns of income in response to the notices issued u/s 148. Even under the judgment of the Supreme Court in GKN Driveshafts (India)Ltd. v. ITO (2003) 259 ITR 19(SC), the petitioner would get the reasons recorded for reopening the assessment only upon filing the return of income pursuant to the notice issued u/s 148. The conduct of the petitioner has been one of defiance; it did not file returns in response to the notices issued u/s 148. The mere filing of the return can never amount to submitting to the jurisdiction. The filing of the return in response to the notice u/s 148 defines the stand taken by the assessee. S. 148 says that the return called for by the notice issued under that section shall be treated as if such a return were a return required to be furnished u/s 139 of the Act. Under the scheme of the Act, a return of income conveys the position taken by the assessee to the assessing authority – whether he has taxable income or not. It is not a mere scrap of paper. There is a sanctity attached to the return. If the assessing authority calls upon the assessee to file a return of income, the same shall be complied with by the assessee and it is no answer to the notice to say that since in his (assessee's) opinion there is no taxable income, he is under no obligation to file the return. The petitioner, not having made the Noida officer aware that no income chargeable to tax had escaped assessment and having merely told him that he has no jurisdiction to issue reassessment notices, was not acting strictly in accordance with law. The writ remedy being a discretionary remedy, the discretion can be exercised in favour of the writ petitioner only if his conduct has been in conformity with law. If it is not, the Court may refuse to exercise the discretion in favour of the writ petitioner;

(ii) The question whether the initiation of reassessment proceedings by the Noida officer was valid or not would depend upon whether the petitioner had a PE within the jurisdiction of the Noida officer. In the absence of any evidence unmistakably and indisputably establishing the existence or otherwise of the PE, we would hesitate to enter this prohibited arena in writ proceedings. It needs no citation of authority to support the proposition that the Court exercising its jurisdiction under Article 226 of cannot enter into disputed questions of fact which is best left to be resolved in the alternative remedies

available to the petitioner. In fact the assessment and appellate authorities, including the Income Tax Appellate Tribunal, constituted under the Act as fact-finding bodies are best suited to examine whether the petitioner had a PE in Noida or not and the question of jurisdiction would depend upon the findings of those authorities. Moreover, when we are exercising discretionary jurisdiction, it is not impermissible to consider whether any real prejudice has been caused to the petitioner to justify the exercise of the extraordinary jurisdiction which is to be sparingly wielded. We do not see any such prejudice to the petitioner. There can be no vested right that escaped income cannot be taxed, provided all the jurisdictional conditions and the procedural requirements of the Act are satisfied. This fundamental question is purely one of fact which ideally should be determined in proceedings relating to assessment and appeal prescribed under the Act. This Court cannot, on the facts of the present case, enter that domain.(AY.2004-05 to 2006-07)

Adobe Systems Software Ireland Ltd..v. ADIT(2014) 268 CTR 173/363 ITR 174 /102 DTR 425/225 Taxman 347 (Delhi)(HC)

S.148: Reassessment-Reasons for reopening recorded after issuing notice under section 148-Notice and reassessment proceedings are in valid. [S.10(23C(vi),147]

The assessee trust was running educational institution. For the relevant assessment years, the assessee had declared income "Nil" claiming exemption u/s 10(23C)(vi) of the Act. Assessments were completed allowing the claim . Subsequently the assessments were reopened by issuing notice u/s 148 on 30-01-2004. Tribunal set aside reassessment proceedings on the ground that notice for reassessment was issued without recording reasons as contemplated by section 148 (2), which vitiated the whole proceedings. On appeal by revenue the Court held that on perusal of the original records it is clear that the reasons were prepared on 4-2-2004 where as the notice was sent on 30-1-2004 . It was also noticed that the contents of draft reasons and the original reasons recorded by the AO do not tally .Accordingly the High Court up held the order of Tribunal.(AY. 1999-00 to 2002-03)

CIT .v. Baldwin Boys High School (2014) 45 taxmann.com 33 /364 ITR 637/108 DTR 373(Karn.)(HC)

CIT .v. Baldwin Girls High School (2014) 45 taxmann.com 33 /364 ITR 637/108 DTR 373(Karn.)(HC)

S.148:Reassessment-Territorial jurisdiction-In the absence of any information that assessee was being assessed to income –tax at rohtak, the authorities at Delhi were legally competent to issue notices u/s 148 as also u/s 142(1)-Transfer of cases to rohtak was valid.[S.68, 124, 142(1),147,148]

Assessee was residing at Delhi. She was operating her bank Account from Delhi. Her address at Delhi had also been prominently recorded in the record of the bank. Dubious entries of heavy amounts was been traced from her bank account. Notice u/s 148 was issued by the IT authorities to the assessee at her Delhi address. It was followed by yet another notice in terms of 142(1). Immediately on request of the assessee for transfer of her case to ITO, Rohtak (where she was being assessed), such request was accepted & her case was transferred to Rohtak, where subsequent proceedings were conducted HC held that in absence of any information that assessee was being assessee to income –tax at rohtak, the authorities at Delhi were legally competent to issue notices u/s 148 as also u/s 142(1). Plea of the assesee that the IT authorities was at Delhi and that they had no jurisdiction to reopen the case of the asessee at Delhi as she was being assessed to income- tax at Rohtak & that when the case of reassessment was transferred to Rohtak from Delhi, fresh notice u/s.148 as also u/s 142(1) was not necessary & was not sustainable.(AY.2003-04)

Rajni Gugnani .v. CIT(2014) 99 DTR 166/266 CTR 300/225 Taxman 188(P&H)(HC)

S.148: Reassessment–Notice–Non-service of notice–proceedings not valid.

A notice u/s. 148 of the Act was issued, in compliance with the notice, the AO received a letter stating that the notice had not been received by the Company and the reopening was bad in law. The AO passed the reassessment order observing that the notice u/s. 148 of the Act was duly served at the address of the company and it was duly acknowledged and the signature and telephone number of person receiving the notice were taken by the process server while serving notice. THE CIT(A) held

that there was no valid service of notice u/s. 148 of the Act and therefore the reassessment proceedings were void ab initio.
On appeal by the department, the Tribunal observed that though there was signature, date and number on the copy of the notice retained by the process server, neither the time of service, nor the manner of service, nor the name and address of the person identifying the service and witnessing the delivery of the notice were present. Thus, the requirement of the Code of Civil Procedure, 1908 were not met. The servicee of the notice was not identified and in the absence of identification of the service, it was impossible to prove that the servicee was an agent of the assessee. Therefore the Tribunal confirmed the Order of the CIT(A).(AY. 1998-1999, 1999-2000 and 2003-2004)
DCIT .v. Usha Stud and Agricultural Farms P. Ltd. (2014) 29 ITR 279 (Delhi)(Trib.)

S. 151 : Reassessment - Sanction for issue of notice - Income escaping assessment – Notice issued after obtaining approval of the Commissioner invalid as approval is contrary to provisions of section 151. [S.143(3), 147, 148]
The AO issued notice u/s. 148 and passed an Order u/s. 143 r.w.s. 147 without furnishing reasons recorded for reopening to the assessee. The CIT(A) confirmed the action of the AO. However, the Tribunal remanded the matter back to the AO with a direction to communicate the reasons for reopening the assessment and thereafter to pass a fresh Order. Subsequently the reasons were furnished to the assessee. However, the approval required u/s. 151 had not been obtained since the reasons merely directed that the matter be "Put up for approval" for issue of a notice under section 148 and there was nothing on record that indicated that the same was actually put up for approval. The AO in his response stated that the notice was issued with the prior approval of the CIT-2 Mumbai.
The High Court, quashing the reopening observed that there was no approval of the Additional Commissioner or the Joint Commissioner either in the affidavit in reply or even otherwise, although they were granted an opportunity of doing so.
The High Court relied on its own decision in the case of Ghanshyam K. Khabrani .v. Asstt. CIT (2012) 346 ITR 443 (Bom.) (Mag.) which held that there is no statutory provision by which a power to be exercised by an officer can be exercised by a superior officer and when the statute mandates the satisfaction of a particular functionary for the exercise of a power, the satisfaction must be of that authority. (A.Y. 1997-1998)
DSJ Communication Ltd. .v. Dy.CIT (2014) 222 Taxman 129 (Bom.)(HC)

S. 153A : Assessment - Search or requisition-No addition can be made in respect of an unabated assessment which has become final if no incriminating material is found during the search. [S.132, 143(3), 263]
In AY 1998-99, the AO passed an assessment order u/s 143(3) on 29.12.2000. Thereafter, on 3.12.2003, there was a search action u/s 132 wherein incriminating documents/ articles were seized. Pursuant to the search, the AO passed an order u/s 153A determining the concealed income at Rs.89 lakhs. The assessee filed an appeal before the CIT(A), who deleted the concealed income computed by the AO. The AO gave effect to the said order of the CIT(A) and recomputed the income at the same figure as it was in the s. 143(3) order. The CIT passed an order u/s 263 stating that as the income computed by the AO in the effect order was less than 30% of the book profit, the AO ought to have computed the total income by invoking s. 115JA. He also held that in the said order, the AO had incorrectly computed s. 80HHC deduction. The assessee filed an appeal before the Tribunal claiming that as the computation of s. 115JA book profit and s. 80HHC deduction were not the subject matter of the s. 153A proceedings, the CIT could not have invoked jurisdiction u/s 263. The Tribunal accepted the assessee's plea. On appeal by the department to the High Court HELD dismissing the appeal:
(i) On initiation of proceedings u/s 153A, it is only the assessment proceedings that are pending on the date of conducting search u/s 132 or making requisition u/s 132A of the Act that stand abated and not the assessments already finalised. This is made clear in Circular No. 8 of 2003 dated 18.9.2003 (See 263 ITR (St) 61 at 107) issued by the CBDT. Therefore, the argument of the revenue, that on initiation of proceedings u/s 153A, the assessments finalised for the assessment years covered u/s 153A stand abated cannot be accepted. Similarly on annulment of assessment made u/s 153A (1) what stands revived is the pending assessment proceedings which stood abated as per s. 153A(1);

(ii) In the present case, the assessment for AY 1998-99 was finalised on 29.12.2000 and search was conducted thereafter on 3.12.2003. Therefore, initiation of proceedings u/s.153A would not affect the assessment finalised on 29.12.2000;
(iii) Once it is held that the assessment finalized on 29.12.2000 has attained finality, then the deduction allowed u/s 80HHC would attain finality. In such a case, the AO, while passing the independent assessment order u/s 153A could not have disturbed the assessment order which has attained finality, unless the materials gathered in the course of the proceedings u/s 153A establish that the reliefs granted under the finalized assessment were contrary to the facts unearthed during the course of s. 153 A proceedings. In the present case, there is nothing on record to suggest that any material was unearthed during the search or during the s. 153A proceedings which would show that the relief u/s 80HHC was erroneous. In such a case, the AO, while passing the assessment order u/s 153A could not have disturbed the assessment order finalised on 29.12.2000 relating to s. 80HHC deduction and consequently the CIT could not have invoked jurisdiction u/s 263. Moreover, since the AO had made addition on account of undisclosed income at Rs.89 lakhs in the s. 153A assessment order, there was no question of computing book profits u/s 115 JA. When the CIT (A) deleted the addition without any direction to compute the book profits, the AO was bound to modify the assessment order as directed by the CIT (A). Therefore, no fault could be found with the AO in giving effect to the order of the CIT (A). Consequently, the CIT could not invoke jurisdiction u/s 263 on the ground that the assessment u/s 153A was erroneous or prejudicial to the interests of the revenue. (ITA No 36 of 2009, dt. 29/10/2010.)
CIT v. Murli Agro Products Ltd. (Bom.)(HC) www.itatonline.org

S. 153A : Assessment - Search or requisition : AO is required to assess the "total income" and is not confined only to income which was unearthed during search. [S.132, 143(3), 263]
For AY 2008-09, the AO passed an assessment order u/s 143(3) on 31.12.2010. A search u/s 132 was conducted on 12.04.2011 in the course of which incriminating material leading to undisclosed income was seized. The AO initiated proceedings u/s 153A of the Act calling upon the assessee to file return of income u/s 153A(1)(a) for six years. The assessee complied with the same. When the said return was under consideration, the CIT passed an order u/s 263 on the ground that the assessment order dated 31.12.2010 passed u/s 143(3) was erroneous and prejudicial to the interests of the revenue. The assessee filed an appeal to the Tribunal in which it claimed that as the assessments u/s 153A were open, the AO could pass appropriate orders thereon. The Tribunal, relying on All Cargo Global Logistics Ltd. .v. Dy. CIT (2012) 137 ITD 287 (SB) (Mum) held that as the s. 143(3) order did not abate and had become final, the AO, in the s. 153A assessment had to confine himself to the incriminating material found during search and could not take into consideration other materials while making the s. 153A assessment. It consequently upheld the CIT's power to revise the s. 143(3) order. On appeal by the assessee to the High Court, HELD reversing the Tribunal:
The Tribunal has proceeded on the assumption by virtue of the judgment of the Special Bench in All Cargo Global, the scope of enquiry u/s 153A is to be confined only to the undisclosed income unearthed during search and if there is any other income which is not the subject matter of search, the same cannot be taken into consideration. Therefore, the revisional authority can exercise the power u/s 263. In the entire scheme of s. 153A of the Act, there is no prohibition for the assessing authority to take note of such income. On the contrary, it is expressly provided u/s 153A of the Act that the AO shall assess or reassess the "total income" of six assessment years which means the said total income includes income which was returned in the earlier return, the income which was unearthed during search and income which is not the subject matter of aforesaid two income. If the CIT has come across any income that the assessing authority has not taken note of while passing the earlier order, the said material can be furnished to the assessing authority and the assessing authority shall take note of the said income also in determining the total income of the assessee when the earlier proceedings are reopened and that income also shall become the subject matter of said proceedings. In that view of the matter the reasoning given by the Tribunal is not justified. The CIT did not have jurisdiction to initiate any proceedings u/s 263 of the Act (CIT .v. Anil Kumar Bhatia (2013) 352 ITR 493 (Del) referred). (ITA No. 38 of 2014, dt. 25/07/2014.)
Canara Housing Development Co. .v. DCIT (Karn.)(HC) www.itatonline.org

S. 153A: Assessment–Evidence for all years–Sale bills showing less quantity than estimate slip-No requirement under section 153A and other provisions requiring the department to collect information and evidence for each and every year for the six years under section 153A.[S.132]

Though the estimate slip reflected the actual purchase and sale of gold made in the business concerns of the assessees, the sale bill was always for a lesser quantity than the details reflected in the estimate slip. By this process the actual sales were not reflected and this was the information gathered during 2006 by the Commercial Tax Department. The search took place in 2007. There was material at least for these two years. Therefore, there was enough information and material to presume the nature of accounting and also the modus operandi in maintaining the records by the assessee. There is also no requirement under section 153A and other provisions requiring the department to collect information and evidence for each and every year for the six years under section 153A**.** Order of Tribunal was confirmed.

Sunny Jacob Jewelers and Wedding Centre .v. DCIT (2014) 362 ITR 664/102 DTR 68/ 267 CTR 361 (Ker.)(HC)

S.153A:Assessment–Search and requisition–Search authorization-In the absence of search assessment was held to be invalid.[S. 124,132,132A]

The provisions of section 124 clearly concern the territorial jurisdiction of the Assessing Officer and have no relevance in so far as the inherent jurisdiction for passing an order of assessment under section 153A is concerned, when no search authorisation under section 132 was issued or requisition under section 132A of the Act was made. In the absence of search authorization, the Tribunal was justified in holding that the assessment orders under section 153A could not be passed.(AYs. 2001-2002, 2002-2003, 2003-2004, 2004-2005)

CIT .v. Ramesh D Patel (2014) 362 ITR 492 / 102 DTR 65 / 225 Taxman 411 / 269 CTR 285 (Guj.)(HC)

S. 153A : Assessment-Search or requisition-Assessment cannot be made in the absence of incriminating material found in search.[S.153C]

Tribunal found that it has been held by the ITAT, Kolkata Bench in the case of LMJ International Limited vs. DCIT 119 TTJ (Kol.) 214 where nothing incriminating is found in the course of search relating to any assessment years, the assessments for such assessment years cannot be disturbed u/s.153C of the Act. Thus it is clear that the provisions of section 153C of the Act cannot be invoked automatically in respect of any assessment year unless there exists incriminating documents for that previous year. The provision of section 153C of the Act cannot be invoked on routine information or on income already accounted/disclosed in the original return, the assessment of which is complete. In this regard we may gainfully refer to the decision of the Mumbai Special Bench of the ITAT in the case of Alcargo Global Logistics Ltd. vs. DCIT.

(ii) We find that the above interpretation which is with respect to section 153A of the Act should also be extended to assessment u/s 153C of the Act. It will be a absurd proposition that the person who is searched u/s 153A of the Act can be assessed only on the basis of incriminating material found and the other person who is assessed u/s 153C of the Act in connection with the same search should be assessed de hors any incriminating material.

(iii) We find that the above view is supported by the amendment to section 153C of the Act w.e.f. 01.10.2014. The provision to section 153C(1) prior to the amendment and sub-section to the amendment are already reproduced in assessee's submission herein above. From the above we find that the provision of section 153C(1) was amended to obviate practical difficulties which arose in its interpretation. To put it simply this amendment to proviso to section 153C(1) of the Act debars the AO from making any assessment dehorse any incriminating material found during the search. Thus in our view this amendment supports the view expressed by us.

Trishul Hi-Tech Industries .v. DCIT (Kol.)(Trib.); www.itatonline.org

S. 153A : Assessment-Search or requisition–Reassessment made without any incriminating material found during search action was held to be not valid.[S. 132, 143]

The return was processed under section 143(1) and the same had attained finality due to expiry of limitation period of 12 months from the end of the month in which the return was filed. Search

operation was carried out on 14-08-2008 and no incriminating documents were found. In pursuance of notice u/s 153A the assessee filed the return of income. The assesse could not produce the books of account and other details as the same were destroyed in the flood.AO completed the assessment under section 144 r.w.s 153A and estimated the net profit In Appeal CIT(A) directed the AO to adopt the net profit at 0.14% as against 0.99% adopted by the AO, however CIT(A) up held the assessment proceedings u/s153A. Department has filed appeal against the deletion made by CIT(A) and the assessee has filed cross objection. Allowing the cross objection of assessee the Tribunal held that reassessments made by the AO u/s.153A without any incriminating material being found during the search action were not in accordance with law and the order was set aside.(ITA no 2141 to 2144 /Mum/2012 dt 20-02-2014 (AY. 2003-04 to 2006-07)

ACIT.v.JayendraP.Jhaveri(2014)65 SOT 118 (URO)(Mum)(Trib.)

S.153A:Assessment-Searchorrequisition-Undisclosed income–Sale proceeds of shares as unaccounted income was deleted and directed the AO to accept as capital gains

The Assessing Officer treated the sale proceeds received on sale of shares as unaccounted income of the assessees and the same was confirmed by the CIT(A). The Tribunal held that nothing has been made out by the Assessing Officer to show that the claim of the assessee in respect of the sale of shares is not correct. Tribunal held that both the authorities below are not justified in holding that the entire sale proceeds shown by the assessees are out of ham and bogus arranged share transactions. Contract notes are genuine. Tribunal directed the Assessing Officer to accept the claim of the long term as well as short term capital gains by holding that all the purchases and sales of shares are the genuine transactions. Addition towards commission at the rate of 6% is based on presumption by the Assessing Officer. The addition is without any merit and the Tribunal deleted the addition. (AY. 2004-05 to 2006-07)

Smita P. Patil (Smt.).v. ACIT (2014) 159 TTJ 182 (Pune)(Trib.)

S.153A:Assessment-Search or requisition-Undisclosed income-Unaccounted receipts collected from students-AO was justified in making addition on the basis of seized material-Matter remanded to deleted the double addition.

The Tribunal sent the matter back to Assessing Officer to quantify the receipt of fees for management quota seats, if any, on the basis of available seized material as well as other material, if any relating to academic years 2003-04 to 2007-08 and not on the basis of seized materials relating to academic years 2008-09 and 2009-10. In other words, instead of estimating the unaccounted receipt for the academic years 2003-04 to 2007-08 on the basis of seized material relating to academic years 2008-09 and 2009-10, the Assessing Officer shall take into consideration the seized material as well as other material what was available during the course of assessment relating to very same assessment years for determining the unaccounted income and further directed that to the extent of unaccounted receipts which were considered in the hands of manager of the assessee (Shri R.K. Rao) the same cannot be treated as unaccounted income in the hands of assessee again. The Assessing Officer shall pass fresh order after giving an opportunity of hearing to the assessee. (AYs. 2004-05 to 2010-11)

JB Educational Society .v. ACIT (2014) 159 TTJ 236/98 DTR 347 (Hyd.)(Trib.)
Joginapally B.R.Educational Society .v. ACIT (2014) 159 TTJ 236 /98 DTR 347(Hyd.)(Trib.)

S. 153C : Assessment - Income of any other person - Search and seizure - Recording of satisfaction-Recording of satisfaction is necessary even if Assessing Officer of both persons is the same-Notice was held to be invalid and assessment was held to be bad in law.[S.132,132A,158BD]

The initiation of proceedings against "such other person" is dependent upon a satisfaction being recorded. Such satisfaction may be during the search or at the time of initiation of assessment proceedings against the "searched person" or even during the assessment proceedings against him or even after completion thereof, but it must be before issuance of notice to "such other person" under section 153C. Even in a case, where the Assessing Officer of both persons is the same and assuming that no handing over of documents is required, the recording of "satisfaction" is a must, as that is the foundation, upon which the subsequent proceedings against the "other person" are initiated. The handing over of documents, etc., in such a case may or may not be of much relevance but the

recording of satisfaction is still required and in fact it is mandatory. The word "satisfaction" refers to the state of mind of the Assessing Officer of the person in respect of whom the search was conducted, which gets reflected in a tangible form, when it is reduced into writing. It is the conclusion drawn or the finding recorded on the foundation of the material available. It was the admitted case of the Revenue before the Commissioner (Appeals) and the Tribunal that though the Assessing Officer (of the other person) in the assessment order had stated that satisfaction for issuing notice under section 153C was recorded, on examination, recording of such satisfaction alleged to have been recorded by the Assessing Officer was not available. Thus, the notice was not valid. Order Tribunal was confirmed. (AY. 1995-96)

CIT .v. Gopi Apartment (2014) 365 ITR 411 (All.)(HC)

S.154: Rectification of mistake–Intimation-Interest waived by creditor was shown as income-Disallowance of interest in earlier year was accepted by subsequent order- Intimation cannot be rectified.[S.143(1)]

At the time when the assessee had to file the return for the assessment year 2005-06, the assessment proceedings for the earlier assessment year 2004-05 were pending. He declared Rs.54,40,440 as income in the return on account of waiver of interest by the creditor. The assessee had claimed the interest expenditure of Rs.54,40,440 for the assessment year 2004-05. The Revenue disallowed the claim and the assessee also did not file an appeal and the assessment proceedings for the assessment year 2004-05 reached finality. The assessee did not file a revised return for the assessment year 2005-06 in spite of the knowledge of disallowance of the interest expenditure of Rs.54,40,440 for the preceding year 2004-05. The Department computed the tax payable based on the return filed by the assessee on October 27, 2005, and issued demand notice indicating Rs. 93,016. Subsequently, the assessee filed an application u/s 154(1)(b) seeking rectification of mistake in the intimation sent by the Department demanding tax.Held, the assessee kept quiet till the intimation was sent u/s.143(1) demanding deficit tax. Assessment by the Department would be based on the material or information indicated in the return filed by the assessee. The demand for deficit tax was also based on the details found in the return submitted by the assessee. Therefore, there was no mistake or error apparent on the face of record in the intimation sent by the Department indicating the exact shortfall of tax to be paid. The mistake on the part of the assessee in not challenging the assessment order for the assessment year 2004-05 and not filing a revised return for the assessment year 2005-06 had led the assessee to this situation. The entire difficulty in which the assessee was put in was on account of his mistake which could not be treated as a mistake apparent on the face of record so far as the intimation sent by the Department and it could not be rectified treating it as a mistake in the intimation of the Department. (AY. 2005-06)

M Far Hotels Ltd .v. CIT (2014) 361 ITR 442 (Ker.)(HC)

S.154:Rectification of mistake-Intimation-CPC hauled up for harassing assessee by imposing tax of 60% on LTCG & refusing to rectify-AO was directed to rectify the mistake in the intimation.[S.143(1)]

An intimation u/s 143(1) was passed by the ACIT (CPC) in which the long-term capital gains were charged to tax at 60% instead of the applicable rate of 20%. The assessee filed an on-line rectification application. However, no order thereon was passed. Instead, the assessee was informed on telephonic enquiry that the application was rejected. The assessee filed an appeal to the CIT(A). The CIT(A) dismissed the appeal by raising hypothetical questions and going into irrelevant issues. On appeal by the assessee to the Tribunal HELD:

In the entire Income-tax Act, there is no provision charging a tax rate of 60% on long term capital gains. The Delhi High Court has issued remedial directions to improve hardships faced by tax payers while processing the e-returns at CPC, Bangalore. The Court has discussed the background that in order to fasten the processing of returns, the revenue has introduced electronic filing of income tax returns, TDS returns, e-tax payments and it operates Centralised Processing Centre (CPC) at Bangalore. This is manned by Higher Ranking Officers of Income Tax Department. The problem is faced by tax payers, when demand is raised or refund reduced on account of either suomotu adjustment by the Income Tax Department and refund against tax demands or mismatch of TDS credit or any other adjustment or disallowance of claim made by tax payer in the return and uploaded by the

assessee in its e-returns. This is a general grievance among the tax payers that the AOs do not adhere to the time limit specified for the disposal of rectification applications and tax payers are invariably called upon to file duplicate application or new application. Further, no record or no receipt counters or registers for receipt of such applications are maintained. Thus, there is no record/register remained with the AO with details or particulars of rectification application made u/s. 154 of the Act as is evident from the present case. Similar directions were issued by the Delhi High Court in the case of its own motion Vs. CIT, WP(C) No. 2659/2012 dated 14.03.2013. The Delhi High Court videpara 18 has issued dictum as under: "18. Each application under Section 154 has to be disposed of and decided by a speaking order. This is the mandate of the Act. The order has to be communicated to the assessee and there is a relevant column to be filled in the register, which is now required to be maintained. The Board should issue specific directions to ensure that there is full compliance of the said requirements and directions by the Assessing Officers, Dak counters and AayakarSewaKendras. This is the first mandamus or direction we have issued in the present judgment". As the facts in the present case are very clear that charging of long term capital gain can only be @ 20% in assessment year 2011-12 and not @ 60% as charged in intimation u/s 143(1) of the Act by CPC, Bangalore which according to the provisions of the Income Tax Act is not legal. Hence, we quash the intimation and appeal of assessee is allowed. The jurisdictional AO is directed to amend the intimation issued by CPC, Bangalore, while giving appeal effect to this order.(ITA No. 1915/Kol/2012, AY. 2011-12, dt.25.06.2014.)

Mohan Kant Bansal .v. ITO (Kol.)(Trib.),www.itatonline.org

S.154:Rectification of mistake-Tax rebate - Securities transaction tax–If mistake is committed by assessee in ROI same cannot be rectified.[S.88E]

In the intimation, the income by the assessee was accepted but the credit for tax paid was allowed partly and the credit for the TDS claimed by the assessee was not allowed. The assessee filed a letter requesting to rectify the intimation by which demand was raised. The assessee furnished photo copies of advance tax challan with STT certificate and requested to give credit u/s. 88E(2). The A.O. rejected the letter stating that the rebate u/s. 88E(2) was to be allowed only in case where the same was claimed in the ROI and since the assessee had not claimed the same in ROI his claim could not be considered.On appeal Tribunal held that the mistake, if any, was in the return of income filed by the assessee. S. 154 cannot be utilized for rectifying the assessee's mistake in filling of the ROI. (AY.2008–2009)

Pawan Kumar Aggrawal .v. ACIT (2014) 146 ITD 787 / (2013) 40 taxmann.com 489 (Delhi)(Trib.)

S. 158B : Block assessment – Undisclosed income – If the income is already disclosed in return of income or is available in books of account, then it does not fall in category of undisclosed income.

A search and seizure operation was conducted at the residential premises of the assessee and additions of four undisclosed income was made by the AO. The High court observed that the four undisclosed items on which addition was made was available in the balance sheet or books of accounts of the assessee and the search did not lead to unearthing of any income. It held that the AO merely had a change of opinion which was neither warranted in law nor could form the basis of invoking the provisions Chapter XIV-B of the Act. Reliance was placed on the decision of CIT .v. Hotel Blue Moon (SC) (Block Period 01-04-1985 to 03-01-1996)

CIT .v. B. Satyanarayana (2014) 220 Taxman 86 (AP)(Mag.) / 356 ITR 323 (AP)(HC)

S. 158B : Block assessment – Undisclosed income - Opening cash balance.

Search was conducted in the premises of assessee and thereafter, Ld. Assessing Officer made addition of opening cash balance as undisclosed income on the ground that assessee was not maintaining personal books of accounts. Tribunal deleted the addition on account that if closing balance or cash in hand is disclosed income then opening balance cannot be undisclosed income. Even, addition made on the ground that assessee was not maintaining personal books of account is not correct. On appeal by revenue to High Court, Tribunal's order was upheld. (A Y. 1986-87)

CIT .v. .V.P. Singh (2014) 220 Taxman 87(Mag.) / 357 ITR 681 (P&H)(HC)

S. 158B : Block assessment – Undisclosed income – Gift.
Assessee during the concerned year has received gift to the extent of Rs. 4,00,000/-. Assessing Officer treated the same as undisclosed income. Tribunal deleted the addition made by Assessing Officer on ground that where assessee was filing his return regularly, non-filing of return for assessment year in question on the ground that after allowing deduction under the Act, income remaining below taxable limit could not be a good ground to hold income as undisclosed income for block period. On appeal by revenue to High Court, Tribunal's order was upheld. (AY. 1995-96)
CIT v. V.P. Singh 220 Taxman 87(Mag.) / 357 ITR 681 (P&H)(HC)

S. 158BB: Block assessment–Assessment of undisclosed income should be based on evidence discovered during search - Report of valuation cell after search - No evidence of undisclosed income during search - Addition based on report of valuation cell - Not valid.[S.132, 132A, 158BC]
Undisclosed income, can be determined or deduced only on the basis of evidence found at the time of search under section 132 of the Act or as a result of requisition of books of account or other documents under section 132A of the Act. Material which is not found at the time of search or as a result of requisition of books of account or other document cannot be made the basis for determination of undisclosed income under section 158BB.[BP 1-4-1985 to 17-10-1995)
CIT v. N.K. Laminates P. Ltd. (2014) 365 ITR 211 (All.)(HC)

S. 158BB : Block assessment–Assessing Officer not properly examining computer generated account seized during search– Application before Settlement Commission pending but no discussion of this in block assessment-Filing of regular return within knowledge of Assessing Officer but not taken into account while passing block assessment order-Matter remanded.
A search and seizure operation was carried out at the business and residential premises of the assessee where some incriminating material was seized. Block assessment for the period September 1, 1996, to September 4, 2002, under section 158BC, was completed on an undisclosed income of Rs.1,48,94,580. The assessee filed a regular return for the assessment year 2002-03, which fell within the block period, showing the income of Rs. 53,27,812. This was accepted by the Assessing Officer. However, the Commissioner passed an order under section 263 and rejected the claim of the assessee for disclosed the income of Rs. 53,27,812 holding that the return was filed belatedly and that full advance tax was not paid. He directed the Assessing Officer not to allow the claim of the assessee for the disclosed income for the year 2002-03 to the tune of Rs. 53,27,812. The Tribunal allowed the claim of the assessee holding that partial advance tax was paid, that the return was filed within the extended time allowed under section 139 and that the assessee was maintaining proper books of account. On appeal : Held, allowing the appeal, that the assessee had filed the return for the assessment year 2002-03 beyond the time allowed under section 139 and the return was, therefore, non est. The Commissioner in his order clearly mentioned that the Assessing Officer did not properly examine the computer generated account for the assessment year 2002-03, which were generated from the computer seized during the course of the search and seizure operation and did not include the undisclosed income reflected from the accounts while completing the block assessment order. The assessee`s application was pending before the Settlement Commission but there was no discussion about this issue in the block assessment order. Filing of the regular return for the assessment year 2002-03 was within the knowledge of the Assessing Officer at the time of completing the block assessment order but the Assessing Officer while passing the block assessment order has failed to take into account the correct position of law. Therefore, the matter was remitted to the Tribunal for fresh adjudication.
CIT .v. Umang Agarwal (2014) 365 ITR 164 (All.)(HC)

S.158BC:Block assessment-Unexplained investments-Credit worthiness of parties who have given old ornaments for repairing was not proved and cash seized was not satisfactorily explained-Addition was held to be justified. [S.69,69A, 158BB]
Assessee firm is engaged in the sale and purchase of gold and silver items/ornaments. The assessee firm is also engaged in the remaking and repair of old ornaments. A search and seizure operation was carried at the premises of the firm and residence of the partners. On the basis of seized materials

block assessment for the period starting from 10th April, 1987 to 14th May 1997 under section 158 BC was passed. Various additions were made, being aggrieved, the assessee went into appeal before the first appellate authority. The CIT(A) directed for deletion of some of the addition. Being aggrieved by the order of the first appellate authority, both the department as well as the assessee went to appeal before the Tribunal. The Tribunal partly allowed the appeal filed by the department and dismissed the assessee's appeal. Not being satisfied the assessee filed the appeal before the High Court. The Court held that the parties were not having the creditworthiness. Most of them are not assessed to tax and even if one or two are assessed to tax, their worth is low, even lower than the jewellery lend by them to the assessee. There is no evidence of genuine transaction with the assessee except in one or two cases. No entry was found in the books of account mentioned by the assessee or party concerned. Nothing was reflected in the books of account of the six creditors. The explanation furnished by the assessee is not found acceptable. Order of Tribunal was confirmed. As regards cash found during search, inspite of ample opportunities given, neither S was produced nor any other documentary evidence was filed in support of the claim. Order of Tribunal was confirmed.(BP.10.04.1987 to 10. 05.1997)

R. C. Jewellers .v. CIT (2014) 97 DTR 276 (All) (HC)

S.158BC: Block assessment-Block assessment only on basis of evidence found during search. [S.132]

Followed the Apex Court in CIT .v. Hotel Blue Moon (2010) 321 ITR 362(SC) wherein it was held that assessment for the block period can only be done on the basis of the evidence found as a result of search or requisition of books of account or documents and such other materials or information as available with the Assessing Officer.

CIT .v. B. Nagendra Baliga (2014) 363 ITR 410 (Karn.)(HC)

S. 158BC:Block assessment–Issue of notice under section 143(2) is mandatory-Cancellation of block assessment was held to be valid.[S. 143(2)]

The Tribunal directed the Commissioner (Appeals) to verify from the assessment record whether any notice u/s.143(2) had ever been issued and served before the limitation period prescribed and in case it was found that no notice u/s 143(2) had been served upon, he would cancel the assessments as illegal and bad in law.Held, specific directions were given to the Commissioner (Appeals) regarding the question whether such notice u/s 143(2) was issued or not. The Commissioner (Appeals) only followed the direction and when he found that no such notice was issued, he passed the consequential order. If the Revenue was aggrieved by the directions of the Tribunal it should have challenged the order of the Tribunal. Admittedly, this was not done. Therefore, there was a consequential order passed by the Commissioner (Appeals), which was in turn confirmed by the Tribunal.Appeal of revenue was dismissed.

CIT .v. Pratapbhai K. Soni (2014) 361 ITR 201 (Guj.)(HC)

S. 158BC: Block assessment–Undisclosed income-Telescoping – No evidence to support claim-Amount could not be reduced from undisclosed income.

Held, that during the course of assessment proceedings, the assessee had admitted that except the business of rectified spirits, it was not doing any other business. It had failed to produce any materials or evidence to support the claim with regard to miscellaneous receipts and also failed to maintain the true and correct accounts. The amount of Rs.31,95,000 could not be reduced from the undisclosed income. Order of Tribunal was set aside.

CIT .v. Sri Lakshmi NarasimhaDistilleries P. Ltd. (2014) 362 ITR 573 (Karn.)(HC)

S:158BC:Block assessment- Undisclosed income-Cross examination was allowed to department by CIT (A)-Addition was delted after examining the documents in detail-Order of Tribunal was confirmed-Cost of Rs 50000 levied on the AO.

The AO assessed the income as undisclosed income on the bais of documents seized.In appeal the CIT (A) examined the author of document and allowed cross examination to the AO. Afeter examining the documents in details the addition was deleted. Tribunal also up held the order of CIT

(A). On appeal by revenue the dismiising the appleal filed by the revenue the court also imposed cost of Rs 50,000 on the AO. (BP.1997-98 to 2002-03)

CIT .v. Sairang Developers and Promoters Pvt. Ltd.(2014) 364 ITR 593/108 DTR 400 (Bom.)(HC)

S:158BC:Block assessment-Presumption-Loose sheets seized are documents within the meaning of s.158B(b)-No evidence was produced by assessee-Addition was justified. [S.132(4A, 158B(b), 34 of Evidence Act.]

Search & seizure operations were conducted at assessee's premises. AO completed the assessment u/s 158BC & had assessed certain undisclosed income. CIT(A) partly allowed assesee's appeal . Before CIT(A) assesssee contended that it is block assessment & that the AO has not been empowered to make addition on estimate basis & the income should have been assessed on the basis of seized document & nothing more . CIT(A) held that it is block assessment & AO has not been empowered to make addition & he could not travel beyond the seized documents while making the assessment of block period & deleted the addition. Tribunal confirmed the order of CIT(A) . On further appeal in HC, HC reversed the order & held that loose sheets seized during the search sometimes contain valuable information & those loose sheets are to be regarded as "documents". Since loose sheets seized were documents within the meaning of S/158B, there is presumption raised u/s 132 (4A) regarding the documents seized. Court further held that the assessee has not adduced any material for rebutting the presumption and there was no substantial error in the addition made towards undisclosed house rent & expenses.

Mahabir Prasad Rungta .v. CIT(A) &Anr. (2014) 99 DTR 11/266 CTR 175(Jharkhand)(HC)

S.158BC:Block assessment-Presumptions-Loose sheets-Additions were on the basis of entries made in the loose sheet.[S.132(4A), 158B(b),34 of Evidence Act]

Assessee submitted his returns for the block period on the notice issued after a search conducted on his premises u/s 132(1) of the IT Act. A notice u/s 158BC of the IT act was issued. A notice u/s 142(1) of the IT Act was issued in connection with the assessment for the block period asking him to produce books of account & documents. The assessee filed its filed its Return of Income wherein he has declared undisclosed total income representing undisclosed Investment made acquiring relief bonds with the aforesaid sum. On the basis of seized documents assessment have been made on the total income on the basis of undisclosed income CIT (A) held that proper enquiries have not been conducted in this regard by the AO on the basis of paper said to have been seized by the AO. The CIT (A) remitted the issue to the file of AO to re-examine the issue afresh in the light of the direction given. On appeal in Tribunal, the court held that the AO should have cross- verified the same from the society & thereafter, this amount ought to have to be taxed in the hands of the assessee as his undisclosed income, which the AO has failed to do. The Tribunal partly allowed the appeal. On further appeal in HC , the court held that s/132(4A) draws a presumption in relation to any books of account or other documents , money etc which are found in possession or control of any person in the course of search the contents of such books of account & other documents are true . The court held that the course is rebuttable presumption which is available to the revenue. Assessee has to rebute the aforesaid presumption. Tribunal & CIT(A) have found that the proper cross verification was not made by the AO before making addition & therefore the matter was remitted to the AO for proper examination & cross verification. Addition is therefore subject to ascertainment of facts &proper verification by the AO. In such circumstances, the contention of the assessee was based on interpretation of S/34 of the Evidence Act was misconceived & was to be rejected. The court also held that in the wake of clear provisions contained in S/158 B(b) r.w.s 132(4A) , the addition of undisclosed income on the basis of entries made in the loose sheet was dependent upon the investigation & facts & cross verification by the AO.

Sanjay Rughta .v. CIT(A) & Anr. (2014) 99 DTR 18 /266 CTR 181 (Jharkhand)(HC)

S.158BC:Block assessment–Computation of undisclosed income– Findings of the Tribunal-Matter remanded to Tribunal to discuss all aspects of the matter.[158BB, 254(1)]

Tribunal deleted the addition of undisclosed income in the block assessment while disregarding the post-search findings of the AO and the CIT(A) that the purchases shown by the assessee from two

concerns were bogus transactions and ignoring other relevant aspects are entirely unjustified and devoid of merits. Matter was remanded to the Tribunal to discuss the entire evidence in detail on all aspects afresh as it had not examined all the evidence and the relevant issues. (Block Period 1.4.1989 to 14.7.1999)

CIT .v. Arun Malhotra (2014) 98 DTR 38/363 TTR 195(Delhi)(HC)

S.158BC: Block assessment-Undisclosed income–Peak of debit and credit entries-Restoring the matter to AO was justified.[S.254(1)]

Tribunal found that the AO had worked out the peak debits/credits from the seized documents on the basis of pick and choose for arriving at the undisclosed income of the assessee. Tribunal was justified in restoring the matter to the AO for recomputation of the peak debit and credit entries. (Block period 1.4.1986 to 13.2.1997)

CIT .v. Fertilizer Traders (2014) 98 DTR 323/222 Taxman 162 (Mag.) (All)(HC)

S.158BD:Block assessment- Undisclosed income of any other person –Satisfaction can be (a) at the time of or along with the initiation of proceedings against the searched person u/s 158BC of the Act; (b) along with the assessment proceedings u/s 158BC of the Act; and (c) immediately after the assessment proceedings are completed u/s 158BC of the Act of the searched person.[S.158BC, 158BE]

The result is that for the purpose of s. 158BD a satisfaction note is sine qua non and must be prepared by the AO before he transmits the records to the other AO who has jurisdiction over such other person. The satisfaction note could be prepared at either of the following stages: (a) at the time of or along with the initiation of proceedings against the searched person u/s 158BC of the Act; (b) along with the assessment proceedings u/s 158BC of the Act; and (c) immediately after the assessment proceedings are completed u/s 158BC of the Act of the searched person.Where satisfaction was not recorded at all matter was set aside to decide the issue.

CIT .v. Calcutta Knitwears(2014)362 ITR 673/ 101 DTR 217223 Taxman 446/267 CTR 105/(2014) AIR 2970(SC)

S. 158BD : Block Assessment–Second Notice-No limitation is placed on number of notice to be issued under section 158 BD– However, proceeding under section 158 BD cannot be continued when in case of, searched person, the proceedings initiated for block period under section 158 BC of the Act have resulted into deletion of addition made on the very ground of undisclosed income.[S. 158BC]

No limitation is placed on number of times the notice can be issued under section 158 BD of the Act upon the person other than the searched person in whose case the A.O. satisfies himself to initiate proceedings under section 158 BD. This by itself cannot be a ground to permit notice more than once on identical facts and material. Moreso, when in case of searched person proceedings initiated for block period under section 158 BC have resulted into deletion.

Narvirsinh Parmar L/H of Late Ramaben D. Zala v. ACIT (2014) 102 DTR 403 (Guj.)(HC)

S. 158BD : Block Assessment –Undisclosed income of any other person-Satisfaction-No evidence produced to show that the AO of the searched person had arrived at a satisfaction during the course of such proceedings that the undisclosed income belongs to the assessee – The action under section 158 BD must fail in absence of such satisfaction.[S.158BC]

Where the Revenue has not produced any evidence to show that the A.O of the searched person had arrived at the satisfaction during the course of such proceedings that the undisclosed income belongs to the assessee. Thus, notice issued under section 158 BD of the Act was liable to be quashed.

Creative Co-operative Credit Society Ltd. v. Amal Garg, Dy. CIT (2014) 102 DTR 412 (Guj.)(HC)

S.158BD:Block assessment- Undisclosed income of any other person-Return was not filed-Assessing as undisclosed income was held to be justified. [S.158BB, 158BC]

Search & Seizure was carried out in the premises of assesse. Notice was issued u/s 158 BD r/w 158BC of the Act as per materials seized. The assesse claimed that the entire income of the

Assessment years could not be included as undisclosed income for the block period while completing the block assessment on the ground that even before the issuance of notices, the assesse had filed their respective return of income. The AO rejected assesee's contention and included income in block period. On further appeal in CIT (A) confirmed AO's order. Tribunal by common order confirmed CIT (A)'s order. On further appeal in HC, HC dismissed assesse's appeal & held that as far as cl (ca) of S/158BB(1) is concerned, when the due date for filing of the return of income has expired and the assessee had not filed the return even as stating that it was "NIL Income, then S/158BB would be of relevance and therefore computation of undisclosed income was sustainable . Accordingly the case of the assesse would certainly fall for consideration under S/158BB r/w 158BD and the assessment could not be faulted with. (Block Period: 1990-91 to 2000-01)

R. Rangasamy .v. DCIT (2014) 264 CTR 410 / 221 Taxman 206(Mag.)(Mad.)(HC)

S. 158BD : Block Assessment –Undisclosed income of any other person- Recording of Satisfaction-Within two years. [S.158BE]

It was held that AO is bound to record the satisfaction within the meaning of S. 158BD within the two year time period stipulated in S. 158BE(1)

Raghav Bahl .v. CIT (2014) 101 DTR 239/225 Taxman 195 (Mag.) (Delhi)(HC)

S. 158BE : Block assessment - Time limit – Limitation Period for completion of assessment.

Search proceeding was challenged by the assessee before the High Court by filing writ petition. The assessment proceedings were stayed, vide interim order dated February 12, 2004. The interim order was vacated on August 26, 2009. Assessing Officer took the date of vacation of the interim order to be the date, when it was received by him on November 9, 2009, and passed the assessment order on June 22, 2010. Tribunal held that Limitation period for completing assessment would start from date when High Court vacated interim order and not from date when Assessing Officer received such vacation order. Therefore, the balance time available for framing assessment was upto 15.04.2010 and hence, assessment was barred by limitation. On appeal by revenue to High Court, Tribunal's order was upheld.

CIT .v. Drs. X – Ray & Pathology Institute (P.) Ltd. (2013) 358 ITR 27 / 40 Taxmann.com 115 / (2014) 220 Taxman 88 (Mag.) (All.)(HC)

S. 158BE: Block assessment–Time limit-Error in panchnama–Does not render search invalid-Writ petition was held to be not maintainable. [S. 132, 153A]

A lapse or failure in the panchnamaneither affect the validity of the search nor nullifies the notice u/s.153A of the Act. It certainly would not affect the initiation of the search which is the starting point and pre-condition for invoking s. 153A of the Act. A panchnama is drawn up when the search stands concluded finally or temporarily. Alternative remedy against section 153A is available. Writ petition was dismissed. (AYs.2006-2007, 2007-2008, 2008-2009)

MDLR Resorts P. Ltd. .v. ACIT (2014) 361 ITR 407 (Delhi)(HC)

S. 158BE: Block assessment–Time limit-Notice beyond reasonable time–Notice was issued after thirty four months after framing the assessment of person against whom search action was conducted- Not valid.[S.132, 158BD]

Information was given to Assessing Officer having jurisdiction over assessee after completion of assessment of person against whom search conducted. Notice was issued to assessee thirty-four months after framing of assessment of person against whom search conducted. Held, notice was issued beyond reasonable time, and hence, block assessment and additions made thereon not justified.

CIT .v. Umesh Chandra Gupta (2014) 362 ITR 1 (Delhi)(HC)

S. 158BE: Block assessment-Time limit–Starting of limitation-Last date of authorization for search to be taken in to-Second authorization issued on 27-08-2003-Limitation starts from the end of that month-The order of assessment was not barred by limitation.[S. 132]

The search conducted on March 28, 2003, came to an end as far as that authorisation was concerned. However, the second search was admittedly on a fresh authorisation. Thus, in respect of search conducted on March 27, 2003, and March 28, 2003, panchnama was drawn with the observation

"search continues", thus, considering the fact that the second search was to be carried out in different premises and materials to be seized, in fitness of things, a fresh authorisation was issued by the Department on August 27, 2003, and under section 158BE of the Act, limitation had to be worked out from that date, i.e., the end of August, 2003, and not with reference to the first search, i.e., March 27, 2003, and March 28, 2003. The order of assessment was not barred by limitation. Decision of the single judge in RakeshSarin v. Dy.CIT (2011) 333 ITR 451(Mad)(HC) was reversed.(AYs. 1997-1998, 1998-1999, 1999-2000, 2000-2001, 2001-2002, 2002-2003)

Dy.CIT .v. RakeshSarin (2014) 362 ITR 619/97 DTR 216 (Mad.)(HC)

AashnaSarin .v. TRO(2014) 362 ITR 619/97 DTR 216 (Mad.)(HC)

S.158BFA:Block assessment-Search and seizure-Interest-Charge of interest is mandatory.

Charging of interest under section 158BFA(1) is mandatory ; no authority has power to reduce or waive the interest levied under the said section.(BP.10.04.1987 to 10. 05.1997)

R. C. Jewellers v. CIT (2014) 97 DTR 276 (All) (HC)

S. 158BFA: Penalty-Block assessment-Revised return-No provision for filing revised return – Additional undisclosed income in revised return – Penalty imposable. [S.158BC]

Return filed u/s. 158BC. Later, assessee disclosed additional undisclosed income. No provision for filing revised return u/s.158BC. It was held that additional undisclosed income is liable for penalty. (Block Period: 1/4/1989 to 29/10/98)

CIT .v. Hitech Chemical P Ltd. (2014) 363 ITR 145/107 DTR 228 (Jharkhand)(HC)

S. 158BFA : Block assessment- Interest-Failure of the Department to furnish seized documents – Delay in filing block returns – Interest not to be levied.

Delay in filing the block returns was due to the delay on the part of the Department in furnishing necessary documents seized during the search. Delay in filing return not attributable to the assessee. Interest cannot be levied. (Block Period: 1/4/1989 to 28/1/2000)

CIT .v. B. Nagendra Baliga (2014) 363 ITR 410 (Karn.)(HC)

S.158BFA: Block assessment–Interest–Penalty–Block assessment-There is a perceptional difference in the operative force of section 271(1)(c) vis-à-vis section 158BFA(2). The charge against the assessee u/s 158BFA(2) could be, why they failed to compute true disclosed income out of the seized material.[S. 158BC,271(1)(c)

On a comparative study of the scheme of assessment of undisclosed income for the purpose of block period, penalty impossible u/s 271(1)(c) and penalty impossible on the undisclosed income in the block period, we find that income for the block period has to be determined on the basis of material seized during the course of search. This material was to be supplied to the assessee before he could be asked to submit his return in response to the notice issued u/s 158BC meaning thereby the material goads any person to compute true undisclosed income. The material is already available with the Assessing Officer. From that very material, true and undisclosed income has to be computed by the assessee and to be disclosed in the block return in response to the notice received u/s 158BC. Thus there is a perceptional difference in the operative force of section 271(1)(c) vis-à-vis section 158BFA(2). The charge against the assessee u/s.158BFA(2) could be, why they failed to compute true disclosed income out of the seized material. Whether the assessees have made a deliberate attempt to disclose nil undisclosed income or they have sufficient reasoning for forming belief that no undisclosed income is available in their hands which is to be disclosed in response to the notice received u/s 158BC.

The question before us is, whether at the time of filing the return, a man of ordinary prudence can form a belief that he has no undisclosed income on the basis of seized material supplied to him. Whether such formation of belief is a bonafide one having regard to the material on the record or it is merely a Performa explanation. It is to be kept in mind that if a claim was not made in the return, then the assessee would be foreclosing his right to dispute the claim and would accept the stand of the Revenue. The Hon'ble Supreme Court in the case of Reliance Petro Products Ltd [2010] 322 ITR 158

(SC) has observed that making incorrect claim does not amount to concealment of particulars, because the assessee wants to take a particular stand on the given facts.
Mohd. Khasim .v. ACIT (Bang.)(Trib.); www.itatonline.org

S. 158BFA : Block assessment–Penalty order passed on deceased person-Null and void. [S.292B]
The AO passed the penalty order u/s. 158BFA(2) in the name of the deceased assessee. He wrote the name of the deceased at the top of the penalty order. The son of the deceased was never impleaded as a legal heir of his father. It is well settled that no penalty can be legally imposed on the deceased person and the order imposing penalty on a deceased person shall be *null and void*. The legal heir was never impleaded or brought on record. The show cause notice for penalty was not issued, as legal heir of the deceased, and therefore, it cannot be said that non-mentioning of the name of the legal heir and writing of name of the deceased at the top of the penalty order is merely a clerical error, where legal heirs of the deceased was brought on record and was impleaded in the proceedings as legal heir, and only mistake is in writing of the name of the deceased on the top of the order passed by the AO, the same shall be simply a clerical error and shall have no adverse effect on the proceedings within section 292B of the Act. However, if the AO has failed to bring the legal heirs on record and the legal heirs has not been impleaded, it cannot be said that it is merely a clerical error to be saved by the provision of section 292B of the Act, and such an order passed on the dead person shall be null and void, and has to be quashed. The facts of the case leaves to only conclusion that the order imposing penalty was passed on the deceased, and therefore, is null and void, and the penalty on the dead person is not leviable. (BP 1-4-1986 to 1-8-1996)
Chandrakant A. Gandhi .v.ACIT (2014) 146 ITD 346 / (2013) 40 taxmann.com 432 (Ahd)(Trib.)

S. 158BFA(1):Interest-Block assessment- Tribunal not justified in directing the deletion of interest charged under section 158 BFA (1) of the Act.
Further, the High Court held that Tribunal was not justified in directing deletion of interest levied under section 158BFA (1) of the Act for delay in filing block return. (Block Period: 01.04.1989 to 28.06.2000)
CIT v.B.Suresh Baliga (2014) 102 DTR 83 / 364 ITR 560 /225 Taxman 228 (Mag.)(Karn.)(HC)

S.158BG:Block assessment-Search and seizure-Approval of Commissioner-No opportunity of hearing is required while giving approval under section 158BG.[S.132, 158BC]
Assessing Officer as a result of search conducted under section 132 upon assessee passed block assessment order on him and made certain addition to his income. Tribunal observed that no opportunity of hearing was given to assessee by Commissioner while granting approval under section 158BG and so no enhancement could be made out in income of assessee. On appeal by revenue the Court held that no opportunity of hearing was required to be given to assessee by Commissioner while granting approval under section 158BG the approval being administrative action. Whetherthe observation of the Commissioner amount to enhancement of the addition or not the Tribunal has not gone in to the merit of the observations/directions. Order of Tribunal was set-aside to the Tribunal with a direction to examine the same on merit and pass a fresh order as per law after providing reasonable opportunity to the assessee.(BP.1987-88 to 1995-96)
CIT v. Singh K.P.(Dr.) (2014) 97 DTR 1 (All) (HC)
CIT v. Sudha Singh(Dr)(Mrs) (2014) 97 DTR 1 (All) (HC)

S. 161 : Liability of representative assessee-Private specific Trust-Discretionary trust-Entire law on taxation of private specific/ discretionary trusts under revocable & irrevocable transfers and AOPs explained.[S.2(31),61, 63 164(1)]
(i) Private Trusts could be Fixed or Discretionary Trusts. A fixed trust is a trust in which the beneficiaries have a current fixed entitlement to such income as remains after proper exercise of the trustee's powers. On the other hand, a discretionary trust is one in which the beneficiaries have no such current fixed entitlement, but only a hope (spes) that the trustees in carrying out their duty to consider how much income might be paid to such beneficiaries will in their discretion pay that income

to a particular beneficiary or beneficiaries. The beneficiaries have no interest in possession under the trust. There are various reasons why a settlor prefers to establish a discretionary trust rather than a fixed trust. Some of the important one's being – to protect the beneficiary against creditors; to continue to exercise control over young or improvident beneficiaries; to make adjustment according to circumstances. "When a trust is set up, there is no way of knowing how the beneficiaries will fare in the future; which of them will be most in need, which will be deserving, which spendthrift, which inebriate, which will marry millionaires and which missionaries". The trustee can take all these factors into consideration in making their decisions.

(ii) When it comes to tax on income received by the Trust on behalf of the beneficiaries, there are some implications depending on whether the trust is a discretionary trust or a non-discretionary trust. As we have already seen in terms of Sec.164(1) a trust is assessed as a representative assessee in respect of income which it receives on behalf of its beneficiaries and if the beneficiaries are not certain or shares of beneficiaries are indeterminate, tax shall be charged on the relevant income or part of relevant income at the maximum marginal rate. Explanation 1 to Sec.164 deems that in certain situations beneficiaries shall be deemed to be not identifiable or their shares are unascertained or indeterminate or unknown. These provisions have already been set out in the earlier part of this order and are not being repeated. The legislative history of the above provisions needs to be examined to find out the object of introduction of the Explanation. Sec. 164(1) was in the Act when it was enacted in 1962 but its wording underwent a change, introducing a concept of taxation at marginal rate in 1970 by the Finance Act of 1970 w.e.f. 1st April, 1970. The object and scope of this amendment were elaborated in a circular of the CBDT (Circular No. 45 dt. 2nd Sept., 1970).

(iii) Under the existing provisions, the flat rate of 65% is not applicable where the beneficiaries and their shares are known in the previous year, although such beneficiaries or their shares have not been specified in the relevant instrument of trust, order of the Court or wakf deed. This provision has been misused in some cases by giving discretion to the trustees to decide the allocation of the income every year and in other ways. In such a situation, the trustees and beneficiaries are able to manipulate the arrangements in such a manner that a discretionary trust isconverted to a specific trust whenever it suits them tax-wise. In order to prevent such manipulation, it is proposed to provide that unless the beneficiaries and their shares are expressly stated in the order of the Court or the instrument of trust or wakf deed, as the case may be, and are ascertainable as such on the date of such order, instrument or deed, the trust will be regarded as a discretionary trust and assessed accordingly."

(iv) The object of the amendments to the provision was only that the distribution of the income should not be entirely at the discretion of the trustees and that the trust deed should regulate the shares.

(v) The basic scheme of section 61 r/w section 62 and section 63 is as follows : where under a settlement any income arises to the settlor, it has to be assessed in the hands of settlor, whether the settlement is revocable or irrevocable. If under a settlement any income arises to any other person apart from the settlor such income can still be assessed in the hands of the settlor provided the settlement is revocable. Even if a settlement on the face of it is stated to be irrevocable, if the same provides for direct or indirect retransfer of income or assets of the settlement to the settlor or gives the settlor a right to resume power directly or indirectly over such income or asset, the settlement should be deemed to be revocable.

(vi) Sec.2(31) of the Act defines the term "Person". The definition includes "Association of Persons"(AOP). There is no definition of the expression AOP occurring in the 1922 Act. By a series of decisions, the meaning of this expression was precisely defined and tests were laid down in order to find out when a conglomerate of persons could be held to be an AOP for the purposes of section 3 of the 1922 Act. While interpreting this expression occurring in section 3 of the Indian IT Act, 1922, the Supreme Court in CIT vs. Indira Balkrishna (supra) held "an AOP must be one in which two or more persons join in a common purpose or common action, and as the words occur in a section which imposes a tax on income, the association must be one the object of which is to produce income, profits or gains". The Supreme Court, however, administered the following caution : ''There is no formula of universal application as to what facts, how many of them and of what nature, are necessary to come to a conclusion that there is an AOP within the meaning of section 3; it must depend on the particular facts and circumstances of each case as to whether the conclusion can be drawn or not". To the above judicial exposition of what constitutes AOP, there has been a statutory rider added. The Finance Act, 2002 has inserted w.e.f. 1st April, 2003 an Explanation to clarify that object of deriving

income is not necessary for AOP, BOI, local authority or an artificial juridical person in order that such entity may come within the definition of "Person" in section 2(31). If income results than they are liable to be taxed as AOP if the other conditions laid down by judicial decisions are satisfied.(ITA No. 178/Bnag/2012., 17.10.2014.)(AY. 2008-09)

DCIT v. India Advantage Fund–VII(Bang)(Trib.);www.itatonline.org

S.164: Representative assessee-Charge of tax–Income-Accurual-Discretionary trust or specific trust-Beneficiaries unknown-Settlor having executed the deeds giving discretion to the Trustees to disburse benefits among the beneficiaries and the trsutees having retained the income and not disbursed the same among the beneficiaries, the trusts continued to be 'discretionary trust' in the relevant assessment years and the value of the assets cannot be assessed on the estate of the deceased settlor. [S.5,Wealth tax Act, 1957 S. 21(3)]

The ex-Ruler of Gondal Shri Vikramsinhji executed three deeds of settlements (trust deeds) in the USA & UK. These trusts were created for the benefit of (a) the Settlor, (b) the children and remoter issue for the time being in existence of the Settlor and (c) any person for the time being in existence who is the wife or widow of the Settlor or the wife or widow or husband or widower of any of them, the children and remoter issue of the Settlor. During his life time, the settlor, Shri Vikramsinhji, was including the whole of the income arising from these trusts in his returns of income. The said income was also included in the two returns filed by his son Jyotendrasinhiji for the AY 1970-71. Thereafter, the assessee took the stand that the income from these trusts is not includible in his income. Jyotendrasinhiji also took the stand that inclusion of the said income in the returns submitted by his father for the AYs 1964-65 to 1969-70 and by himself for the assessment year 1970-71 was under a mistake. Clause 3 of the deeds of settlement executed in U.K. leaves at the discretion of the trustees to disburse benefits to the beneficiaries. The endorsement made in the returns, as noted above, shows that income was retained by the trustees and not disbursed. The Tribunal while considering clause 3(2) and Clause 4 of the U.K. Trust Deeds observed that if the trusts were really intended to be discretionary, the trustees had a duty cast on them to ascertain the relative needs and personal circumstances of all the beneficiaries and to allocate the income of the trusts, among them from time to time, according to the objects of the trusts, however, the tell tale facts bring out the intention of the settlor to treat the trust property as his own. The settlor and after his death his son have been showing the income of foreign trusts in the returns of income filed from time to time. Had the trust deeds been really understood by the trustees and the beneficiaries as discretionary by virtue of the operation of clause 3, one would have expected the state of affairs to have been different. Consequently, the Tribunal held that due to failure on the part of the Maharaja to appoint discretion exercisers as per clause 3(2), clause 4 has become operative and the U.K. trusts have to be held to be specific trusts. The High court did not agree with the Tribunal's view and held that on interpretation of the relevant clauses of the deeds of settlement executed in U.K., character of the trusts was discretionary and not specific. On appeal by the department to the Supreme Court HELD dismissing the appeal:

A discretionary trust is one which gives a beneficiary no right to any part of the income of the trust property, but vests in the trustees a discretionary power to pay him, or apply for his benefit, such part of the income as they think fit. The trustees must exercise their discretion as and when the income becomes available, but if they fail to distribute in due time, the power is not extinguished so that they can distribute later. They have no power to bind themselves for the future. The beneficiary thus has no more than a hope that the discretion will be exercised in his favour. Having regard to the above legal position about the discretionary trust which is also applied by by this Court in the earlier judgment and the fact that the income has been retained and not disbursed to the beneficiaries, the view taken by the High Court cannot be said to be legally flawed. Merely because the Settlor and after his death, his son did not exercise their power to appoint the discretion exercisers, the character of the subject trusts does not get altered. The two U.K. trusts continued to be 'discretionary trust' for the subject assessment years. The High Court has taken a correct view that the value of the assets cannot be assessed on the estate of the deceased Settlor (Snell's Principles of Equity, 28th Edition, Page 138 followed) (AY. 1984-85 to 1991-92, 1970-1971 to 1976-77)

CWT .v. Estate of Late HMM Vikramsinghji of Gondal(2014) 268 CTR 232/103 DTR 211/363 TTR 679/225 Taxman 166(SC)

S.164:Representative assessee–Charge of tax–Beneficiaries unknown–Trust-Trustees-Charge of tax where share of beneficiaries unknown-Matter remanded to consider the genuineness of Trust.[S.167B]

The assessee trust was formed under the terms of the trust deed, which stated that, future spouse and children would also become beneficiaries with effect from the year of their marriage and birth, respectively. The AO rejected the assessee's claim to be assessed as a trust on the ground that trust was a sham, inasmuch as the beneficiaries were not aware of their share in it and some were not even aware of its existence. The CIT(A) confirmed the finding of the Assessing Officer. The Tribunal also dismissed the assessee's appeal. On further appeal by the assessee, the High Court held that mere reference to a would-be spouse or future child by itself was not enough to reject the assessee's claim of trust status. However, without giving finding on genuineness of trust, the High Court remanded the matter to the Tribunal to pass an order after considering the genuineness of the trust. (AYs. 1998-99 to 2000-01)

A.K.K. Specific Family Trust .v. CIT (2014) 220 taxman 395 (Mad.)(HC)

S.164:Representative assessee-Charge of tax – Beneficiaries unknown –Once the income is taxed at maximum rate in the hands of trustees, beneficiaries cannot be taxed once again.[S.10(34), 56(2)(vi),166]

The assesse is one of the beneficiaries of a private discretionary trust. The assesse received her beneficial share out of dividend income and claimed exemption on the ground that the income was already taxed in the hands of trustees under section 164. AO taxed the beneficial share in the hands of assesse as income from other sources under section 56(2)(vi).On appeal the Tribunal held that the AO was not justified in assessing the amount of beneficial share in hands of assesse once again when the income is already taxed in the hands of trustees at maximum marginal rate .Tribunal also observed that the entire trust income id from dividends which is exempt under section 10(34) of the Act ,therefore what comes in the hands as beneficial share retains the same colour and is also exempt under section 10(34). The beneficial share being part of exempt dividend income , same is exempt and is to be excluded while computing the income of assesse.(AY.2009-10)

Alpana Kirloskar (Smt.) .v. ACIT(2014)108 DTR 21/165 TTJ 542(Delhi)(Trib.)

S. 170:Succession to business other than on death- Liability of successor for tax and penalty of predecessor.[S.271(1)(c),Wealth- tax Act , 1957 S.18(1)(c)]

Petitioner had taken over all assets and liabilities of brokerage business of one S.C. Mangal & Co.Assessing Officer directed petitioner to pay liabilities and dues of S.C. Mangal & Co under Income-tax Act and Wealth-tax Act as successor of S.C. Mangal & Co .Petitioner contended that Assessing Officer should record a finding under section 170(3) that sum payable in respect of income of such business or profession could not be recovered from predecessor. The revenue contended that the assessee had taken over the liabilities payable by S.C.Mangal & Co and therefore under common law recoveries can be made from the assessee The assesse filed the Writ petition challenging the recovery proceedings . Allowing the petition the Court held that recovery proceedings cannot be initiated against the assesse successor for recovery of the dues under the Income –tax Act without the AO first passing an order under section 170(3). If and when any advese order is passed by the AO the assesse would be entitled to file an appeal as provided under section 246. The Court also observed that the AO has to examine the scope and ambit of section 170(3) and decide whether penalty amount can be recovered from the successor under the said section, though the penalty order was subsequent to the date of succession. Where no order under section 170(3) had been passed by the Assessing Officer, recovery proceedings could not be initiated against assessee as successor of business for recovery of tax dues of predecessor.

As regard the penalty under the Wealth –tax Act, 1957 , since the Wealth-tax Act did not have any equivalent section as section 170 for recovery of dues of predecessor from successor and recoveries sought to be made in instant case under Wealth tax Act were on account of penalty imposed under section 18(1)(c) of Wealth-tax Act, which were passed after date of transfer, same was not recoverable from petitioner. Court held that successor cannot be made liable for penalty imposed on predecessor , more so when penalty orders were passed after the date of transfer .(A.Ys. 1991-92, 1992-93 and 1995-96)

Moongipa Securities Ltd. .v. ACIT (2014) 97 DTR 241 (Delhi) (HC)

S.172:Shipping business–Non-resident–Agent-Beneficiary for claiming benefit under the treaty-Assessee was acting as an agent of owner of ship and not "P" therefore "p" was not entitled to get the benefit of DTAA-DTAA-India-Netherland. [S.163, Art 8]

One 'P', a Netherlands-based shipping company, chartered a ship owned by an Iranian company in October 2008. The ship was engaged by the assessee, a ship broker, to carry goods from Mangalore to other countries. The assessee filed a return of income under Section 172(3) on behalf of 'P' claiming to be an agent of 'P' and showed 'P' as a beneficiary of its freight. It stated that 'P' was entitled to the benefits of the DTAA between India and the Netherlands**.** The Assessing Officer noticed that under the charter party agreement executed by the Iranian company and 'P', the Iranian company was the owner of the ship. He held that the treaty with the Netherlands could be applied only if the owner of the ship was the beneficiary of the freight. He further held that the owner of the ship was the beneficiary of the freight and not 'P'. He therefore denied the benefit of the DTAA between India and Netherlands. The appellate authorities upheld the action of the Assessing Officer. On appeal to High Court it was held that from clause 14 of the charter party agreement, it was clear that 100 per cent freight charges minus 3.75 per cent commission was payable to the owner's bank account within four banking days upon completion of last load port by 'P'. Clause 24 of the agreement further showed that out of the commission of 3.75 per cent, 2.5 per cent would go to 'P' and 1.25 per cent to the assessee. In view of the above, High Court observed that the conclusion of the revenue authorities that relief under DTAA was not allowable was justified and was in accordance with law. (A.Y. 2009-2010)

Marine Links Shipping Agencies .v. CIT (2014) 220 Taxman 198 /360 ITR 709/102 DTR 268/267 CTR 509(Karn.)(HC)

S.172: Shipping business - Non-residents –Indian agent-Not liable to be assessed under section 172(4)[S.44B, 90, 139]

Respondent company acted as an agent for the UK freight beneficiary which was engaged in the business of transportation of goods by sea. The Respondent Company had filed its return under section 139 (1) of the Act. The magnitude of voyages undertaken by fright beneficiary, it could be said that freight beneficiary was not engaged in occasional, but in regular shipping business and further that it's Indian agent was regularly filing return. In view therefore, Indian agent i.e. Respondent Company was liable to be assessed on basis of return filed under section 139 (1) for it's entire income and thus, order passed by A.O. u/s. 172 (4) was to be quashed.(AY. 2010-2011)

ITO .v. Marine Containers Services (India) Pvt. Ltd. (2014) 61 SOT 260(Rajkot)(Trib.)

S. 179: Private company-Liability of directors–Unless any evidence to indicate any grossneglect, misfeasance or breach of duty on the part of director in relation to affairs of company, provision of section 179 could not be invoked.[S.2(43)]

Petitioner a director in a private limited company resigned from directorship of Company. Said company had unpaid outstanding tax demands. Assessing Officer proceeded against petitioner on premise that petitioner was a director of said private company and she was liable to discharge such liability under section 179. No effort was made by department to recover tax due of company from trade debtors and shares. The asessee filed writ petition against the said order.Allowing the petition the Court held that, since, petitioner-director had proved that non recovery of tax due against company could not be attributed to any gross negligence, misfeasance or breach of duty on her part in relation to affairs of the company, section 179 could not be invoked against her.(AY. 1984-85)

Pratibha Garg (Smt.) .v.CIT (2014) 97 DTR 116(All.)(HC)

S. 179(1): Private company-Liability of directors–No gross neglect, misfeasance or breach of duty-Recovery of tax dues of company personally form directors was not permissible.

Since the facts established that there was no neglect, misfeasance or breach of duty on part of the directors, recovery of tax dues of company personally from directors was not permissible.(AY.1998-99)

JashvantlalNatverlalKansara .v. ITO (2014) 362 ITR 115 (Guj.)(HC)

S. 192: Deduction at source–Salary–Professional payments to doctors-No employer and employee relationship-Not salary not liable to deduct tax at source as salary. [S. 201(1A)]
Mere prohibitory clause that doctors cannot take up any other assignments does not change the basic character of the relationship between parties. Since there was no administrative control over the doctors who were free to come at any time and treat patients. Held, payments to doctors were not salaries. (AY. 2008-09)
CIT(TDS) .v. Yashoda Super Speciality Hospital (2014) 365 ITR 356 (AP)(HC)

S.192:Deduction at source–Salary–Fringe benefit tax-Not liable to deduct tax at source on payment of allowance and subsidy to employees to the extent of amount expended. [S.17(1)(iv), 201, R.3]
The assessee paid conveyance maintenance reimbursement expenditure (CMRE) allowance to its employees for running & maintenance expenditure of their personal vehicles for official work. It treated the same as non-taxable in the hands of the employees and accordingly no tax was deducted on this amount u/s 192 of the Act. The AO treated it as additional salary within the meaning of 17(1)(iv) and held that the provisions of section 192 were attracted and since the assessee has not deducted the tax it treated it as assessee in default u/s 201(1) / 201(1A) of the Act.

The High Court held that the payment in question if not utilized actually, the same can be held to be taxable salary of the employees. Moreso, in this appeal, what one is considered is the taxable receipt and not the payment of tax by the employer. Moreover till the FBT regime was in existence, the assessee had already paid the FBT u/s 115WB. Therefore there was no default of the assessee u/s.201. (AY. 2006-07 to 2009-10)
CIT(TDS) .v. Oil & Natural Gas Corporation (India) Ltd. (2014) 220 Taxman 187/267 CTR 498/101 DTR 278 (Guj.)(HC)

S.192:Deduction at source-Salary-Perquisites-Reimbursement of expenses-Meal coupons- Not liable to deduct tax at source. [S.17]
In the present case, in view of the order passed in case of Asst C.I.T V/s. Infosys BPO (Bang) , assessee was not required to deduct tax at source in respect of payments made to its employees towards reimbursement and leave travel medical allowance. It was also further held that having regard to the decision in the case of I.T. O. vs. Cedilla Health care & C.I.T. V/s. Reliance Ind, providing meal coupons to employees to be used outside office premises would not give rise to taxable perquisites and the assessee was not required to deduct tax at source while distributing said coupons.(AYs. 2006-2009 to 2010-2011)
ACIT .v. Oracle India (P) Ltd. (2014) 61 SOT 222 (Bang.)(Trib.)

S. 194A : Deduction at source-Interest other than interest on securities-Societies wholly funded by Government-Societies which are wholly funded by Government, would qualify for non-deduction of tax. [S. 201,201(IA)]
Assesseebank did not deduct TDS from payments of interest under section 194A made to societies engaged in promotion of bio-technology and bio-business. It was held to be assessee indefault u/s. 201(1) and interest was charged u/s. 201(1A). Societies were wholly financed by Central Governmentas per Notification No. S.O. 3489, dated 22-10-1970, bank is not liable to deduct TDS on funds belonging to said societies. Assesseebank could not be held as assesse indefault. Societies which are wholly funded by Government would qualify for non-deduction of tax.
ITO .v. State Bank of Patiala (2014) 146 ITD 497 / (2013) 35 taxmann.com 466 (Chand.)(Trib.)

S.194A: Deduction at source-Interest other than interest on securities-Discounting charges of bills of exchange- Expenditure on discounting/factoring charges is not in the nature of interest for purposes of TDS u/s 194A or disallowance u/s 40(a)(ia). [S.2(28A, 40(a)(ia)]
The term "interest" relates to a pre-existing debt, which implies a debtor creditor relationship. Unpaid consideration gives rise to a lien over goods sold and not for money lent as held in Bombay Steam Navigation Co. Pvt. Ltd. Vs. CIT (1963) 56 ITR 52 (SC) where interest on unpaid purchase price was not treated as interest on loan. It is clear from the definition that before any amount paid is construed

as interest, it has to be established that the same is payable in respect of any money borrowed or debt incurred. According to us, discounting charges of Bill of Exchange or factoring charges of sale cannot be termed as interest. The assessee in the present case is acting as an agent. Now what is this is to be seen. A Del Credere is an agent, who, selling goods for his principal on credit, undertakes for an additional commission to sell only to persons for whom he can stand guarantee. His position is thus that of a surety who is liable to his principal should the vendee make default. The agreement between him and his principal need not be reduced to or evidenced by writing, for his undertaking is a guarantee. A Del Credere Agent is an agent who not only establishes a privity of contract between his principal and the third party, but who also guarantees to his principal the due performance of the contract by the third party. He is liable, however, only when the third party fails to carry out his contract, e.g., by insolvency. He is not liable to his principal if the third party refuses to carry out his contract, for example, if the buyer refuses to take delivery. In the present case before us the assessee has assessed the income as Del Credere being trading in goods and merchandise and also dealing in securities and which is assessed as income from business and not income from other sources. The expenditure incurred is also on account of business expenditure and not interest expenditure in the nature of interest falling u/s. 194A of the Act. Accordingly, these discount/factoring charges do not come within the purview of section 194A and assessee is not liable to TDS on these charges. (ITA No. 729/Kol/2011. Dt. 27.01.2014.) (AY. 2007-08)

ITO .v. MKJEnterprises Ltd.(2014)62 SOT 71(URO) (Kol.)(Trib.)www.itatonline.org

S.194B : Deduction at source-Winning from lottery-Cross word puzzle-Winnings from advertisement–Provision is not applicable. [S.201 & 201(A)]

The assessee company was engaged in the business of manufacture and sale of various consumer goods / products. During the previous year it had conducted certain sale of promotion schemes. The Company advertised in packs/ containers of their products. Some of those coupons indicated that on purchase, the prizes that were offered were Santro car, Maruti Car, Gold Coins, Gold Tables, Silver Coins, emblems etc. The total amount of prizes distributed valued at Rs.6,51,238 for A.Y : 2001-02 and Rs 54,73,643 for A.Y : 2002-04 . AO conducted survey at assessee's premises and thereafter passed an order treating assessee as an assessee in default u/s 201(1) and 201(A) for AY : 2001-02 and treated respondent as an assessee-in-default of its obligations in terms of 194B of the Act as although the customers did not pay anything extra to receive the prize , nevertheless they had participated in the schemes by purchasing the products advertised to take a chance at winning the prize. AO further held that what has been paid as prize in kind in various schemes conducted by the respondent was a lottery on which tax was neither deducted nor ensured payment thereof before the winnings were released. CIT (A) affirmed the order of the AO. Tribunal reversed the decision and held that although there was no element of chance, but as no consideration or payment was made by the customers for the purpose of participation in the lottery with the object of winning the prizes, the schemes conducted by the assessee would not fall within the ambit of S/194B of the Act. On further appeal in HC, HC affirmed the order of Tribunal and held that on conjoint reading of S/201 & 194 would show that if the person responsible fails to pay is deemed to be an assessee-in-default, in respect of tax. Where the payment of the winnings is wholly in kind and not in cash at all, the question of deduction does not arise and in that eventuality, the winner of prize before the prize/ winnings was to be released in assessee's favour. Therefore proceedings against the person u/s 201 , such as the assessee in the assessee's case, who failed to ensure payment of tax , as contemplated by proviso to S/194B , before releasing the winnings were not maintainable or the proceedings against such person were without jurisdiction. (AYs. 2001-02, 2002-03)

CIT v. Hindustan Lever Ltd. (2014) 264 CTR 93 / 220 Taxman 177 / 361 ITR 1 (Kar)(HC)

S. 194C : Deduction at source–Surcharge-Payments to contractors –Short deduction-No obligation at relevant time on assessee to deduct surcharge in addition to tax - Assessee not in default for short deduction.

Section 194C(1) and (2) as existed at the relevant point of time had cast no obligation on the assessee to deduct any surcharge during the relevant years when payments were made to contractors. Section 201(1A) had no application. Assessee cannot be held to be in default for short deduction.

CIT .v. Municipal Corporation, Visakhapatnam (2014) 365 ITR 254 (AP)(HC)

S.194C: Deduction of tax at source- Contractors/sub-contractors-Firm could not be considered as contractor and partners as sub contractors-Provisions of section 40(a)(ia) was not applicable.[S.40(a)(ia)]

Assessee firm was formed by two partners for purpose of carrying business of works contract. It got contracts from various Governments and distributed work among two partners and executed work. received a sum of Rs. 115 crores as contract receipts of which it transferred a sum of Rs. 111 crores to partners. credited balance receipt of Rs. 4 crores and debited corresponding expenses in profit and loss account. It secured contracts and had given it to its partners with a collective responsibilities and liabilities jointly and severally liable towards owners for execution of contracts in accordance with contract conditions. demarcated nature of contracts into principal contracts and sub contracts for purpose of identifying work handled by partners and for purpose of accounting contract receipts and payments, assessee-firm could not be considered as contractor and its partners as sub-contractors of firm to cast liability u/s. 194C(2) on it.Disallowance by invoking section 40(a)(ia) was liable to be deleted.(AY. 2009-10)

Hindustan Ratna JV .v. ITO (2014) 149 ITD 443 / 42 taxmann.com 107 (Hyd.)(Trib.)

S.194C : Deduction at source – Contractors and sub-contractors – Transportation contract-Assesee has not hired the truck owners , hence not liable to deduct tax at source.[S.40(a)(ia)]

Assessee had undertaken contract from a company for transportation of their products. In order to execute assignment given by company, assessee engaged his own truck as well as had hired truck from other owners. AO held that payment made by assessee to truck owners amounted sub-contracting transportation work and disallowed payment under section 40(a)(ia).On appeal Tribunal held that since entire payment of transportation was made by company to assessee after deducting tax, same established that there was no nexus between company and owners of truck engaged by assessee. Further since, assessee was responsible for entire transportation job assigned by company to assessee and there was nothing on record to show that assessee had sublet his work to other truck owners, it could be construed that assessee had hired trucks along with drivers and executed work himself, and, hence, provisions of section 194C were not attracted.(AY. 2006-07)

Saiyad Saukatali Saiydamiya v.ITO (2014) 61 SOT 110 (URO)/ (2013) 40 taxmann.com 57 (Ahd.)(Trib.)

S.194C:Deduction at source – Contractors-Sub-contractors-Supply of food and security peronnel-Not technical services.[S.194J]

Contracts for supply of bread and butter and supply of security personnel would be covered under provisions of s. 194C as contract and not technical sercices under section 194J.(AY. 2008-09, 2009-10)

ITO . .v. Accounts Officer, Govt. Medical College, Jammu (2014) 146 ITD 648 / (2012) 22 taxmann.com 149 (Asr.)(Trib.)

S.194C:Deduction at source-Contactors-Sub-contractors-Deduction to be made at the time of payment-Debiting the running account of a payee at the yearend cannot be said to be deduction of tax at source as contemplated-Disallowance was held to be justified.[S. 40(a)(ia)]

The assessee paid certain amounts to contractor on three different dates, without deduction of tax at source. Assessee claimed that tax was deducted at source on 31-03-2006 i.e.last date of relevant accounting period by debiting the running account and the same was deposited with the Government before due date specified in sub-section 139(1)and therefore the impugned payments were not hit by section 40(a)(ia).However the AO disallowed the payment. CIT (A) allowed the claim of assesse. On appeal by revenue the Tribunal held that by debiting running account of payee on last date of accounting period could not be said to be deduction of tax at source as contemplated by section 194C. If tax is deducted at any other point of time than at the time when the amount exigible to deduction of tax at source is paid or is deducted out of any other sum than the sum out of which it is mandated to be deducted, such deduction of tax per se cannot be said to be at source. Deduction of tax at source, i.e., out of the amount payable in terms of s. 194C r.w.s 40(a)(ia), is one thing and debiting the running account of the payee on the last date of the accounting period is altogether a different thing.

Debiting the running account of a payee cannot be said to be deduction of tax at source as contemplated by s. 194C r.w.s. 40(a)(ia). Appeal of revenue was allowed. (AY. 2006-07)
ITO .v.Bhoomi Construction (2014) 146 ITD 639 / (2013) 30 taxmann.com 335 (Rajkot)(Trib.)

S. 194C: Deductionat source-Contractors-Sub-contractors-Payments to contracts for supply of bread and butter and supply of security personnel would be covered under provisions of section 194C and not under section 194J.[S.194J,201(1), 201(IA)]
The assessee, a Medical College, had entered into contracts/agreements with various parties for supply of bread and butter and supply of security and personnel. The assessee made payments to the contractors and deducted the tax at source under section 194C. The AO held that the assessee had made payments to the contractors for technical services covered under section 194J and, therefore, it had made a short deduction of tax at source. He, therefore, treated the assessee as an assessee in default under section 201(1) and raised tax demand upon it. He also levied interest under section 201(1A) upon the assessee. Commissioner (Appeals) held that the contracts under discussion were covered under work or service contracts and the CBDT Circular No. 715, dated 8-8-1995 was clearly applicable to the instant case. Hence, there was no short deduction of tax at source. Tribunal confirmed the order of CIT(A).
ITO .v. Accounts Officer, Govt. Medical College, Jammu (2014) 146 ITD 648 / (2012) 22 taxmann.com 149 (Asr.)(Trib.)

S. 194H : Deduction at source – Commission – Brokerage – Petitioner not entitled to file Writ Petition to consider and settle issues which are primarily based on facts for which assessee had already preferred an appeal.[S. 250, Constitution of India Art 226]
The assessee was engaged in the business of news-paper publication, etc. The AO observed that the assessee had paid commission to advertisement agencies without deducting tax at source which the assessee claimed to be trade discount and hence disallowed the same u/s. 40(a)(ia) of the Act. An appeal was filed against the said Order to the CIT(A). When the said appeal was still pending, assessee was advised by its Counsel not to press grounds on question of deduction of tax at source on trade discount given to advertising agencies and payment of interest on amount of TDS u/s. 201(1A) and to raise question which, according to him, is a jurisdictional issue, in a Writ Petition.
Dismissing the said Writ Petition, the High Court held that the assessee did not file the required documents to prove that the petitioner has offered trade discount and not commission to the advertising agencies. The AO did have jurisdiction and that he has not committed any such patent error of jurisdiction, which entitles the petitioner to file the Writ Petition, to consider and settle the issues, which are primarily based on facts. The advice given to the appellant not to press certain grounds, would not give the petitioner a right to directly approach the Court, even if similar questions of law have been raised. (AY. 2009-2010 , 2010-11)
Amar Ujala Publication Ltd. .v. ACIT (2014) 222 Taxman 70 (Mag.) (All)(HC)

S.194H: Deduction at source-Trade discount-Incentive to stockists are not commission- Not liable to deduct tax at source.[S.40(a)(ia)]
The assesse is engaged in the business of manufacturing and trading of pharmaceutical products. The aasessee gave incentive to its distributors/dealers /stockists under different schemes.AO treated the said incentives as commission and disallowed the expenses on applying the provision of section 40(a)(ia) as the tax was not deducted under section 194H. CIT (A) and Tribunal decided the issue in favour of assesse. On appeal by revenue high also affirmed the view of the Tribunal holding that provision of section 194H is not applicable. (AY. 2005-06)
CIT .v. Intervet India (P)Ltd. (2014)364 ITR 238/ 103 DTR 98 /268 CTR 429(Bom.)(HC)

S.194H: Deduction at source–Commission or brokerage-TDS does not apply to all sales promotional expenditure. It applies only if relationship between payer & payee is that of principal & agent.
The assessee had undertaken sales promotional scheme viz. Product discount scheme and Product campaign under which it offered an incentive on case to case basis to its stockists / dealers / agents. An amount of Rs.70 lakhs was claimed as a deduction towards expenditure incurred under the said

sales promotional scheme. The relationship between the assessee and the distributor / stockists was that of principal to principal and in fact the distributors were the customers of the assessee to whom the sales were effected either directly or through the consignment agent. As the distributor / stockists were the persons to whom the product was sold, no services were offered by the assessee and what was offered by the distributor was a discount under the product distribution scheme or product campaign scheme to buy the assessee's product. The distributors / stockists were not acting on behalf of the assessee and that most of the credit was by way of goods on meeting of sales target, and hence, it could not be said to be a commission payment within the meaning of Explanation (i) to Section 194H of the Income-tax Act, 1961. The contention of the Revenue in regard to the application of Explanation (i) below Section 194H being applicable to all categories of sales expenditure cannot be accepted. Such reading of Explanation (i) below Section 194H would amount to reading the said provision in abstract. The application of the provision is required to be considered to the relevant facts of every case. (ITA No. 1616 of 2011. dt.01/04/2014.)

CIT .v. Intervet India Pvt. Ltd. (Bom.)(HC);www.itatonline.org

S. 194H : Deduction at source - Commission or brokerage -Mutual funds-Sub brokerage-Buying and selling of units of mutual fund is not covered-Not liable to deduct tax at source.

Assessee is in the business of Mutual Funds distribution and investment agent. From the details of brokerage received and service tax deducted there from it can be seen that out of the brokerage income. The sub-brokerage is paid in relation to units of Mutual Funds. The sub-brokerage paid is connected with the services rendered in the course of buying and selling of units of Mutual Funds or in relation to transactions pertaining to Mutual Funds. As per the provisions of section 194H Explanation (i) these are not covered by the provision for deduction of tax at source. There is nothing on record to indicate that the sub-brokerage is paid for any other services other than relating to securities. (AY. 2005-06,2007-08)

Dy. CIT .v. S. J. Investment Agencies (P.) Ltd. (2014) 146 ITD 691 / (2013) 32 taxmann.com 97 (Mum) (Trib.)

S. 194H : Deduction at source-Commission or brokerage-Mutual funds-Not covered by section 194H. [S.40(a)(ia)]

Tribunal held that sub-brokerage paid in connection with services rendered in course of buying and selling of units of mutual funds or in relation to transactions relating to mutual funds is not covered by provisions of section 194H.There is no doubt that Mutual Funds are categorised as securities.Therefore the ITAT held that Sub-brokerage paid in connection with services rendered in course of buying and selling of units of mutual funds is not covered by provisions of s. 194H.(AYs. 2005-06 ,2007-08)

Dy.CIT .v. S.J. Investment Agencies (P.)Ltd. (2014) 146 ITD 691 / (2013) 32 taxmann.com 97 (Mum.)(Trib.)

S.194I: Deduction at source-Rent- Towers-Passive infrastructure services-Tax deduction at source to be at rate prescribed under section 194I(a).[S.194C, 197]

Towers are neutral platform without which the mobile operation cannot operate.Dominant intention is use of equipment or plant or machinery.Amounts to renting of plant and machinery.That equipment housed in the premises incidental and not a renting of premises .Tax deducted at source to be at rate prescribed in section 194I(a).Writ petition of assesse was allowed.(FY.2013-14)

Indus Towers Ltd. .v. ACIT(TDS) (2014) 220 Taxman 402/364 ITR 114/104 DTR 77/224 Taxman 68 (Delhi)(HC)

S.194I:Deduction at source-Rent-Composite contract for loading and unloading and transportation of granites-Provision of section 194I is applicable and provisions of section 194C.[S.40(a)(ia), 194C]

The assessee deducted the tax at source under section 194C instead of section 194I.AO held that the payments are hit by provision of section 40(a)(ia) hence disallowed the expenditure. On appeal the court held that in case of a composite contract for loading and unloading and transport of granites

where the assessee makes use of vehicles and equipment, S. 194I will be applicable and not s. 194C; contention that for attracting s. 194I there must be a lease or other arrangement relating to immovable property is not sustainable. Section 194I intends liability to deduct tax in respect of "any machinery or plant or equipment" .The machinery need not be the machinery annexed to immoveable property otherwise under the Transfer of Property Act. Applicability of section 40(a)(ia) the matter was remitted to Tribunal to decide a fresh. (AY. 2007-08)

Three Star Granites (P) Ltd. .v. ACIT (2014) 98 DTR 9/266 CTR 326 (Ker.)(HC)

S.194I : Deduction at source–Rent-Wharfage- Wharfage charge is payment for using land together with structure on shore of navigation water and, thus, would be treated as rent under section 194-I. [S.194J]

Assessee Company, engaged in business of developing, constructing, operating and maintaining port on Build, Own, Operate, Transfer (BOOT) basis, entered into two agreements with GMB, i.e., lease and possession agreement and concession agreement. By concession agreement assessee was granted right to use waterfront against payment of charges to be computed on basis of actual throughputs achieved in month. In pursuance of that agreement assessee paid wharfage charges to GMB after deducting TDS under section 194J. Waterfront was part of land and, therefore, payment made in lieu of its use would fall under definitions of 'rent' as given in section 194-I(i), and, hence, assessee was required to deduct tax at source under section 194-I and not under section 194J. (AY. 2006 – 2007 & 2007 – 2008)

Gujarat Pipavav Port Ltd v.Dy. CIT (2014) 149 ITD 23 / (2013) 40 taxmann.com 174 (Rajkot)(Trib.)

S.194I: Deduction at source–Rent-Lease premium–Premium was not paid under a lease but was paid as a price for obtaining lease, it preceded grant of lease and, therefore, by any stretch of imagination, it could not be equated with rent which was paid periodically-Payment for additional FSI area could not be equated to rent - Not liable to deduct TDS on both types of payment u/s.194-I. (S. 201]

Assessee took plot of land from MMRD and made payment of lease premium for allotment of plot of land as also payment for additional built up area and fees for FSI.AOvheld that the assessee was required to deduct TDS u/s. 194-I.The Tribunal held that, the premium is not paid under a lease but is paid as a price for obtaining the lease, hence it precedes the grant of lease. it cannot be equated with the rent which is paid periodically. The records show that the payment to MMRD is also for additional built up are and also for granting free of FSI area, such payment cannot be equated to rent. It is also seen that the MMRD in exercise of power u/s. 43 r.w. Sec. 37(1) of the Maharashtra Town Planning Act 1966, MRTP Act and other powers enabling the same has approved the proposal to modify regulation 4A(ii) and thereby increased the FSI of the entire 'G' Block of BKC. The Development Control Regulations for BKC specify the permissible FSI. Pursuant to such provisions, the assessee became entitled for additional FSI and has further acquired/purchased the additional built up area for construction of additional area on the aforesaid plot. Thus the assessee has made payment to MMRD under Development Control for acquiring leasehold land and additional built up area. Payment of lease premium for allotment of plot of land as also payment for additional built up area and fees for FSI, are not liable to TDS liability under section 194-I. (AY. 2008-09)

ITO .v. Wadhwa& Associates Realtors (P.) Ltd.(2014) 146 ITD 694 / (2013) 36 taxmann.com 526 (Mum.)(Trib.)

S.194I:Deduction at source-Rent-Neither landlord-tenant relationship nor a licensor-licencee relationship-Not liable to deduct tax at source as rent.[S.194C, 201,201(IA)]

The assessee company took over the running BPO business of a company at its various locations.It entered in to use of tenanted premises for a period of six months.All the payments were remitted to various parties by other company on behalf of assessee company.The assessee reimbursed said payments and deducted the tax at source in terms of section 194C on the amount of reimbursement on actual basis.AO held that the assessee was required to deduct tax in terms of section 194I from the said payments.The AO raised the demand for short deduction of TDS under section 201 and also levied interest under section 201(1A).In appeal, CIT(A) held that the assessee was under no obligation

to deduct tax at source and not liable for interest. On appeal by revenue, the Tribunal held that, revenue has not brought any evidence to demonstrate any tenancy or sub-tenancy agreement between the assessee and other party, the order of CIT(A) was confirmed.(AY.2009-10)
ACIT .v. Serco BPO (P) Ltd.(2014) 146 ITD 453 / (2013) 32 taxmann.com 223 (Delhi)(Trib.)

S. 194J : Deduction at source – Royalty-Satellite television rights of films for a period of 99 years-Sale-Payment made for them would not fall within the definition of royalty as per Explanation 2 to clause (vi) of section 9(1) of the Act.[S.9(I)(vi)]
The assessee had purchased satellite television rights of some Telugu films for a period of 99 years through an irrevocable transfer deed. The AO opined that the said payment amounted to royalty as defined in Explanation 2 to Section 9(1)(vi). Since the assesse had failed to deduct tax at source under section 194J, the payment was disallowed under section 40(a)(ia). The CIT(A) held that the payment was covered by section 28 as trading expenses and thus disallowance was not warranted under section 40(a)(ia). The Tribunal, however, restored the order of the AO. On appeal to the High Court, it was observed that the assessee enjoys the exclusive status, as the World Negative rights (picture and sound) including theatrical rights owner as also the right to assign the said rights, which were transferred in their favour, and the transferor was not entitled to claim any revenue or consideration received by the assessee in respect of the said assignment agreement. It was observed from the various conditions contained in the agreement of transfer that there was a transfer of copyright in favour of the assesse. However, the deed of transfer being irrevocable for a period of 99 years, which was in excess of the prescribed period of 60 years in terms of section 26 of the Copy Right Act, 1957, in the case of cinematographic film, the payment for television/film rights could only be treated as one of sale. Thus, the High Court reversed the order of the Tribunal and upheld the findings of First Appellate Authority that the transfer in favour of the assessee was a sale, which was excluded from the definition of royalty as defined under clause (v) to *Explanation (2)* of section 9(1). (AY. 2009-10)
K. Bhagyalakshmi (Mrs.) .v. DCIT (2014) 221 Taxman 225 (Mad.)(HC)

S. 194J : Deduction at source - Fees for professional or technical services –Maintain operation theatre and surgical equipments, RO system, CT scan machine, MRI machine etc-Require professional skill-Tax is deductible under section 194J. [S.9(1)(vii)]
Assessee, a medical College, entered into contracts with various parties to maintain operation theatre and surgical equipments, RO system, CT scan machine, MRI machine, medical equipments lift sterlisation and as well as to provide services of anti-termite treatment. All these services cannot be provided in routine and normal manner, but require technical expertise or professional skills and therefore, provisions of section 194J, would be attracted to these contracts. (AY. 2008-09, 2009-10)
ITO .v. Accounts Officer, Govt. Medical College, Jammu (2014) 146 ITD 648 / (2012) 22 taxmann.com 149 (Asr.)(Trib.)

S.194J :Deduction at source-Fees for professional or technical services –Maintenance of operation theatre and surgical equipment's system tax to be deducted as per provisions of section 194J and not as per section 194C. [S.9(1)(vii),194C]
Assessee, a medical College, entered into contracts with various parties to maintain operation theatre and surgical equipments, RO system, CT scan machine, MRI machine, medical equipments lift sterlisation and as well as to provide services of anti-termite treatmentall these services cannot be provided in routine and normal manner, but require technical expertise or professional skills and therefore, provisions of S. 194J attracted to these contracts. Appeal of revenue was allowed.(AYs. 2008-09 and 2009-10)
ITO .v. Accounts Officer, Govt. Medical College, Jammu (2014) 146 ITD 648 / (2012) 22 taxmann.com 149 (Asr.)(Trib.)

S. 194J : Deduction at source-Fees for professional or technical services-Hospitals-Doctors-No employer and employee relation-Tax to be deducted as professional fees.[S.192]
Assessee,hospital under an agreement was availing services of doctors.Fixed their own OPD hours etc. and there was no control of hospital by way of direction to doctors on treatment of patients, there

was no employer and employee relationship between hospital and professional doctors. Tax to be deducted u/s. 194J and not u/s. 192. (AYs. 2009-10, 2010-11)
Dy. CIT .v. Ivy Health Life Sciences (P.) Ltd. (2014) 146 ITD 486 / (2013) 31 taxmann.com 236 (Chandigarh)(Trib.)

S.194J:Deduction at source-Technical service fee-Reimbursement of purchase price-DTAA-India-UK-Not liable to deduct tax at source.[Art. 13]
Sister concern made purchases of rough diamonds on behalf of assessee. Sister concern made payment after deducting TDS @ 15 per cent as per article 13. Assessee reimbursed expenses to sister concern, no element of margin or profit or value addition by sister concern. No TDS was required to be made u/s. 194J at time of payment by assessee to sister concern. (AYs. 2006-07 to 2008-09)
ITO .v. VishindaDiamonds(2014) 146 ITD 745 / (2013) 34 taxmann.com 163 (Mum.)(Trib.)

S.194J: Deduction at source-Fees for professional or technical services-Hospitals and Doctors-No employer and employee relation-Provisions of section 192 is not applicable. [S.192]

The Assessee Company was running a hospital. It engaged certain professional doctors to provide full time services to the patients as per contract for service entered with them. The professional doctors shared fees received from the patients, their remuneration was not fixed and they were free to render service to the patients as they considered appropriate in terms of time or duration. The assesse company deducted tax u/s. 194J from the payments made to them treating the payments as professional fees. AO held that there was employer and employee relationship between assessee and doctors and tax was to be deducted at source u/s. 192. The CIT(A) analysed the agreement with doctors and hospital. He found that the doctors enjoyed complete professional freedom, they define working protocol, have free hand in treatment of patients and there was no control of the hospital by way of any direction to the doctors on the treatment of patients. Doctors fixed their own OPD hours and were available on call in case of emergency. They were working in their professional capacity and not as employees. Therefore Commissioner (Appeals) held that A. O. was not right in concluding that there existed an employer - employee relationship between the hospital and the professional doctors. Thus, invocation of section 192 was not justified. On appeal Tribunal observed and held that there does not exist employer-employee relationship between the assessee appellant and the persons providing professional services. On consideration of the agreement in its entirety evident that it is not a case of employer - employee relationship between the assessee appellant and the doctors. Hence, Tax was to be deducted at source under section 194J as professional charges. (AYs.2009-10, 2010-11)
Dy. CIT (TDS) .v. Ivy Health Life Sciences (P.) Ltd. (2014) 146 ITD 486 / (2013) 31 taxmann.com 236 (Chd.)(Trib.)

S.194LA:Deduction at source-Compensation for acquisition of immoveable property-Not liable to be deducted under section 194LA.[S.194IA]
Writ Petition was filed by assesse, contending whether income Tax liable to be deducted from the sale consideration at the time of transfer of an immovable property by a resident transfer? The Petitioner was apprehensive of deduction of Income- Tax and has filed the writ Petition for a direction to disburse the whole of the sale consideration without any deduction whatsoever relying on the decision of Info park Kerala V. DCIT (2010) 231 CTR 479(Ker) wherein it was held by the court that such deduction is warranted only when there is compulsory acquisition. The respondent contended that the property agreed to be transferred is not an agricultural land hence provisions of SECTION 194LA is not applicable .Allowing the Writ Petition , the court held that Petitioner was fully justified in his contention that tax was not liable to be deducted @ 10% of the sum under S/194-LA. The obligation to deduct tax u/s 194-IA of the Act arises when consideration is payable to a resident transfer on the transfer of immovable property otherwise than by land acquisition. It is upto Petitioner to submit his return before the jurisdictional AO and take proceedings to a logical end in the determination of his tax liability.
M. C. Thomas .v. District Collector and Ors. (2014) 264 CTR 437 (Ker.)(HC)

S.194LA:Deduction at source - Payment of Compensation on Acquisition of Certain Immovable Property - Purchase of land under Chhattisgarh Nagar Tatha Gram Nivesh Adhiniyam (CGNTGNA), 1973 –Not liable to deduct tax at source and consequently, there was no default U/S.201(1).[S.201(1)]

The assessee had acquired land for development of new capital city of the State from various landowners and paid compensation to them without deducting tax on the compensation paid to the landowners and hence, AO held that it is in violation of the provisions of s. 194LA of the Act which, in turn, mandates that 'any person responsible for paying to a resident any sum, being in the nature of compensation, shall at the time of payment of such sum, deduct an amount equal to 10 per cent of such sum as income-tax thereon.'

ITAT Held that, it is not in dispute that the CGNTGNA, 1973 has no power to compulsorily acquire the land and in fact, the ban on transfers in the specified zone is not a directive given by the assessee herein but it is the act of the State Government and the assessee has no role to play. In such an event of the matter, it may be inappropriate to assume that the transaction in question amounts to compulsory acquisition of land. As rightly pointed out by the assessee, compulsory acquisition of land is permitted only under the specific enactment whereas, the assessee herein has no power to acquire the land under any law for the time being in force.

If the power of acquisition is vested in the District Collector, the assessee cannot be indirectly assumed to have been vested with such powers inasmuch as the District Collector, in his capacity as a State representative, cannot be assessed to tax under the IT Act whereas, the assessee in its status as 'local authority' can suffer tax. Having regard to the distinction created between the two sets of 'persons', it has to be taken into its logical conclusion to hold that the assessee has no power to acquire the land; its duty is limited to entering into mutual settlements which cannot be equated to compulsory acquisition of land. Under these circumstances, the Assessing Officer as well as the Commissioner (Appeals) were not justified in holding that provisions of section 194LA are applicable in the instant case. Consequently, the assessee local authority cannot be treated to be in default under section 201(1)(AY.2008-09)

Naya Raipur Development Authority v. ITO (2014) 61 SOT 244/(2013)38 taxmann.com 271 (Bilaspur)(Trib.)

S. 195 : Deduction at source-Non-resident-Commission to agent-Circular-Later circular withdrawing the earlier circular operative only from the date of issue - Earlier circular did not oblige assessee to deduct TDS –Expenditure allowable. [S.9(1)(vii), 40(a)(i), 119]

During the relevant year, circular in force not obliging assessee to deduct TDS on commission paid to non-resident agents. Circular issued later withdrawing the earlier circulars operative only from the date of issue. Commission paid to non-resident agents allowable as expenditure. (AY.2008-09)

CIT . .v. Allied Exims (2014) 363 ITR 62 (All.)(HC)

S. 195 : Deduction at source – Non-resident - Agreement for procuring only orders does not involve any managerial services – Explanation to section 9(2) not applicable.[S. 9(1)(vii),40(a)(i)]

Assessee appointed foreign agents for securing orders. Commission paid to agents disallowed on the ground that it is in violation of provisions of section 195 r.w.s. 9(1)(vii). Agreement was only for procuring orders which did not involve any managerial services. Explanation added to section 9(1)(vii) by Finance Act, 2010 with effect from 1-6-1976 was not applicable in view of fact that agents had their offices situated in foreign country and they did not provide any managerial services to assessee. (AY.2008-09)

CIT .v.Model Exims (2014) 363 ITR 66 / 222 Taxman 94 / 267 CTR 177 (All.)(HC)

S. 195:Deduction at source–Letter of credit-Assessee had privity contract only with Indian Bank-No obligation to deduct to deduct tax at source. [S.201]

The assessee paid certain amounts to Allahabad Bank for arrangement of letter of credit in favour of its foreign suppliers. The American Express Bank charged a certain sum as interest on the Allahabad

Bank. The Allahabad Bank debited a sum of US $ 1,16,468-70 + US $ 3457-66 with certain other payments to American Express Bank which were recouped from the assessee. The amount of US $ 3,457-66 which was collected by Allahabad Bank was treated as paid by the assessee to American Express Bank towards interest. On such amount, the assessee was treated as the assessee in default for non-deduction of tax at source u/s 195 and demanded for a sum of Rs.2,78,639 with further interest of Rs.44,292 was raised on the assessee. On appeal :

Held, that the assessee had privity of contract only with the Allahabad Bank and the amounts were paid to Allahabad Bank. It was a different matter that Allahabad Bank in turn had made payments to American Express Bank. In that view of the matter, it could not be said that the assessee had any obligation to American Express Bank and in that view of the matter it could not be said that the transaction would fall within s. 195. Thus, there was no obligation on the assessee to make tax deduction at source u/s 195. (AY. 1995-96)

SriramRefregeration Industries.v. ITO (2014) 361 ITR 119 (AP)(HC)

S.195:Deduction at source-Double taxation relief- Technical services-Service PE-Business support Services-Tax implications of employee secondment contracts explained- Payments was held to be taxable in India and Indian comaony was bound to deduct tax at source-DTAA-India—Canada-UK. [S.9(1)(i), 9(1)(vii),90, Art.5, 12, 13]

The High Court had to consider whether the consideration for secondment of employees by British Gas Trading Ltd, UK, ("BSTL") and Director Energy Marketing Limited, Canada ("DEML") to Centrica, India, for providing "business support services" constitutes "fees for technical/ included services" under Articles 12 & 13 of the India-Canada and India-UK DTAAs and whether the presence of the seconded employees created a "service PE" in India for the foreign employers. HELD by the High Court:

(i) The overseas entities required the Indian subsidiary, CIOP, to ensure quality control and management of their vendors of outsourced activity. For this activity to be carried out, CIOP required personnel with the necessary technical knowledge and expertise in the field, and thus, the secondment agreement was signed since CIOP did not have the necessary human resource. The secondees are not only providing services to CIOP, but rather tiding CIOP through the initial period, and ensuring that going forward, the skill set of CIOP's other employees is built and these services may be continued by them without assistance. In essence, the secondees are imparting their technical expertise and know-how onto the other regular employees of CIOP. Indeed, it is admitted by CIOP that the reason for the secondment agreement was to provide support for the initial years of operation, till the necessary skill-set is acquired by the resident employee group. The activity of the secondees is thus to transfer their technical ability to ensure quality control vis-à-vis the Indian vendors, or in other words, "make available" their know-how of the field to CIOP for future consumption. The secondment, if viewed from this angle, actually leads to a benefit that transmits the knowledge possessed by the secondees to the regular employees. Indeed, any other reading would unduly restrict the Article 12 of the DTAA, which contemplates not only a formal transfer of intellectual property, but also other techniques and skills ("soft" intellectual property) required for the operation of a business. The skills and knowledge required to ensure that the task entrusted to CIOP – quality control – is carried on diligently certainly falls within the broad ambit of Article 12;

(ii) CIOP's arguments that it is not liable to deduct income tax u/s 195 on the ground that (i) there is no service PE, since CIOP is the economic employer, whilst the overseas entities are only the legal employers, (ii) the payment made by CIOP to the overseas entities is only by way of reimbursement, which does not form part of the income of those entities, and in any case, (iii) that payment is not the income of the overseas entities on account of the doctrine of "diversion of income by overriding title" are not acceptable;

(iii) The argument that there is no "service PE" is not acceptable because though CIOP has operational control over these persons in terms of the daily work, and is responsible (in terms of the agreement) for their failures, these are limited and sparse factors which cannot displace the larger and established context that the persons continue to be employees of the foreign parties (Morgan Stanley, OECD Commentary & referred);

(iv) The argument that the payment is a "reimbursement" on the ground that it is described as such in the secondment agreement and that there is no mark-up is not acceptable. It would lead to an absurd

conclusion if, all else constant, the fact that no payment is demanded negates accrual of income to the overseas entity. Instead, the various factors concerning the determination of the real employment link continue to operate, and the consequent finding that provision of employees to CIOP was the provision of services to CIOP by the overseas entities triggers the DTAAs. The nomenclature or lesser-than-expected amount charged for such services cannot change the nature of the services. Once it is established that there was a provision of services, the payment made may indeed be payment for services – which may be deducted in accordance with law – or reimbursement for costs incurred. This, however, cannot be used to claim that the entire amount is in the nature of reimbursement, for which the tax liability is not triggered in the first place.

(v) The argument that there is a "diversion of income by overriding title" on the basis that the payment made to the overseas entity is not income that accrues to the overseas entity, but rather, money that it is obligated to pass on to the secondees is also not acceptable for two reasons. One, in view of the findings that: (a) the payment is not in the nature of reimbursement, but rather, payment for services rendered, (b) the employment relationship between the overseas entities and CIOP – from which the former's independent obligation to pay the secondees arises – continues to hold, no obligation to use money arising from the payment by CIOP to pay the secondees arises. The overseas entities' obligation to pay the secondees arises under a separate agreement, based on independent conditions, in relation to CIOP's obligation to pay the overseas entity. Assuming the agreement between CIOP and the overseas entity envisaged a certain payment for provision of services (and not styled as reimbursement). Surely no argument could be made that such payment is affected by the doctrine of diversion of income by overriding title. If that be the case, then the fact that the payment under the secondment agreement is styled as reimbursement, and limited on facts to that, without any additional charge for the service, cannot be hit by that doctrine either. The money paid by CIOP to the overseas entity accrues to the overseas entity, which may or may not apply it for payment to the secondees, based on its contractual relationship with them. This, at the very least, is independent of the relationship and payment between CIOP and the overseas entity.Reimbursement of salaries was payment for technical services.Payment accrued to overseas entities .On facts this is not a case of diversion of income by overridning title.Payments taxable in India and Indian company is bound to deduct tax at source.(W.P. No. 6807 of 2012, dt. 25.04.2014).

Centrica India Offshore Pvt. Ltd. .v. CIT(2014) 364 ITR 336/104 DTR 33/224 Taxman 122/270 CTR 1(Delhi)(HC)

S.195: Deduction at source-Non-resident-Artist-Remuneration-Commission paid to an agent for services rendered abroad and payment by way of reimbursement of expenses are not taxable in India-DTAA-India-UK[S. 90, 201,Art ,7,18]

The assessee paid remuneration to the artists, to the agent and reimbursed the expenses in connection with the visit and performance of the artists in India. The assessee deducted tax at source on fees paid to the international artists in India. Tax was deducted at source on the payment made to artists for performance in India but it was not deducted at source on the commission paid to Mr. Colin Davie who acted as an agent between the assessee and the artists performed in India. Under Article 18 of the India-UK DTAA, the payment made to the artists and by way of reimbursement has been completely misconstrued inasmuch as the agreements with the artists and the understanding with Mr. Colin Davie would indicate that the payment of commission to him is not covered by Article 18. Mr. Colin Davie never took part in the event organised. He did not exercise any personal activities in India. Mr. Colin Davie did not act as a performing artist or entertainer, all that he was concerned are the services which were rendered outside India. He contacted the artists and negotiated with them for performance in India in terms of the authority given by the assessee. The CIT(A) and Tribunal rightly arrived at the conclusion that Mr.Colin Davie did not perform any services in India, but they were rendered outside India. Therefore, commission income to the agent is not liable to tax in India and there was no obligation on the part of the assessee to deduct the tax at source at the time of making of payment. In so far as payment or reimbursement of expenses in connection with the visit and performance of the artists in India, the amount reimbursed to them was towards air travel and was supported by documents. On that tax need not be deducted.

DIT .v. Wizcraft International Entertainment Pvt. Ltd(2014) 364 ITR 227/223 Taxman 250/104 DTR 68/269 CTR 108(Bom.)(HC)

S. 195 : Deduction at source - Non-resident - Reimbursement of share of costs towards administrative and management support services in connection with technology updates etc is not taxable-Not liable to deduct tax at source.

The assessee company is a member of the international organization of Ernst &Young and its several associate concerns worldwide. Ernst & Young Global Services LLP and Ernst Young UK LLP provide administrative and management support services in connection with technology updates, system and methodology and upgrades, training through webs etc. to the assessee and to other associate concerns of the Group. The assessee and its other associate concerns share the costs. A sum of Rs.6,88,12,554 was reimbursed to Ernst & Young Global Services LLP and a sum of Rs.23,78,781 to Ernst & Young UK LLP by the assessee during the current assessment year on account of its share of costs for such services. The said concerns were set up by member firms of Ernst & Young for providing resources to obtain best methodologies at a lower cost which in the present days of globalisation was imperative for any professional firm. Development of such methods by anyone concern would have been cost prohibitive apart from lacking uniformity and mutual compatibility. Accordingly, arrangement was arrived at for such services to be developed in pool by the said two concerns to which the member firms would have access to and reimbursing their respective shares of cost incurred there for. Such reimbursement was agreed on the basis of respective turnover of the member firms. These facts are not denied by revenue even now before us and these are reimbursement of expenses. Once these are reimbursement of expenses the assessee is not liable to deduct TDS u/s. 195 of the Act. (ITA No. 1159/kol/2012, dt. 30.04.2014.) (AY.2003-04)

DCIT .v. Ernst & Young Pvt. Ltd.(Kol.)(Trib.);www.itatonline.org

S.195:Deduction at source -Non-resident-Commission-Not liable to deduct tax at source-DTAA-India-Germany.[S.9(1)(vii),Art. 11]

Assessee, is an 100 per cent export oriented unit, was exporting leather saddler and its accessories. It procured and executed orders through agents outside India and commission was paid to them but it did not deduct TDS from said payment .Assessee submitted that as per Circular No. 23 of 1969, dated 23-7-1969 and Circular No. 786 of 1969, dated 7-2-2000, it was not liable to deduct tax at source from said commission payment. However, AO made disallowance of commission on ground that aforesaid circulars were withdrawn vide Circular No. 7 of 2009, dated 22-10-2009 and that payment of commission was made in India. ITAT Held that, Obligation to deduct tax at source under s. 195 is attracted only when the payment is chargeable to tax in India.IT authorities having accepted that the non-resident recipient is not liable to pay any tax in India, the assessee-payer was not liable to deduct tax at source under s. 195(1) in respect of the mobilization and demobilization costs reimbursed by it to the said non-resident company. Further, there was no element of Technical / Consultancy or Managerial Services in the services rendered by the non-resident agent. The services rendered by the non-resident agent were simply to procure orders from foreign buyers and to receive commission. Under the circumstances, the provision of section 9(1)(vii) are not applicable to the facts of the case and lastly, the payment of commission to non-resident was made outside India for the services rendered outside India and merely an entry in the books of account is made in India, for which it cannot be held that non-resident has received any payment in India.(AY.2008-09)

Reliance International v. ITO (2014) 61 SOT 86 (URO)/ (2013)36 taxmann.com 129(Luck.)(Trib.)

S.195:Deduction at source- Fees for technical services - Since entire services rendered by foreign company to assessee in respect of phase one and two were outside India, then same would not be chargeable to tax in hands of foreign company in India. The amendment in section 9(1)(vi) by inserting Explanations 5 and 6 by Finance Act, 2012 with retrospective effect from 1-6-1976 also did not create any liability against the assessee- DTAA-India –UK.[S. 9(1)(vi),Explanations 5 & 6)Art.13]

Assessee had entered into an agreement with Project Orange of London to carry out work of designing, etc. in three phases - Under phase one Project Orange was to prepare project time schedule, scales, design report and other documents which were to be prepared in London. In phase two technical design and drawings so prepared were to be transported to India and these were imported to

India under Customs Regulations. According to assessee payment made by it under phase one and two were not chargeable under Act as same did not constitute income in India in the hands of recipient.The Commissioner (Appeals) held that payment made by the assessee to the UK company was in the nature of fees for technical services within the meaning of Article 13(4)(c) of Indo UK Treaty and taxable in India. The assessee was liable to deduct tax at source under section 195. He had also rejected the claim of the assessee regarding reimbursement and upheld the liability of tax imposed by the Assessing Officer. ITAT Held that. in view of decision of Supreme Court in the case of Ishikawajima-Harima Heavy Industries v. DIT (IT) [2007] 288 ITR 408/158 Taxman 259, it has to be held that the entire services rendered by the foreign company to the assessee in respect of phase one and two was outside India. Therefore, the same cannot become chargeable to tax in the hands of the foreign company in India. If the amount paid by the assessee-company to the foreign company does not become chargeable to tax in India then the question of applicability of section 195 does not arise. Therefore, without considering the amendment made by Finance Act, 2012 it has to be held that there was no liability of the assessee to deduct tax at source on the payment made by it with respect to work relating to phase one and two. In respect of the Amendment by Finance Act, 2012 brought Explanations 5 and 6 into statute w.r.e.f. 1-6-1976, it was held that, issue is covered in favour of the assessee by the decision of the Tribunal in the case of Channel Guide India Ltd. v. Asstt. CIT [2012] 25 taxmann.com 25/139 ITD 49 (Mum.)(AY.2007-08) .

New Bombay Park Hotel (P) Ltd. v. ITO (2014) 61 SOT 105/ 41 taxmann.com 36 (Mum.)(Trib.)

S.195: Deduction at source-Non-resident- Royalty – Payment for supply of software-Liable to deduct tax at source. [S.9(1)(vi)]

The Tribunal held that the amounts paid for supply of software under a license agreement is to be considered as royalty under the provisions of the Act and also under DTAA and liable to tax in India and directed the AO to deduct tax under section 195. (AY. 2003-04, 2004-05, 2005-06 & 2007-08)

Dy. DIT .v. Reliance Infocom Ltd. (2014) 159 TTJ 589 / 29 ITR 132/ 64 SOT 137 **(Mum.)(Trib.)**

S.195: Deduction at source –Fresh claim before CIT (A) – Refusal of AO to verify.

During assessment, AO noticed that assessee paid to one of its directors export commission but did not deduct tax at source u/s 195 and disallowed payment made u/s 40(a)(i). Assessee contended before CIT(A) that disallowance made u/s 40(a)(i), increased total income but since assessee had claimed 100 percent deduction u/s 10B, disallowance so made was also eligible for deduction u/s 10B or alternatively u/s 10A. CIT(A) noticed that assessee was not eligible u/s 10B since it did not satisfy conditions but for claiming deduction u/s 10A, hence, CIT(A) forwarded copy of documents filed by assessee to AO seeking his comments and also for verification of information, however AO declined to examine same with plea that new claims could be made by assessee only through revised return. CIT(A) allowed deduction u/s 10A to assessee. Held, CIT(A) allowed deduction with observation that AO did not make any adverse comment against allowing deduction u/s 10A but AO did not examine documents. In that case, naturally, AO would not make any comment, either positive or adverse. Thus, eligibility of assessee to claim deduction u/s 10A needs to be examined at end of AO. Accordingly, restore matter of deduction before AO. Revenue's appeal partly allowed. (AY. 2009-2010)

ITO .v. Device Driven (India) P. Ltd. (2014) 159 TTJ 1 / 97 DTR 53/ 29 ITR 263 (Cochin)(Trib.)

S.195:Deduction at source-Payment for legal consultancy services-Income is not chargeable to tax in India-DTAA- India-Portugal. [S.9(1)(vii)(90, 201(1) & 201(1A); Art. 14 & 15]

Assessee made payment for legal consultancy services to the non-resident who had no fixed base available to her for performing her duty or any PE in India and who was in India for 22 days only. Such payment is not taxable in India either u/art. 14 or 15 of the India-Portugal DTAA. The assessee was under no obligation to deduct TDS u/s. 195.Order passed under section 201(1) and 201(IA) was quashed.(AY. 2011-12)

Cedrick Jordan Da Silva v. ITO (IT) (2014) 98 DTR 314 /62 SOT 239(Panji)(Trib)

S.195: Deduction at source-Non –resident-TDS obligation depends on law prevailing on date of payment and is not affected by retrospective amendment-No disallowance can be made under

section 40(a)(i) read with section 9(1)(vii) if that law did not require TDS to be deducted.[S.9(1)(vii),40(a)(ia)]

In accordance with the law laid down in Ishikawajma-Harima Heavy Industries, which was good law at the time of the remittance, unless the services are rendered in India, the same cannot be brought to tax as 'fees for technical services' u/s 9. Though the law was amended retrospectively, so far as tax withholding liability is concerned, it depends on the law as it existed at the point of time when payments, from which taxes ought to have been withheld, were made. The tax deductor cannot be expected to have clairvoyance of knowing how the law will change in future. A retrospective amendment in law does change the tax liability in respect of an income, with retrospective effect, but it cannot change the tax withholding liability, with retrospective effect. As there is no material whatsoever to establish that the design and development services were rendered in India, the assessee did not have any liability under s. 195 r.w.s. 9(1)(vii) to deduct tax at source from these payments. As a corollary thereto, no disallowance can be made in respect of these payments u/s 40(a)(i).(ITA No. 256/Agr/2013. Dt. 14/02/2014.) (AY. 2008-09)

DCIT .v. Virola International(2014) 162 TTJ 112/147 ITD 519(Agra)(Trib.)

S.195:Deduction at source-Non-resident-Film production services-Services rendered by the non-resident company to the applicant company fall under the definition of 'work' u/s 194C & the payments made thereafter by the applicant to the said company were not taxable in absence of any PE of the latter in India & consequently, the said payments would not suffer withholding of tax u/s 195-DTAA-India-Brazil. [S.9(1)(i), 90, 194C, Art. 7,12]

The applicant was a resident company incorporated under the companies Act, 1956. It was engaged in the business of producing & distributing television programmes. The assessee entered into an agreement with the Brazilian Country Utopia Films for availing line production services. For the purposes of shooting a programme / show outside India, it engaged a foreign company for receiving line production services under an agreement. The issue was whether line production services provided by the non-resident company to the applicant company fall under the definition of 'work' u/s 194C &payments thereof were taxable or not . The court held that that the services rendered by the non-resident company to the applicant company fall under the definition of 'work' u/s 194C & the payments made thereafter by the applicant to the said company were not taxable in absence of any PE of the latter in India & consequently, the said payments would not suffer withholding of tax u/s 195.(AAR Nos. 1081/1082 of 2011 dt 19-2-, 2014)

Endemol India (P.) Ltd .v. (2014) 99 DTR 397/222 Taxman 67 /266 CTR 142/361 ITR 658 (AAR)

S. 197: Deduction at source - Certificate for lower rate - AO directed to reconsider application u/s. 197 where he rejected the application without assigning any reasons for the same.

The assessee made an application u/s. 197 for no deduction of tax certificate since it was successively under a loss from the A.Y. 2010-11 to the A.Y. 2013-14. The AO without furnishing any reasons, rejected the application of the assessee.

The High Court observed that there were no reasons assigned as to why the application of the assessee was rejected. Accordingly, the AO was directed to reconsider the application in the light of the various materials which were placed by the assessee on record and in accordance with law. (AY. 2014-2015)

Vodafone Cellular Ltd.v. ACIT (2014) 222 Taxman 137 (Mag.)(Karn.)(HC)

S.197: Deduction at source–Rent-Certificate for lower rate-An application for certificate of deduction at lower rate can be made even before the commencement of financial year.[S.194C,194I]

The assessee was entitled to file an application for a certificate of deduction at a lower rate even before the commencement of the financial year in which that tax is to be deducted. (FY.2013-14]

Indus Towers Ltd. .v. ACIT(TDS) (2014) 220 Taxman 402/364 ITR 114/104 DTR 77(Delhi)(HC)

S. 197A : Deduction at source-No deduction to be made-Delay in filing declarations-Does not provisions of section 201 and 201(IA)-Not liable to pay interest.[Form No. 15G, 15H, 201,201(IA)]

During the course of survey it was found that the assessee had short deducted tax at source and in some cases it had not deducted the tax at source. The assessee contended that it had obtained the form 15G and 15H but had not filed the same with CIT.The AO rejected the contentions of the assessee and determined the tax payable under section 201 and interest payable under section 201(IA).On appeal to Tribunal,Tribunal following the decision in VipinP.Mehata .v.ITO,11 Taxmann.com 342 (Mum.)(Trib.) held that if the assessee has delayed the filing of declaration with the office of the jurisdiction CIT,within the time limit specified in the Act, that is a distinct omission or default for which penalty is prescribed.Merely because there was a failure on the part of the assessee bank to submit these declarations to the jurisdictional Commissioner with in time, it cannot be held that the assessee did not have declarations with him at the time when the assessee Bank paid the interest to the payees.Appeal of assessee was allowed.(ITA no 2672 to 2674/Del/2013 dt 14-03-2014). (AYs. 2007-08 to 2009-10)

Vijay Bank .v.ITO (2014) BCAJ-July –P.32(Delhi)(Trib.)

S. 199: Credit for tax deducted-Refund-Assessee cannot be denied credit for TDS on the ground of Form 26AS mismatch because he is not at fault. Non-grant of TDS credit causes harassment, inconvenience & makes the assessee feel cheated. Department to pay interest + costs of Rs. 25,000. [S.154, 237, 243, Form 26AS]

The assessee filed a return in which he claimed a refund of Rs. 2.32 lakhs on account of excess TDS by the Government department. The return was processed by the Central Processing Centre (CPC) of the Income-tax Department at Bangalore and a refund of only Rs.43,740 was issued. No intimation was given to the assessee as to why the balance amount of Rs.1,88,630 was not refundable. The assessee filed an application u/s.154 for rectification of the mistake and asked for refund of the balance amount. As there was no response from the department despite several reminders, the assessee filed a writ petition in the High Court. HELD by the High Court allowing the Petition:

On facts, no effort has been made by the AO to verify whether the deductor had made the payment of the TDS in the government account. On the other hand, the Income-tax department has show helplessness in not refunding the amount on the sole ground that the details of the TDS did not match with the details shown in Form 26AS. There is a presumption that the deductor has deposited TDS amount in the government account especially when the deductor is a government department. By denying the benefit of TDS to the Petitioner because of the fault of the deductor causes not only harassment and inconvenience, but also makes the assessee feel cheated. There is no fault on the part of the Petitioner. The fault, if any, lay with the deductor. The mismatching is not attributable to the assessee. The department must refund the amount within 3 weeks with interest. The department must also pay costs of Rs. 25,000 to the Petitioner.

Rakash Kumar Gupta .v. UOI (2014) 365 ITR 143(All.)(HC)

S.199: Credit for tax deducted-Refund-Assessee cannot be denied credit for TDS on the ground of Form 26AS mismatch because he is not at fault. Non-grant of TDS credit causes harassment, inconvenience & makes the assessee feel cheated. Department to pay interest + costs of Rs. 25,000. [S.154,237, 243 ,Form 26AS]

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(i) The difficulty faced by the tax payers relating to credit of TDS was considered by the Delhi High Court in Court On its Own Motion vs. CIT (2013) 352 ITR 273 and the CBDT was directed to issue directions with regard to giving credit of unmatched and mismatched TDS certificates. Pursuant thereto, the CBDT issued Instruction No.5 of 2013 dated 8.7.2013 directing that where the assessee

approaches the AO with requisite details and particulars in the form of TDS certificate as evidence against any mismatch amount the AO would verify whether or not the deductor had made payment of the TDS in the government account and, in the event, the payment had been made, credit of the same would be given to the assessee.
(ii) On facts, no effort has been made by the AO to verify whether the deductor had made the payment of the TDS in the government account. On the other hand, the Income-tax department has shown helplessness in not refunding the amount on the sole ground that the details of the TDS did not match with the details shown in Form 26AS. There is a presumption that the deductor has deposited TDS amount in the government account especially when the deductor is a government department. By denying the benefit of TDS to the Petitioner because of the fault of the deductor causes not only harassment and inconvenience, but also makes the assessee feel cheated. There is no fault on the part of the Petitioner. The fault, if any, lay with the deductor. The mismatching is not attributable to the assessee. The department must refund the amount within 3 weeks with interest. The department must also pay costs of Rs. 25,000 to the Petitioner. (ITA No. 657 of 2013. dt. 06/05/2014.)
Rakash Kumar Gupta .v. UOI(2014) 365 ITR 143(All) (HC), www.itatonline.org

S.199: Deduction at source-Credit for tax deducted-Rule 37BA (credit for TDS) inserted w.e.f. 01.04.2009 to mitigate hardship to taxpayers has to be treated as being retrospective in nature.[R. 37BA]
Rule 37BA of the Rules clearly mentions that credit for tax deducted at source and paid to the Central Government shall be given to the person provided that the deductee files a declaration with the deductor and the deductor reports the tax deduction in the name of other person in the information relating to deduction of tax referred to in sub-rule (1) of Rule 37BA of the Rules. Further, sub-rule (3) of Rule 37BA of the Rules provides that for the purpose of giving credit in respect of tax deducted in terms of provisions of Chapter XVII for the purpose of giving credit to a person other than those referred to in sub-section (1) and also the assessment year in which such credit may be given. In view of the above provision of section 37BA of the Rules and the provisions of section 199(1) of the Act, the credit for tax deduction could be given to the person from whose income, tax has been deducted. The Rule as amended by the Amendment Rules, 2009 w.e.f. 01.04.2009 makes it abundantly clear that the credit will be given based on the information by deductor. The proviso to sub-rule (2) of Rule 37BA of the Rules mitigates the hardship faced by assessee for claiming credit of TDS whereby deductee files a declaration with the deductor and the deductor reports the tax deduction in the name of other person in the information relating to deduction of tax as referred to in sub-rule (1) of Rule 37BA of the Rules. In such provisions of law, the assessee should have been allowed credit for TDS in the given set of facts and circumstances of the case. The only issue is that the amended provision is applicable w.e.f. 01.04.2009 and the relevant assessment year involved is 2008-09. Whether the amended Rule as amended by Amendment Rules, 2009 is a beneficial provision mitigating the hardship of the assessee and in turn the same can be declared as retrospective and will apply to all pending matters. Similar issue was dealt by Hon'ble Supreme Court in the case of Allied Motors Pvt. Ltd. Vs. CIT (1997) 224 ITR 677 (SC), wherein it has been held that "the provisions of the first proviso, which has newly been inserted by the Finance Act, 1987, with effect from 1st April, 1998, to section 43B is remedial in nature, designed to eliminate unintended consequences which may cause undue hardship to the assessee and which made the provision unworkable or unjust in a specific situation, and is of clarificatory nature and, therefore, has to be treated as retrospective with effect from 1st April, 1984, the date on which section 43B has newly been inserted by the Finance Act, 1983." Similarly, here also the Rule was inserted by the Amendment Rules, 2009 to remove the hardship faced by assessees and to give true meaning to the provision of section 199 of the Act. In such circumstances, I direct the AO to allow the credit of TDS after verifying declaration to be filed by deductee in term of proviso to sub-rule (2) of Rule 37BA of the Rules.(ITA No. 2417/Kol/2013, Dt. 02.09.2014.(AY. 2008-09)
Parmanand Tiwari .v. ITO (Kol.)(Trib.);www.itatonline.org

S.199: Credit for tax deducted-Assessee cannot be denied credit for TDS on the ground of discrepancy in Form 26AS filed by the deductor. [S.198,203AA, 206C(5),Form 26AS]

Though Form 26AS (r/w r.31AB and ss. 203AA and 206C(5)) represents a part of a wholesome procedure designed by the Revenue for accounting of TDS (and TCS), the burden of proving as to why the said Form (Statement) does not reflect the details of the entire tax deducted at source for and on behalf of a deductee cannot be placed on an assessee-deductee. The assessee, by furnishing the TDS certificate/s bearing the full details of the tax deducted at source, credit for which is being claimed, has discharged the primary onus on it toward claiming credit in its respect. He, accordingly, cannot be burdened any further in the matter. The Revenue is fully entitled to conduct proper verification in the matter and satisfy itself with regard to the veracity of the assessee's claim/s, but cannot deny the assessee credit in respect of TDS without specifying any infirmity in its claim/s. Form 26AS is a statement generated at the end of the Revenue, and the assessee cannot be in any manner held responsible for any discrepancy therein or for the non-matching of TDS reflected therein with the assessee's claim/s. Where so, no doubt a matter of concern, is one which is to be investigated and pursued by the Revenue, which is suitably armed by law there for. The plea that the deductor may have specified a wrong TAN, so that the TDS may stand reflected in the account of another deductee, is no reason or ground for not allowing credit for the TDS in the hands of the proper deductee. The onus for the purpose lies squarely at the door of the Revenue. (ITA No. 4828/Mum/2012, dt. 27.03.2014.) (AY.2009-10)

LSG Sky Chef (India) Pvt. Ltd. .v. DCIT(2014)106 DTR 202/163 TTJ 808 (Mum.)(Trib.)

S.199:Credit for tax deducted-Association of persons-Credit for TDS given to person in whose hands income is assessable.[S.190]

The assessee had claimed TDS on interest on bonds received by her on behalf of the AOP where she was member. Though the funds utilized and invested were of the AOP, the investment being in the name of assessee the TDS certificate was issued in the name of assessee, who then remitted the full amount of interest to the AOP. The AO held that such interest should be assessed in the hands of the assessee. The CIT(A) held that the AOP being the beneficiary of the interest, the same should be assessed in hands of the AOP, but assesse could claim the credit for TDS.

On appeal by the department, the Tribunal held that since income is assessable in hands of AOP credit for the TDS shall also be granted only to the AOP and cannot be granted to the assessee. (AY. 2008-09)

ITO .v. Amee Hosang Mistry (2014) 29 ITR 397 /149 ITD 503(Mum.)(Trib.)

S. 201:Deduction at source-Failure to deduct or pay-Limitation--Reasonable time-Even if the statute does not lay down a time limit, proceedings must be completed within a limitation period-Passing of order has to be within one year from the end of finacial year in which proceedings under section 201(1)is initiated same time limit will apply for passing order under section 201(IA).[S.195,153(1)(a),201(IA)]

In the context of a GDR/ Euro issue by the assessee, the department claimed that the assessee ought to have deducted TDS u/s 195 on payment of fees to the fund managers etc. The Special Bench {Mahindra & Mahindra Ltd. v. Dy. CIT (2009)122 TTJ 577(Mum)(SB)} allowed the assessee's appeal inter alia on the ground that a time limit for initiation and completion of proceedings u/s 201 (1) & (1A) had to be read into the statute. On appeal by the department to the High Court HELD dismissing the appeal:

S. 201 of the Act does not prescribe any limitation period for the assessee being declared as an assessee in default. If no period of limitation is prescribed, a statutory authority must exercise its jurisdiction within a reasonable period. What should be the reasonable period depends upon the nature of the statute, rights and liabilities thereunder and other relevant factors. Insofar as the IncomeTax Act is concerned, s. 153(1)(a) prescribes the time limit for completing the assessment, which is two years from the end of the assessment year in which the income was first assessable. It is well known that the assessment year follows the previous year and, therefore, the time limit would be three years from the end of the financial year. This seems to be a reasonable period as accepted u/s 153 of the Act, though for completion of assessment proceedings. Even though the period of three years would be a reasonable period as prescribed by s. 153 of the Act for completion of proceedings, the Income Tax Appellate Tribunal has taken the view that four years would be a reasonable period of time for initiating action, in a case where no limitation is prescribed. The rationale for this seems to be quite

clear if there is a time limit for completing the assessment, then the time limit for initiating the proceedings must be the same, if not less. Nevertheless, the Tribunal has given a greater period for commencement or initiation of proceedings. Though section 201 does not prescribe any limitation period for the assesse being declared as an assesse in default yet the revenue will have to exercise the powers in that regard with in a reasonable time.(AY.1998-99)

DIT(IT) .v. Mahindra & Mahindra Ltd.(2014) 365 ITR 560/106 DTR 337/270 CTR 105/225 Taxman 306 (Bom.)(HC)

DIT (IT) v.Larsen & Toubro (I) Ltd.(2014) 365 ITR 560/106 DTR 337/270 CTR 105 (Bom.)(HC)

S. 201 : Deduction at source-Failure to deduct or pay-Rent-Wharfage-First proviso to section 201(1) which had been made effective from 1-07-2012 could be applied retrospectively-Matter remanded [S.194I]

First proviso to section 201(1) was applicable to pending matters also notwithstanding fact that it had been made effective from 1-7-2012. On facts stated under heading 'Deduction of tax at source - Rent', assessee would not be treated as assessee in default in case AO. was satisfied after due verification, that conditions stipulated by first proviso to sub-section (1) of section 201 had been fulfilled by assesse. However, in that situation also, assessee would be liable to pay interest under section 201(1A) at prescribed rate from date on which such tax was deductible under section 194-I to date of furnishing of return of income by payee. (AY. 2006 – 2007 & 2007 – 2008)

Gujarat Pipavav Port Ltd v. Dy. CIT (2014) 149 ITD 23 / (2013) 40 taxmann.com 174 (Raj)(Trib.)

S. 201:Deduction at source-Failure to deduct or pay-The payer is not liable for TDS default if the Dept does not show that the tax could not be recovered from the recipient.[S.194A,201(IA)]

The assessee, a bank, was held liable u/s 201(1) and 201(1A) r.w.s. 194 A for failure to withholding TDS on interest paid by it to customers on deposits placed by them with the assessee. The assessee claimed that it could not be treated as an assessee-in-default as no steps had been taken to determine whether the recipients of the interest had paid tax thereon. HELD by the Tribunal allowing the appeal:

(i) A short deduction of tax at source, by itself does not result in a legally sustainable demand u/s 201(1) and u/s 201(1A). As held in Hindustan Coca Cola Beverages vs. CIT(2007) 293 ITR 226, taxes cannot be recovered once again from the assessee in a situation in which the recipient of income has paid due taxes on income embedded in the payments from which tax withholding requirements were not fully or partly, complied with. In JagranPrakashan vs. DCIT 21 TM.com 489 (All) it was held that the deductor cannot be treated an assessee in default till it is found that assessee has also failed to pay such tax directly. Thus, to declare a deductor, who failed to deduct the tax at source as an assessee in default, condition precedent is that the recipient has also failed to pay tax directly;

(ii) S. 201(1) seeks to make good any loss to revenue on account of lapse by the assessee tax deductor. However, the question of making good the loss of revenue arises only when there is indeed a loss of revenue and the loss of revenue can be there only when recipient had a liability to pay the tax and he has not paid tax;

(iii) The onus is on the revenue to demonstrate that the taxes have not been recovered from the person who had the primarily liability to pay tax, and it is only when the primary liability is not discharged that vicarious recovery liability can be invoked. Once all the details of the persons to whom payments have been made are on record, it is for the AO, who has all the powers to requisition the information from such payers and from the income tax authorities, to ascertain whether or not taxes have been paid by the persons in receipt of the amounts from which taxes have not been withheld;

(iv) As regards the levy of interest u/s 201(1A), though the interest is compensatory in nature and is applicable whether or not the assessee was at fault, it is applicable for the period from the date on which tax was required to be deducted till the date when tax was eventually paid. In a case in which the recipient of income had no tax liability embedded in such payments, there will obviously be no question of delay in realization of taxes and s. 201(1A) will not come into play at all. (ITA No. 448 to 454/Agra/2011, AYs. 2001-02 to 2007-08, dt.20.06.2014.)

Allahabad Bank .v. ITO (Agra)(Trib.),www.itatonline.org

S.204 : Deduction at source-Person responsible for paying-Bar against direct demand on assessee-Upon issue of Form 16A TDS certificate, TDS credit has to be given to the payee even if there is Form 26AS mismatch or deductor is at fault for non-deposit of TDS with the Goverbmentor in the form No 26AS downloaded from the department site only partial credit was shown-Dedcutee shall be entitled to credit of the same, nothwitstanding the fact that dedcutor may not have deposited the tax with department.[[S.192,198, 204,205, 221, Form 16, 16A, 26AS]

The tax was deducted by the employer from whom the assesse received both salary and consultation fees and the form no 16 & 16A were issued. In the Form no 26AS down loaded from the department site only partial credit was appearing in favour of the assesse was shown. AO did not give full credit and raised the demand U/S 221(1) of the Act , which was challenged by the assesse by way of Writ petition, allowing the petition the court held that Deductee is entitled to credit of tax deducted at source for which form No 16 or 16 A were issued though in the form No 26AS downloaded from the department site only partial credit was shown. Court also held that if the department is of the opinion that deductor has not deposited the said amount of tax deducted at source , it will always open for the department to recover the same from the deductor.Dedcutee shall be entitled credit of the same, notwithstanding the fact the ddeductor may not have deposited the tax with the Government.[SCA No 2349 of 2014 dt 23-06-2014)(AY.2010-11)

Sumit Devendra Rajani .v. ACIT (2014) 108 DTR 51/271 CTR 89S(Guj.)(HC)

S.206C: Collection of tax at source–Liquor business-Meaning of "buyer"-Licensee under State Act–Not a buyer-Tax cannot be collected from such a licensee. [U.P. Excise Act, 1910, S.41(e)(iii)]

Held, that all the petitioners, who were retail vendors, were granted licence under the U. P. Excise Act, 1910, at the relevant time and since the maximum retail price was fixed by the Excise Commissioner in exercise of the powers conferred on him under section 41(e)(iii) of the U. P. Excise Act, 1910, the petitioners were excluded from the provisions of section 206C in view of Explanation (a)(iii) as the petitioners could not be termed "buyers". Therefore, the demands created by the Assessing Officer against the distilleries on the basis that they had committed default in collecting tax at source in terms of section 206C from the petitioners could not be sustained and the distilleries were restrained from collecting any tax at source in view of the provisions of the Act. Licensee under State Act is not buyer. Tax cannot be collected at source form such a licensee.

Prateek Kumar .v. UOI (2014) 362 ITR 444/98 DTR 128 **(All.)(HC)**

Ragavendra Prasad Mishra .v. UOI (2014) 362 ITR 444/98 DTR 128(All.)(HC)

SankathaShukla .v. UOI (2014) 362 ITR 444/98 DTR 128 **(All.)(HC)**

S. 206C: Collection at source–Scrap–Cotton waste–Not scrap within the meaning of Explanation (b) to section 206C-Not liable to collection at source-Form no 27C obtained from buyer filed in appellate proceedings-Technical breach liable to be condoned.[S.154,Form no.27C]

The Tribunal had specifically found that in the process of manufacture of cotton yarn, cotton waste came to be generated and the use of the waste by another manufacturer showed that it was used as raw material by the purchaser. Even the Revenue stated before the Tribunal that the cotton waste disposed of by the assessee was reused as raw material for manufacture of lower count of cotton yarn and it did not come under the definition of "scrap" as defined in Explanation (b) to section 206C of the Income-tax Act, 1961. The conclusion of the Tribunal having been reached as a finding of fact, there was no question of law much less a substantial question of law to be considered in the appeal.

(ii) That the Tribunal had noted that the assessee had obtained Form 27C from the buyers of the cotton waste. In the course of the appellate proceedings, Form 27C was also filed before the assessing authority by applying the provisions of section 154. The Tribunal held that the assessee having filed the statutory form, viz., Form No. 27C, the technical breach was liable to be condoned. (AY. 2007-2008)

CIT .v. Adisankara Spinning Mills (P) Ltd. (2014) 362 ITR 233/226 Taxman 44 (Mag) (Mad.)(HC)

S. 206C: Collection at source-Scrap-Molasses produced during course of manufacturing of sugar is by-product and does not fall within meaning of scrap-Not liable to deduct collection at source.

Molasses produced during course of manufacturing of sugar is by-product and does not fall within meaning of scrap as defined in Explanation (b) to section 206C.Assessee is not liable to deduct collect tax at source. (AYs. 2007-08 to 2010-11)

Nawanshahar Co-op. Sugar Mills Ltd. .v. ITO (2014) 146 ITD 523 / (2013) 32 taxmann.com 279 (Asr.)(Trib.)

S. 209 : Advance tax -Proviso to sub-section (1) of section 209 is prospective in nature and cannot be applied retrospectively-Interest u/s 234B is not leviable.[S.234B]

The language used in section 209(1) is regarding payment of advance tax in the financial year, therefore, the proviso is not attracted for the assessment year. The assessee was held to be not required to deposit any advance tax. In view of this fact, it was held that interest u/s 234B is not leviable. Since the assessee is not liable for advance tax, therefore it cannot be charged interest for failure to pay advance tax. (A.Y. 2005-06 and 2006-07)

Dy. DIT .v.MGB Metro Group Buying HK Ltd. (2014) 146 ITD 343 / (2013) 29 taxmann.com 164 (Delhi)(Trib.)

S.214 : Interest payable by Government - Interest on refunds – Interest payable on the interest only in case of inordinate delays. [S.244A]

Doubting the correctness or otherwise of the decision of the Supreme Court in the case of Sandvik Asia Ltd. .v. CIT (2006) 280 ITR 643, a bench of two learned Judges had referred the following question of law for consideration and authoritative pronouncement of a larger (3 judge Bench) by order dated 28.08.2012:

"The question which arises in this case is, whether interest is payable by the Revenue to the assessee if the aggregate of installments of Advance Tax OF TDS paid exceeds the assessed tax?"

Answering the aforesaid question, the 3 judge Bench of the Supreme Court observed that in the case of Sandvik Asia Ltd.'s (supra) the Court was considering the issue whether an assessee who is made to wait for refund of interest for decades should be compensated for the great prejudice caused to it due to the delay in its payment after the lapse of statutory period. The Bench observed that in the facts of that case, the Court had come to the conclusion that there was an inordinate delay on the part of the Revenue in refunding certain amount which included the statutory interest and therefore the Supreme Court had directed the Revenue to pay compensation for the same not an interest on interest.

Accordingly, the Supreme Court held that only interest provided for u/s. 244A of the Act may be claimed by an assessee from the Revenue and no other interest on such statutory interest.

CIT .v. Gujarat Fluoro Chemicals (2014) 222 Taxman 349 (SC)

S. 215 : Interest payable by assesse-Default in payment of advance tax – Delay in completion of assessment by the AO- Interest cannot be charged to the assessee [R. 40]

Assessee filed its return of income and thereafter revised return on 29-7-1985 and 13-1-1986 respectively. Assessing Officer issued notice with regard to assessment on 9-6-1987. During assessment proceedings, secondrevised return was filed by assessee on 18-1-1988. Assessment was completed on 18-2-1988 and interest under section 215 was levied on assesse. The High Court held that since revised return was filed by assesse only on account of his omission or wrong statement made in initial return, period between filing of original return and filing of revised return could not enure to the benefit of assessee and thus, starting point for computing period of one year referred to in rule 40(1) would be date on which first revised return was filed. As the Assessing Officer did not complete assessment within a period of one year, any interest liability for period beyond that one year could not be foisted on assessee unless delay in not completing assessment within period of one year was clearly attributable to the assessee. Since filing of second revised return caused a delay in assessment, waiver of interest would be in respect of period commencing at end of one year from date of filing first revised return upto date of filing of second revised return.

(AY. 1985-86)

Kelvinator of India Ltd. .v. CIT (2014) 220 Taxman 149 (Mag.)(Delhi)(HC)

S.220: Collection and recovery of tax-Stay of demand- When issue was decided in favour of assessee by an order of appellate authority for earlier years, assessee would not be considered to be assessee in default-Stay against demand of tax should be granted.

The Court held that in spite of the order of the Tribunal and CIT (A) on identical issues for the earlier assessment years 2005-06 to 2011-12, the AO in its order for the assessment year 2012-13 has ignored them.Court held that in hierarchical system of jurisprudence, it is not open to lower authority to ignore the binding decision of a superior authority unless the order of the superior authority has been stayed.When issue was decided in favour of assessee by an order of appellate authority for earlier years, assessee would not be considered to be assessee in default-Stay against demand of tax should be granted. (AY.2012-2013)

ICICI Prudential Life Insurance Co. Ltd..v. CIT (2014) 226 Taxman 74 (Mag.)(Bom.)(HC)

S. 220 : Collection and recovery-Stay of demand in high-pitched assessments should be considered as per observations in Soul v. DCIT 323 ITR 305 (Delhi)(HC).

This writ petition is directed against the order dated 06.08.2014 passed by the Additional Commissioner of Income Tax with the approval of the CIT, Delhi-I, New Delhi. By virtue of the said order dated 06.08.2014 the stay application filed by the petitioner has been rejected. We have gone through the impugned order dated 06.08.2014. The learned counsel for the petitioner has also taken us through the instruction No. 96 of 1969 as well as instruction No. 1914 of 1993. We have also examined the decision of this court in the case of Soul v. DCIT: 323 ITR 305 (Delhi) and, in particular, paragraph 8 thereof where the above mentioned two instructions have been considered as also the earlier decision of this court in Valvoline Cummins v. DCIT: 307 ITR 103 (Delhi). Considering the same, we feel that it would be appropriate if the ACIT reconsiders the application of the petitioner for stay in the light of the observations contained in the said decision [Soul v. DCIT (supra)]. This is so because according to the petitioner the assessment is a high pitched one inasmuch as it is approximately 17 times of the returned income. Consequently, we set aside the impugned order dated 06.08.2014 and remit the matter to the ACIT, Range-3, New Delhi for a fresh consideration of the stay application filed by the petitioner after taking into account the above mentioned decision of this court.

Charu Home Products Pvt. Ltd. v. CIT (Delhi)(HC); www.itatonline.org

S. 220 : Collection and recovery - Assessee deemed in default – Recovery of tax demand is to be stayed till disposal of assessee's appeal if department has sufficient amount for assessee to satisfy amount of tax.

The total demand outstanding against the assessee was Rs. 18,02,71,254/-. The amount of money of the assessee which was already held by the department was Rs. 16,46,82,156/- post which the assessee had paid a sum of ten crores for the very same assessment year.

The High Court held that since the interests of the department were sufficiently safeguarded there was no reason for the department to recover any additional sums from the assessee and therefore the stay would be extended till the date of disposal of the appeals filed before the CIT (A). (AY. 2010-2011)

Pragathi Gramin Bank .v. ACIT (2014) 221 Taxman 125(Mag.) (Karn.) (HC)

S. 220 : Collection and recovery - Assessee deemed in default –Stay of 50% of demand was held to be appropriate.

Stay of 50% demand is appropriate when the Writ petition is pending for disposal against the Order of Settlement commission.

Mayura Prime Estates Ltd v. ITSC (2014) 265 CTR 419 / 99 DTR 4 (Raj.)(HC)

S.220:Collection and recovery–Stay-Deemed in default-Not disclosed three bank accounts in the return , declining stay and permitting to pay the tax in instalments was held to be justified.

Order passed by the assessing officer discloses that the assessee was maintaining three bank accounts, which were not disclosed in the return. Total deposits in the bank accounts during the relevant year were about Rs. 5.47 Cr. The Appellate authority applied his mind to the stay application and found

that no prima facie case is made out by the assessee. It was also observed that it was not a case where income was enhanced merely on guess work. The grievance raised by the assessee in a writ petition was that the in the order rejecting the stay application, merits have been gone into which has vitiated the said order. The Hon'ble Court by dismissing the petition held that, the submission on behalf of the assessee cannot be accepted as it is inevitable that while deciding the stay application, to consider the prima facie case, merits and such consideration is only for the purpose of deciding whether the case of interim stay has been made out. The Hon'ble Court further held that the assessee having not disclosed in his return three bank accounts maintained by him, in which total deposits of Rs. 5.47 Cr were deposited during the relevant previous year, there has been no patent illegality or irregularity in the order passed by the appellate authority declining stay and permitting the assessee to pay the assessed tax in instalments on the ground that the assessee has not made out a case for absolute stay.
Bimal Paul v.CCIT(2014) 97 DTR 254(Gau)(HC)

S. 220 : Collection and recovery - Assessee deemed in default-High Court directed CIT(A) to dispose the appeal.[S. 201,201(IA)]
The assessee had filed an appeal before the CIT(A) against Order u/s. 201 and 201(1A) passed by the AO. During pendency of the appeal the AO issued communication to remit 50% of the demand and attached the bank accounts of the assessee.
The assessee filed a petition before the High Court inter-alia contending that it had pending refunds for A.Y.s 2012-13 and 2013-14 the assessment of which years were pending and that it would not press for refunds of the said amounts till the disposal of the appeal before the CIT(A) and hence no coercive action should be initiated.
The High Court disposing the petition directed the department to lift the attached bank accounts of the assessee and directed the CIT(A) to dispose of the appeal on or before a particular date and also directed the assessee not to press for refunds till then. (AY. 2012-2013, 2013-2014)
Hosmat Hospital (P.) Ltd. .v. CIT (2014) 222 Taxman 71 (Mag.)(Karn.)(HC)

S. 220 : Collection and recovery - Assessee deemed in default –Stay-CIT (A)-Coercive action should not be taken till decision of CIT(A) on assessee's stay application.[S.251]
The assessee filed an appeal against the Order of the AO before the CIT(A) alongwith a stay application against recovery proceedings. The appeal however was pending before the CIT(A), before the disposal of which the AO initiated recovery proceedings and by attaching the bank accounts of the assessee, transferred the demand amount into the account of the revenue authorities.
The High Court held that during the pendency of the appeal the assessee should not be treated as defaulter and hence no action can be taken by the revenue authorities during the pendency of the stay application before the CIT(A).
Sanjay Kumar Sahu .v. ITO (2014) 222 Taxman 140 (Mag.) (MP)(HC)

S.220: Collection and recovery-Assessee deemed in default-Stay-Without speaking order– Rejection of application is bad in law.[S.220(6)]
Application for stay was rejected mechanically without adverting to the facts and without considering the true impact of the Instruction No.1914 issued by the CBDT. Writ Petition was filed challenging the recovering proceedings. High Court allowed writ petition & held that it appeared from the impugned order that the assessee was not afforded the opportunity of hearing. Therefore the impugned order was set aside and the first respondent was directed to pass a reasoned order on the application filed u/s 220(6) after giving assesse an opportunity of hearing. Till decision on the assessee's application, the respondent was directed not to take coercive steps against the assessee for recovery of the demand raised against it & also court held that because the assessee has filed a stay application along with memo of appeal, the respondents cannot content that the application u/s 220(6) was not maintainable & the assessee was directed to seek the remedy of stay from the higher authority.
Madhya Pradesh Paschim Kshetra Vidyut Vitaram Company Ltd. .v. DCIT (2014) 99 DTR 7 /265 CTR 423 (MP)(HC)

S.220: Collection and recovery-Assessee deemed in default-Stay- Power of stay to be exercised by the AO, when assessee preferred an appeal.[S.220(6)]

DCIT passed assessment order against which Petitioner preferred an appeal before CIT (A). After filing an appeal, Petitioner moved a stay application u/s 220(6) of the act before AO/DCIT making a prayer not to treat as being in default in respect of amount in dispute in the appeal which was rejected by the AO. On writ the court held that, it is only when assessee has presented an appeal; the power in respect u/s 220(6) can be exercised by the AO. Therefore impugned order was quashed with a direction to the AO to reconsider the assessee's application & pass a fresh reasoned order, after giving an opportunity of hearing to the assessee.

Kanchanbag .v. UOI (2014) 99 DTR 10(MP)(HC)

S.220: Collection and recovery-Assessee deemed in default-Stay-Pendency of rectification application before AO-Appeal before Tribunal-During Pendency of appeal-Stay was granted. [S.220(6)]

Writ Petition was filed for staying recovery of tax demand till the pendency of the appeal before the Tribunal during pendency of rectification application before AO. HC allowed Writ Petition and held that apart from the rectification application filed by the assessee before seeking depreciation as already granted by the CIT, appeal filed by the assessee before the Tribunal against withdrawal of exemption/ cancellation of registration was also pending for adjudication. AO was directed to decide the rectification application filed by the assessee within 1 month after it with the copy of this order. Further the court directed assessee to file application for interim relief before the ITO who may pass appropriate order on the said application subject to verification of the fact that the order passed by the IT allowing benefit of depreciation was not been stayed by any interim order. Further the court directed that recovery made in the addition to the above, if any, shall remain subject to final outcome of the appeal pending before the Tribunal. (AY. 2008-09 & 2009-10)

Rajasthan Cricket Association .V. ITO (2014) 99 DTR 5/221 Taxman 483/ 265 CTR 420(Raj)(HC)

S.220: Collection and recovery-Assessee deemed in default-After rejecting stay application AO must give reasonable time before taking steps for coercive recovery.[S.226(3)]

Assessee filed an application for stay on payment of tax demand under section 220(3) - Assessing Officer rejected said application and on same day, he issued garnishee order under section 226 to bank and recovered tax demand. Assessee filed stay application on said demand before Tribunal and he filed present application on ground that Assessing Officer was not justified in recovering tax demand - Whether though technically no fault could be found with Assessing Officer, still there was an element of impropriety in his action in issuing garnishee order on same date when stay application was rejected and, therefore, it would be appropriate to direct Assessing Officer to deposit said sum in assessee's account till Tribunal would decide said application.

Sony India Pvt. Ltd. .v. ACIT (2014) 266 CTR 225 (Delhi)(HC)

S.220: Collection and recovery–Assessee deemed to be in default - AO must pass a speaking order and extend a opportunity of personal hearing while disposing of the stay application filed by the Assessee-Matter was remanded to AO for decision afresh.

The Assessee filed a stay application praying for stay of demand before the AO. This was rejected by him without giving any sufficient opportunity. On a writ filed by the Assessee, the High Court held that while examining an application for stay of demand under section 220(6), the AO had to pass a speaking order and extend an opportunity of personal hearing, if one was sought by the assessee. The matter was remitted for fresh adjudication. (AY.2009-10)

Joshna Rajendra (Smt.) .v. CIT(A) (2014) 220 taxman 360 /268 CTR 462/103 DTR 259(Karn.)(HC)

S.220: Collection and recovery-Assessee deemed in default-AO is required to pass a speaking order for rejecting stay application. [S.226]

The Assessee filed an application u/s. 220(6) before the AO requesting a stay of demand since it had disputed the AO's demand in appeal. The AO rejected the application by passing a non-speaking order and attached bank accounts. On a writ filed by the Assessee, the High Court held that where an appeal was pending against the assessment order, the assessee was not to be treated as an assessee in

default in respect of the amount in dispute in appeal, in the discretion of the AO on such conditions as he thinks fit to impose. The AO is, thus, required to pass a reasoned speaking order. The High Court quashed the order of the AO for attaching the assessee's bank accounts of the assessee and gave the AO the liberty to pass a fresh speaking order in accordance with law. (AY. 2009-10)

Lalita Wadhwa .v. CIT (2014) 220 Taxman 420 (P&H)(HC)

S.220: Collection and recovery–Stay-Power of Tribunal-Recovery of money before expiry of time limit for filing an appeal was held to be not justified-Tribunal has inherent powers to direct the revenue to refund the amount collected without following due process of law. [S.156, 220(6), 254(2A)]

The assessee is a statutory corporation engaged in the activity of constructing and providing accommodation to economic weaker sections of society. The AO denied exemption under section 11 read with section 2(15) of the Act. The Appeal of the assessee was dismissed by CIT(A). Assessee preferred an appeal and stay before the Tribunal. In the mean time AO recovered the tax by attaching the bank account. Tribunal directed the revenue to refund the amount recovered by attaching the bank account. Revenue filed the writ petition against the order of Tribunal. Dismissing the petition the court held that Recovery of money before expiry of time limit for filing an appeal was held to be not justified. Tribunal has inherent powers to direct the revenue to refund the amount collected without following due process of law .(WP(L) no. 3174 of 2013 dt 4 -02-2014)(AY.2010-11).

DIT(Exemption) .v. ITAT (2014) 361 ITR 469/99 DTR 73/265 CTR 337(Bom.)(HC)

S.220: Collection and recovery –Stay-Appeal to Tribunal-Not to take any coercive steps for recovery against the petitioner, till the appeal time is exhausted- Assessee deemed in default-AO cannot exercise coercive measures to recover tax during the period available for filing an appeal.[S.253]

Against the assessment order, further appeal lies to the Income Tax Appellate Tribunal u/s 253 of the Act and the time for moving the Tribunal is 60 days from the date of receipt of a copy of the order. As the appellate remedy is available to the petitioner, it could be accepted and the authority may thereafter proceed with the matter. However, in the absence of any legal impediment, the respondents have initiated recovery proceedings against the petitioner, when there is reasonable time for him to prefer an appeal. In view of the above, respondents are directed to not to take any coercive steps for recovery against the petitioner, till the appeal time is exhausted. Thereafter, the respondents are at liberty to act in accordance with law for recovery of the amount as per the order of the appellate authority.(WP No. 373 of 2014, dt. 07.01.2014.)

Dishnet Wireless Limited .v. ACIT(2014)361 ITR 449/105 DTR 262/225 Taxman 202(Mag.) (Mad.)(HC)

S. 220 : Collection and recovery- Stay- When tax payable and when assessee deemed in default - recovery proceeding initiated without expressly rejecting stay application filed by assessee and without giving assessee an opportunity of being heard, was not sustainable.[S.226]

During assessment proceeding AO determined income of assessee at Rs. 14.49 crore as against returned income of Rs. 8.29 crore an accordingly, raised demand which included tax component as well as interest segment. Assessee filed an application for stay of recovery, while said application was pending, AO initiated recovery proceedings and passed an order under section 226(3) attaching bank account of assesse. Recovery proceeding initiated without expressly rejecting stay application filed by assessee and without giving assessee an opportunity of being heard, was not sustainable, stay application filed by assessee was to be allowed subject to payment of tax component of demand in instalments. (AY. 2007-08)

Capital IQ Information Systems India (P.) Ltd. .v. ACIT (2014) 149 ITD 809 / (2012) 26 taxmann.com 31 (Hyd.)(Trib.)

S. 220(6):Recovery–Stay–Prima facie case–Tribunal considering the facts of the assessee's case directing the assessee to pay fifty percent of demand – Held not perverse.

Where the assessee was not able to make out prima facie case to opine that assessment of the liability determined by the A.O. is wholly untenable or illegal. The Tribunal upon the stay application filed by

the assessee directed it to deposit fifty percent of tax liability. The order held to be logical, met the interest of justice and not perverse. (AY. 2008 – 09 to 2012 – 13)
Dy. DIT (IT) v. Vodafone South Ltd. (2014) 102 DTR 145 / 267 CTR 544 (Karn.)(HC)

S. 222 :Recovery- Certificate to Tax Recovery Officer-Priority of claim-The claim of the stock exchange against the defaulter member has priority over Government claim.[S.226, Sch. 11, Securities Contracts (Regulation) Act, 1956, S, 8,9, Bombay Stock Exchange Rules, R. 5, 9, 16(iii), (43)]
The moment a member of the Bombay Stock Exchange is declared a defaulter, his right of nomination ceases and vests in the Exchange as even the personal privilege given to him is taken away at that point of time. As per rule 16(iii) of the Bombay Stock Exchange Rules ,whenever the Governing Board exercises the right of nomination in respect of membership which vests in the Exchange, the ultimate surplus that may remain after the membership card is sold by the Exchange comes only to the Exchange and not to the member. As per Rule 43, the security provided shall be first and paramount lien for any sum due to the Exchange, such Lien is only compatible with the member being owner of the security.Lien possessed by the Bombay Stock Exchange makes it a secured creditor, therefore the claim of the stock exchange against the defaulter member has priority over the Government dues.
Stock Exchange of Bombay .v. V.S. Kandalgaonkar & Ors. (2014) / 368 ITR 296 / 271 CTR 192 / 109 DTR 225 (SC)

S. 222 : Recovery- Certificate to Tax Recovery Officer - Attachment and sale of immoveable property-Unless the assessee is in default or is deemed to be in default a certificate cannot be issued by the TRO.[S. 156, 220, Schedule 11, Recovery of Debts due to Banks and Financial Institutions Act, 1993 , S. 19,29]
In this petition the petitioner has challenged the order passed by the Debt Recovery Tribunal (DRT) and sought a declaration that it is entitled to commission @ 3 % of the value of the guarantee issued by it in favour of the Prothonotary and Senior Master at the request of M/s. Shah Thakur & Sons. By an order DRT held that petitioner is entitled to commission for the year 2004-05 till the date of the sale of the property. While dealing with various issues of recovery the Court held that the Recovery Officer under the RDDB Act also cannot adjudicate upon the claims of any party in proceedings instituted under the RDDB Act. That can be done by the DRT.Under S. 19 of the RDDB Act, a bank or financial institution is entitled to make an application "to the TRIBUNAL'.s.19 then provides a detailed procedure for the adjudication of the claim filed under s.19(1)"to the Tribunal'. On this basis the Recovery Officer directed the release in favour of the petitioner from the balance sale process. An amount can be said to be recoverable from an assessee under the Act only after necessary orders are passed, steps are taken and events occur under section 156, 220 and 221. Schedule 11 comes in to play upon issuance of a certificate by TRO under section 222.Mere assessment order does not entitle the TRO to start recovery proceedings. Unless an assessee is in default or is deemed to be in default, a certificate cannot be issued by the TRO. Thus, the words "any other amount recoverable from the assesse under the Act" occurring in rule 8(1)(b) means the amounts payable in consequence of any order passed under the Act, therefore TRO cannot utilize the balance amounts for the satisfaction of any amounts other than the amounts payable in consequence of any order passed under the Act. Writ petition of the petitioner was dismissed.
Canara Bank .v. Debts Recovery Appellate Tribunal (2014) 271 CTR 233 (Bom.)(HC)

S. 226: Collection and recovery–Garnishee proceedings - No challenge to debts in existence-Project halted by litigation on validity of agreement - Applies only to future liability - Garnishee proceedings valid.
The assessee was engaged in the business of construction and land development for industrial projects and residential townships, and entered into a development agreement with EHTPL, for the development of 258.36 acres of land owned by EHTPL. However, the project was halted owing to litigation on the validity of the agreement. The Tax Recovery Officer directed the assessee to pay Rs. 32,82,79,787 towards the outstanding demand of EHTPL. The assesse challenged the order by filing writ petition.Held, dismissing the writ petition of the assessee, that the entries in the assessee's ledger account details as enclosed with the notice of the Tax Recovery Officer to the assessee against the

dates April 30 to October 31, 2012, indicated that the assessee admitted a liability to EHTPL, each month, as part of the 25 per cent. consideration owed under the development agreement. The existence of this liability was also admitted in the note to the accounts for the year ending March 31, 2013, referring to "EHTPL's share of Rs. 482.62 million". There was no challenge to the existence of the debt itself since it was nobody's case that the agreement stood cancelled. Thus, the assessee's debt to EHTPL was in existence, and the fact that the project had been brought to a standstill could only negate the future liability to make payments, since no collections were being made on the project. A potential or possible cancellation of an existing debt, depending on the outcome of on-going litigation was too distant a contingency to make the dues unenforceable. With any agreement, there are several contingencies that can come to fruition in the future, to affect an existing debt. Within the realm of the law of contracts, the ramifications of any such contingency are several and diverse, and not open to prediction by a court not called upon to pronounce upon issues that might arise in the future in relation to those particular facts. That an existing debt may cease to exist at some point in the future if one of several contingencies plays out, cannot affect the debt in praesenti. Writ petition was dismissed.

Emaar MGF Land Ltd..v. TRO (2014) 365 ITR 293 (Delhi)(HC)

S.226:Collection and recovery-Stay-Power of Tribunal-Certain amount of consistency was expected in working of statutory Tribunal-Dismissal of stay application was held to be not justified.[S.253,254(1)]

While disposing off the stay petition, one bench of the Tribunal held that the assessee had a prima facie case and directed that the assessee's appeal shall be heard on out of turn basis along with the Department's cross-appeal. At the time of hearing the appeal, the assessee requested for an adjournment. However, another bench of the Tribunal took a diametrically opposite view and dismissed the stay petition and rejected the adjournment request. Notwithstanding the change of composition of the Bench, a certain amount of consistency was expected in the working of a statutory tribunal like the Income-tax Appellate Tribunal. If the Tribunal had formed an opinion, albeit tentatively, in the matter, it should have heard and decided the appeal itself. Having regard to the fact that the Tribunal had earlier observed that the assessee had an arguable case, the Tribunal was to finally hear and decide the appeal.

Unique Artage.v. UOI(2014) 360 ITR 467/102 DTR 350/ 267 CTR 456/226 Taxman 55 (Mag.) (Raj.)(HC)

S.226: Collection and recovery-Modes of recovery-Stay-AO warned of contempt action for seeking to overreach ITAT's stay order-Revenue should lift attachment and enure that amouns recovered are deposited back in assessee's account.[S.221]

The assessee filed a stay application before the Tribunal and informed the AO about the same. Thereafter, the Tribunal heard the matter on 14.02.2014 and granted stay of the demand. Despite this, the AO attached the assessee's bank account on 19.02.2014 and withdrew the proceeds. The assessee filed a Writ Petition to challenge the attachment. The AO defended his action on the ground that he was not present during the hearing of the stay application and was not intimated of the stay granted by the Tribunal. HELD by the High Court allowing the Petition:

The income tax authorities were represented by the CIT-DR, before the Tribunal. The order on the stay application was also pronounced in open Court on that date. In these circumstances, the submission of the revenue that the concerned AO was not intimated cannot be accepted. If such an argument was made before this Court, where orders are pronounced in Court in the presence of counsel, it would certainly not be accepted, and in fact would be seriously viewed. In the facts of this case, it clearly amounts to overreach of the interim order of the Tribunal; in a similar situation, this Court itself would possibly be initiating contempt proceedings. In these circumstances, the Court is of the opinion that the respondent should lift the attachment and ensure that the amounts recovered are deposited back in the petitioner's account within a week from today. A copy of the present order shall be marked to the Central Board of Direct Taxes separately and communicated.(W.P. (C) 1937 of 2014 dt. 28.03.2014.)(AY.2007-08)

A.T.Kearney India Pvt. Ltd .v. ITO(2014) 363 ITR 172 (Delhi)(HC)

S.226: Collection and recovery–Modes of recovery-recovery of excess payments made to government employees could be recovered from them and mere fact that said payment was not due to any fraud or misrepresentation on part of employee would make no difference-Principle of natural justice.

The assessee's filed writ petition against the impugned recovery, whereby a certain amount paid to them as a salary was sought to be recovered from them. The allegation being that they had been paid the amount in excess of their entitlement. The assessee's case was that they had not been paid any amount in excess, inasmuch as whatever was actually due and payable had been paid; therefore the proposed recovery was improper. Further, the impugned recovery had been initiated without issuing any show-cause notice or giving the assessee's any opportunity to be heard. The High Court held that the excess money received by the assessee's had come from the public exchequer; it was public money contributed by the taxpayers. The administration, whether executive or judiciary, held public funds in trust and with the responsibility of spending it strictly in the proper manner, without wasting it or distributing it wrongly or illegally. If an amount was paid to an employee in excess of what he was entitled, it could be recovered from him and the mere fact that the said payment was not due to any fraud or misrepresentation on the part of employee would make no difference. Since no opportunity was granted in this case it violated the principles of natural justice, and, accordingly, the writ petition was allowed. The impugned orders insofar as they related to the assessee's were quashed. However, the respondents were at liberty to pass a fresh order after giving an opportunity for hearing to the assessee.

Janardan Yadav .v.State of U.P. (2014) 220 Taxman 218 (All.)(HC)

S.226: Collection and recovery–Modes of recovery-During the pendency of the Mutual Agreement Procedure with the competent authorities demand cannot be recovered-DTAA-India-USA. [S.90,Art 27]

The assessee was a subsidiary of Motorola Solutions Inc. USA and had filed a return declaring certain taxable income. The Assessing Officer, having made certain additions to this income, raised a tax demand. The assessee filed an appeal before CIT (appeal) and a further demand was raise through a rectification order. The Assessee, however, invoked the Mutual Agreement Procedure (MAP) between India and USA by filing an application before the competent authority in the USA. The invocation of MAP was brought to the notice of the competent authority in India, i.e. the Joint Secretary (FT & TR-1), CBDT. Simultaneously, the assessee also filed an application for stay before the Assistant Commissioner. For the purposes of stay, the assessee was directed to furnish a certain amount of bank guarantee. Subsequently, the Revenue, took a view that MAP proceedings were not pending and, moreover, that the assessee had failed to renew its bank guarantee, appropriated a certain amount from the assessee's bank account towards the alleged demand of tax. The assessee filed a writ petition challenging the validity of this appropriation. It was noted that controversy with respect to admission or pendency of MAP stood conceded in favour of the assessee by an affidavit filed by the Joint Secretary (Foreign Tax and Tax Research Division), Department of Revenue, Ministry of Finance, Central Board of Direct Taxes wherein it was clarified that MAP Proceedings were pending and discussions were held between the competent authorities in Indian and the USA. With regard to the bank guarantee, the concerned bank had not sent any communication to the Revenue that the assessee had not renewed its guarantee, and, therefore, the bank guarantee stood automatically renewed for a further period of three years. The High Court allowed the assessee's petition, holding that where in respect of the tax liability of assessee, Mutual Agreement Procedure (MAP) proceedings were pending and, moreover, the assessee had also furnished a bank guarantee in terms of stay of demand, during the pendency of those proceedings; therefore the Revenue was not justified in appropriating funds from the assessee's bank account towards their demand of tax. In view of this, the writ petition was allowed, demand notices were quashed and the respondents were directed to refund the tax appropriated to the petitioner. (AY. 2005-2006)

Motorola Solutions India (P.) (Ltd.) .v. CIT (2014) 220 Taxman 164/364 ITR 663 (P&H)(HC)

S. 226(3):Collection and recovery-Modes of recovery-Public Provident Fund Account-Amount remaining in account would be immune from attachment for recovery of tax due.[Public Provident Fund Act,1968,S.9,10,Code of Civil Procedure Code,1908, S.60(1)]

As long as an amount remains invested in a public provident fund account of an individual, the amount would be immune from attachment for recovery of the tax dues. The situation may change as and when such amount is withdrawn and paid over to the subscriber, which is not the situation in the case of the present assessee. The clarification issued by the Central Board of Direct Taxes does not take into account the provisions of rule 10 of the Second Schedule to the 1961 Act and the provisions of section 60(1) of the Code of Civil Procedure. The clarification is contrary to such statutory provision. Thus, the action of the Tax Recovery Officer in first attaching and thereafter, unilaterally withdrawing a sum of Rs. 9,05,000 from the public provident fund account of the assessee was liable to be quashed.

DineschandraBhailalbhai Gandhi .v. TRO (2014) 362 ITR 380 (Guj.)(HC)

S. 234A: Interest–Liability to pay–Properties attached- Attachment of properties by operation of statute- Notified person under the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992. [S. 234B, 234C]

Even though the assessee was a notified person under the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992, it was liable to pay interest u/s. 234A, 234B, 234C. Merely because the assets and properties were attached did not mean that liability to pay interest would not arise. (AY. 2004-05)

CIT .v. Cascade Holdings P. Ltd. (2014) 365 ITR 84 (Bom.)(HC)

S. 234B : Interest-Advance tax–Book profit-Interest u/s. 234B can be charged only after allowing credit of MAT.

The High Court following the decision of the Rajasthan High Court in the case of CIT v. M.A. Presstressed Works (1996) 220 ITR 226 held that interest u/s. 234B had to be calculated after allowing credit of MAT. (AY. 2001-2002)

CIT .v. Cadila Pharmaceuticals Ltd. (2014) 221 Taxman 155(Mag.) (Guj.)(HC)

S.234B : Interest-Advance tax-Non resident-Non resident cannot escape the liability for interest on the ground that it was for the Indian payers to have deducted the tax and if they had not done so the assesse cannot be Liable to pay interest-Held liable to pay interest.[S.195]

Assessee filed Return claiming its income not taxable in India as it had no PE in India and equipment were sold outsideIndia, but accepted its taxability before the CIT(A), the issue before the HC was whether Tribunal was correct in holding that assessee was not liable to pay interest in terms of S/234B of the IT Act . Allowing the revenue's appeal, the court held that it could not escape the liability for interest u/s 234 B on the ground that it was for the Indian payers to have deducted the tax and if they had not done so, the assesse cannot be held liable for the interest. Further the court held that revenue has been deprived of the use of the monies and thereby put to loss for no fault on its part and where the loss arose as a result of vacillating stands taken by the assessee, it is not expected of the assessee to shift the responsibility to the Indian payers. (AY. 2004-05 to 2008-09)

DIT(IT) v. Alcatel Lucant USA, INC (2014) 264 CTR 240 / 223 Taxman 176 (Mag.)(Delhi)(HC)

S. 234B: Interest–Advance tax-Partners–Partnership firm-Depreciation of firm cannot be allocated to benefit of partners personally and it shall revert to firm-Advance tax not paid-Partners are liable to pay interest.

While completing the assessments of the assessees for the years 1991-92 and 1992-93, the Assessing Officer disallowed the claim of set off of unabsorbed depreciation pertaining to the firm and determined the tax payable, and levied interest under section 234B for non-payment of advance tax. The claim of waiver of interest by the assessees was rejected. On a writ petition the single judge held that for no fault of the assessees, if the assessees did not pay the tax payable by them, they shall not be saddled with the liability to interest under section 234B.

Held, the returns pertaining to 1991-92 were filed on October 30, 1991, and for 1992-93 on October 30, 1992. The judgment of the Supreme Court Garden Silk Weaving Factory v.CIT (1991) 189 ITR 512 (SC) was rendered on March 22, 1991, much prior to the submission of returns for both assessment years by the assessees. Once the Supreme Court had laid down the law that depreciation of a firm cannot be allocated to the benefit of the partners personally and it shall revert to the firm. In the

light of such observation of the Supreme Court the returns ought to have been filed showing the correct income. Apparently, advance tax was not paid, and automatically the assessees were liable to pay interest chargeable under section 234B. Decision of the single judge reversed. (AYs. 1991-1992, 1992-1993)

CCIT .v. George P. Mathews (2014) 362 ITR 660 (Ker.)(HC)

S.234B: Interest-Advance tax -interest under sections 234B and 234C cannot be levied for default in payment of advance tax in case where tax is paid under MAT[S.115JB, 234C]

The High Court relied on one of its own decisions in the matter of *CIT* v. *Jupiter Bio-Science Ltd*. [2013] 352 ITR 113/[2011] 202 Taxman 80/13 taxmann.com 161 (Kar.) wherein it was held that the assessee was liable to pay advance tax under the amended provisions of Section 115JB of the Act for the relevant period, however he was not liable to pay interest on the amount due under the amended provisions, since there was no default of the assessee.(AY. 2002-2003)

CIT .v.Kirloskar Systems Ltd (2014) 220 Taxman 1 (Karn.)(HC)

S. 234B : Interest-Adavance tax-Denmark was not liable to Indian taxes -No liability to pay interest.

Assessee being tax resident of Denmark was not liable to Indian taxes, no interest could be levied on it u/s. 234B. (AY. 2006-07)

A.P. Moller Maersk .v. Dy. DIT (2014) 149 ITD 434 / (2013) 38 taxmann.com 346 (Mum.)(Trib.)

S. 234B : Interest-Advance tax-Where assessee was not liable to deposit advance tax, no interest under section 234B could be charged. [S. 202, 209]

The language used in section 209(1) is regarding payment of advance tax in the financial year, therefore, the proviso is not attracted for the assessment year. The assessee was held to be not required to deposit any advance tax. In view of this fact, it was held that interest u/s 234B is not leviable. since the assessee is not liable for advance tax, therefore, cannot be charged interest for failure to pay advance tax. (AYs. 2005-06, 2006-07)

Dy. DIT . .v.MGB Metro Group Buying HK Ltd. (2014) 146 ITD 343 / (2013) 29 taxmann.com 164 (Delhi)(Trib.)

S. 234B : Interest – Advance tax-Adjustment of cash recovered during search as advance tax.[S. 234C]

Tribunal held that the assessee is entitled to credit of cash recovered during search as advance tax and held that amended explanation w.e.f. 1/6/2013 is prospective and not retrospective. Tribunal followed decision in the case of Shreeji Prints (P) Ltd. (ITA No. 359/Ahd./2012 order dt. 20-4-12). (A.Y. 2007-08)

Kanishka Prints (P) Ltd. ACIT (2014) 159 TTJ 699 / (2013) 143 ITD 716 (Ahd.)(Trib.)

S. 234B :Interest –Advance tax-Non-resident-Deduction at source[S. 195]

The Tribunal following the decision of Hon'ble High Court in the case of DIT .v. NGC Network Asia LLC (2009) 313 ITR 187 (Bom.) held that the levy of interest is mandatory but in the instant case, the income of the assessee is liable for deduction of tax at source under section 195, it is consequential. (AY. 2005-06)

Addl. DIT .v. Valentine Maritime (Gulf) LLC (2014) 159 TTJ 706 (Mum.)(Trib.)

S. 234B : Interest-Advance tax-Non-resident-Deduction at source. [S.195]

The Tribunal held that since the amount was covered by TDS which was already made while paying to the assessee, question of levy under section 234B does not arise.

Addl. DIT .v. Lucent Technologies GRL LLC (2014) 159 TTJ 589 / 29 ITR 132 (Mum.)(Trib.)
Dy. DIC .v. Reliance Infocom Ltd. (2014) 159 TTJ 589 / 29 ITR 132 (Mum.)(Trib.)

S.234B:Interest-Advance tax-Proviso to sub-section (1) of s. 209 as inserted by Finance Act, 2012 is prospective in nature and cannot be applied retrospectively-Where assessee was not liable to deposit advance tax, no interest u/s. 234B could be charged. [S.133A,202, 209]

A survey operation u/s. 133A was conducted at the business premises of the assessee. During survey, mainly computers were found, prints were collected therefrom, which were inventorised. The claim of the assessee of exemption u/s 9(1)(i) was rejected and the assessee's income was computed as 15.29% markup on the total expenses incurred. Such working was claimed to be based on Rule 10B(1)(e) considering the transactional net margin method. Interest u/s 234A, 234B and 234C was also held to be leviable by the A.O. Commissioner (Appeal) following the decisions held that the interest u/s 234B is not leviable.Revenue is in appeal before the Tribunal, the contention regarding amendment inserted by the Finance Act, 2012, is prospective in nature and not with retrospective effect. proviso was brought into operation w.e.f. 1.4.2012 whereas the A.Ys. involved are 2005-06 and 200607, therefore, said proviso is not retrospective in nature. S. 209(1) is regarding payment of advance tax in the financial year, the proviso is not attracted for the impugned assessment year. Assessee was not liable to deposit advance tax no interest under section 234B could be charged. (AYs. 2005-06 and 2006-07)

Dy. DIT .v. MGB Metro Group Buying HK Ltd. (2014) 146 ITD 343 / (2013) 29 taxmann.com 164 (Delhi)(Trib.)

S. 234C: Interest– Deferment of advance tax-Book profits-Interest can be charged. [S.115JA]

Interest can be charged on tax calculated on book profits. (AY. 1997-98)

Hotel and Allied P. Ltd. .v. Dy. CIT (2014) 361 ITR 184 (Ker.)(HC)

S.234C: Interest-Deferment of advance tax-Liability to pay interest-on advance tax payable on returned income and not on assessed income.

The Tribunal directed the AO to re-calculate the interest u/s. 234C of the Act for deferment of advance tax based on the advance tax payable on the 'returned income' and not on the 'assessed income'. (AYs. 2004-05 to 2008-09)

SAP India (P.) Ltd .v. DCIT (2014) 29 ITR 469/104 DTR 82 (Bang)(Trib.)

S. 234D : Interest on excess refund– Explanation 2 - section is applicable to all the assessments completed after 1.6.2004. [Explanation 2]

Assessment was completed before 1.6.2003. The court held that Explanation 2 to Section 234D clarifies that section is applicable only in respect of assessments completed after 1.6.2003. (AY. 1998-99)

CIT .v. Reliance Energy Ltd. (2014) 220 Taxman 89 (Mag.)(SC)

S.234D:Interest on excess refund -In view of retrospective amendment, s. 234D will apply to assessment orders passed after 01.06.2003.[S.143(1),143(3)]

It can also be noted that the Bombay High Court (Commissioner of Income tax v. Indian Oil Corporation Ltd., reported in 2010 Taxman 466) has in terms held that the decision of the Tribunal in ITO v. Ekta Promoters (P.) Ltd**.,** reported in (2008) 113 ITD 719 (Delhi) (SB) was not correct, by holding that till such time, the assessment proceedings are completed in respect of relevant assessment year, the Amended Act would be applicable to the pending proceedings. For all the pending proceedings in regard to which the refund has been provided under section 143(1) of the Act, which are not concluded and finalized, the refunds are held to be granted under section 143(1) of the Act as finally determined when final assessment is passed under section 143(3) of the Act. Explanation 2 to section 234D of the Act applies thus to the pending proceedings, where the assessment in respect of assessment year is not completed on June 01, 2003. The Court held that the provision for charging interest in every case was a part of substantive law and not an arbitrary provision and though in those cases where the refunds have been granted prior to June 01, 2003, section 234D was not applied for not having any retrospective operation, however, in all pending proceedings, where the assessment had not been completed on June 01, 2003, the same has been made applicable. In other words, explanation (2) to section 234D of the Act has been made applicable to even the assessment year commencing before June 01, 2003. The only requirement in such a case would be that the assessment has to be completed after June 01, 2003. Therefore, after insertion of Explanation 2, the operation of section 234D of charging interest on the excess refund paid to the assessee is not restricted, making operation of such section effective from June 01, 2003. In other

words, the refund granted under section 143(1) of the Act in respect of a particular assessment year, is subject to the final determination under subsection (3) of section 143 of the Act. Addition of Explanation 2 to section 234D of the Act when is being held declaratory amendment, what would be relevant for the purpose of charging interest on the refund granted under section 143(1) of the Act is the date of completion of assessment. If the assessment is framed after June 01, 2003, the said provision shall have applicability. (ITA No. 936 of 2011, dt. 17/02/2014.)
CIT .v. Gujarat State Financial Service Ltd. (Guj.)(HC);www.itatonline.org

S. 234D:Interest on excess refund–Assessment completed on March 28, 2005–Assesseeis liable to pay interest.
Since the regular assessment of the assessee for the AY 2002-03 was completed on March 28, 2005, and s. 234D came into operation on and from June 1, 2003, prior to the completion of the regular assessment, the assessee was liable to pay interest on the excess refund amount received as contemplated u/s 234D.
CIT .v. Fisher Sanmar Ltd (2014) 361 ITR 296 (Mad.)(HC)

S. 234E:Fee for default in furnishing statements-Deduction at source-High Court grants ad-interim stay against operation of notices levying fee for failure to file TDS statement
S. 234E of the Income-tax Act, 1961 inserted by the Finance Act, 2012 provides for levy of a fee of Rs. 200/- for each day's delay in filing the statement of Tax Deducted at Source (TDS) or Tax Collected at Source (TCS). A Writ Petition to challenge the validity of s. 234E has been filed in the Madhya Pradesh High Court. HELD by the High Court by an ad-interim order:
Issue notice to the respondents on interim relief. Additionally issue notice to Attorney General of India as the validity of the Central enactment is put in issue.
By way of ad interim relief, we direct the respondents not to take coercive action against the petitioner with regard to the subject matter referred to in the impugned Annexures P/2 to P/5. We are inclined to grant this order ex parte keeping in mind the orders passed by other High Courts (High Court of Kerala, High Court of Rajasthan, Bombay High Court and High Court of Orissa).(W.P. No. 11831/2014, dt. 11.08.2014.)
Shree Builder v. UOI (MP)(HC)www.itatonline.org

S.234E: Fee-Default in furnishing the statements-High Court grants ad-interim stay against operation of notices levying fee for failure to file TDS statement.
S. 234E of the Income-tax Act, 1961 inserted by the Finance Act, 2012 provides for levy of a fee of Rs. 200/- for each day's delay in filing the statement of Tax Deducted at Source (TDS) or Tax Collected at Source (TCS). A Writ Petition to challenge the validity of s. 234E has been filed in the Bombay High Court. The Petition claims that assessees who are deducting tax at source are discharging an administrative function of the department and that they are a "honorary agent" of the department. It is stated that this obligation is onerous in nature and that there are already numerous penalties prescribed for a default. It is stated that the fee now levied by s. 234E is "exponentially harsh and burdensome" and also "deceitful, atrocious and obnoxious". It is also claimed that Parliament does not have the jurisdiction or competence to impose such a levy on tax-payers.The Bombay High Court has, vide order dated 28.04.2014, granted ad-interim stay in terms of prayer clause (d) i.e. stayed the operation of the impugned notices levying the fee.
Rashmikant Jundalia .v. UOI (Bom.)(HC)www.itatonline.org

S.234E: Fee-Default in furnishing the statements-High Court issues notice on challenge to notices for levy of fee for failure to file TDS statement. Recovery of fee is subject to outcome of Petition.
S. 234E of the Income-tax Act, 1961 inserted by the Finance Act, 2012 provides for levy of a fee of Rs. 200/- for each day's delay in filing the statement of Tax Deducted at Source (TDS) or Tax Collected at Source (TCS). A Writ Petition to challenge the validity of s. 234E has been filed in the Jodhpur Bench of the Rajasthan High Court. Vide an order dated 15.04.2014 the High Court has directed that notice should be issued to the CBDT and the UOI as to why the Petition should not be

accepted. It has also been held that in the meanwhile, if any recovery is made from the Petitioner, that shall be subject to the final decision of the Writ Petition.(WP No. 1981 of 2014. dt. 15.04.2014)
Om Prakash Dhoot .v. UOI (Raj)(HC);www.itatonline.org

S.234E:Fee-Default in furnishing the statements-High Court grants interim stay on enforcement of notices for levy of fee for failure to file TDS statement.
S. 234E of the Income-tax Act, 1961 inserted by the Finance Act, 2012 provides for levy of a fee of Rs. 200/- for each day's delay in filing the statement of Tax Deducted at Source (TDS) or Tax Collected at Source (TCS). The constitutional validity of s. 234E has been challenged in the Karnataka High Court. Vide an interim order dated 19.02.2014 the High Court held as follows:
Petitioners have questioned the constitutional validity of the provision of Section 234E of the income Tax Act and a notice to the petitioner levying fee vide annexure A1 to A21 and Annexure – B. Pending consideration of the grounds in the writ petition, it is desirable that enforcement of notices referred to above issued by the 4th respondent are stayed until further orders.(WP 6918-6938/2014 (T-IT) dt. 19.02.2014)
Adithaya Bizorp Solutions India Pvt. Ltd. .v. UOI (Kar.)(HC),www.itatonline.org

S.237: Refunds-Claim for refund filed belatedly–Condonation of delay-Return was filed in pursuance of notice u/s 148-Court directed the CIT to consider the claim on merits.[S.148]
The assessee had not filed the returns for the assessment years 1996-97 and 1997-98 voluntarily but filed them in response to the notice issued under s. 148. Inasmuch as the claim for refund of advance tax had been filed belatedly and without any valid reasons for the delay, the authorities rejected the claim as laid down in the Act. The Chief Commissioner rejected the assessee's request for refund of the advance tax. On a writ petition: Held, allowing the petition, the delay even though due to the fault of the assessee, should liberally be condoned. Therefore, the delay in filing the application for refund was condoned and the matter was remitted to the Chief Commissioner to consider the application afresh on the merits in accordance with law and pass appropriate orders.(AY.1996-97,1997-98)
Vasco Sales and Marketing Corporation .v. DCIT (2014) 360 ITR 578 (Ker.)(HC)

S. 237: Refunds–Rejection of application–Matter was remanded to AO.[S.143(1), 154]
Whereassessee's appeal against assessment order passed u/s. 143(3) for claiming refund, was rejected only on ground that its claim of refund had already been rejected in rectification application filed against assessment made u/s. 143(1) matter was remitted to AO in interest of justice. (AY. 1999-2000)
Siel Ltd. .v. ACIT (2014) 146 ITD 730 / (2013) 37 taxmann.com 231 (Delhi)(Trib.)

S. 239: Refunds–Delay in filing return-Change in management cannot be the grounds for condonation of delay. [S.139(1)]
Audit of assesse was done and audit report was submitted well in time Change of management cannot be a ground to condone delay.Application filed belatedly for claim of refund which was not condoned by the Commissioner was affirmed by the single judge and division bench of High Court.(AY. 2009-10)
Learning Curve Technologies Bangalore P. Ltd. .v. ACIT (2014) 361 ITR 183 (Karn.)(HC)

S.244:Refunds-Interest on when no claim is made-Matter remanded. [S,214, 243(1)(b)]
High Court allowed the claim of assessee relying upon the order in Sandvik Asia Ltd v. CIT (2006) 280 ITR 643 (SC) for interest on delayed payment of amount refunded by revenue which was wrongly with held, order passed was set aside and the matter was remanded back for disposal afresh in light of observations made by Supreme Court in CIT v.Flouro Chemicals (2013) 358 ITR 291 (SC)(CAP NO 3507 OF 2014 dt 26-02-2014)
CIT .v.GujaratFluro Chemicals (2014) 222 Taxman 233 (Mag.)(SC)

S. 244: Refunds–Delay in paying interest–Interest on interest is not payable.
While paying interest on delayed payment of refund, interest on interest was not payable u/s. 244.(AY. 1991-92)

CIT .v. Brakes India Ltd. (2014) 361 ITR 424 (Mad.)(HC)

S. 244: Refunds–Time of accrual–Date of passing order-Chargeable to tax in respective year for which interest was paid.[S.237, 240,244(IA]

The assessment of the assessee for the assessment year 1982-83 was completed with substantial additions.The assessee paid the tax.Tribunal granted substantial relief to the assessee on June 16, 1989.Thereafter the AO gave effect to the order of Tribunal by orders dated September 18 , 1989 refunding the amount paid and along with the interest up to October 31, 1995. The assessee received the ofRs.79 950 for the period October 30 1985 to August 31, 1989. The AO brought to tax the interest in the assessment year 1990-91 ignoring the claim of assessee to spread over the assessment years 1985-86 to 1988-89. Claim of assessee was allowed in appeal by The Appellate Commissioner. On appeal by revenue the Tribunal restored the order of the AO. On appeal to High Court allowing the appeal held that the income has legally accrued to the assessee, i.e., the assessee has acquired a right to receive the income, though its valuation may be postponed to a future date, the determination or quantification of the amount does not postpone the accrual. Held, interest u/s.244(1A) on the refund due did not accrue on the date when the appellate authorities passed order and it accrued from the previous year relevant to the assessment year and interest was chargeable to tax in the respective year for which interest was paid. Appeal of assessee was allowed.(AY.1990-91)

M.JafferSaheb (Decd.) .v. CIT (2014) 361 ITR 25 (AP)(HC)

S.244: Refunds–Interest-Interest on interest is not pyable. [S.244A]

Interest on interest is not payable u/s. 244. (AY. 1991-92)

CIT .v. Brakes India Ltd (2014) 98 DTR 285(Mad.)(HC)

S.244A: Refunds–Interest–Deduction at source-Deductor entitled to interest on refund of excess TDS from date of payment.[S.156, 195, 240, 244]

The assessee made an application u/s 195(2) for permission to remit technical service charges and reimbursement of expenses to a foreign company without deduction of tax at source. The AO passed an order directing the assessee to deduct TDS at the rate of 20% before making remittance. The assessee effected the deduction and filed an appeal before the CIT(A) in which it claimed that the said remittance was not subject to TDS. The CIT(A) upheld the claim with regard to the reimbursement of expenses with the result that the TDS thereon was refunded to the assessee. However, the AO declined to grant interest u/s 244A on the said interest by relying on Circular Nos 769 dated 06.08.1998 and 790 dated 20.4.2000 issued by the CBDT. The CIT(A) upheld the AO's stand though the Tribunal and High Court upheld the assessee's stand. On appeal by the department to the Supreme Court HELD dismissing the appeal:

(i) A "tax refund" is a refund of taxes when the tax liability is less than the tax paid. When the said amount is refunded it should carry interest in the matter of course. As held by the Courts while awarding interest, it is a kind of compensation of use and retention of the money collected unauthorizedly by the Department. When the collection is illegal, there is corresponding obligation on the revenue to refund such amount with interest in as much as they have retained and enjoyed the money deposited. Even the Department has understood the object behind insertion of Section 244A, as that, an assessee is entitled to payment of interest for money remaining with the Government which would be refunded. There is no reason to restrict the same to an assessee only without extending the similar benefit to a deductor who has deducted tax at source and deposited the same before remitting the amount payable to a non-resident/ foreign company;

(ii) Providing for payment of interest in case of refund of amounts paid as tax or deemed tax or advance tax is a method now statutorily adopted by fiscal legislation to ensure that the aforesaid amount of tax which has been duly paid in prescribed time and provisions in that behalf form part of the recovery machinery provided in a taxing Statute. Refund due and payable to the assessee is debt-owed and payable by the Revenue. The Government, there being no express statutory provision for payment of interest on the refund of excess amount/tax collected by the Revenue, cannot shrug off its apparent obligation to reimburse the deductors' lawful monies with the accruedinterest for the period of undue retention of such monies. The State having received the money without right, and having retained and used it, is bound to make the party good, just as an individual would be under like

circumstances. The obligation to refund money received and retained without right implies and carries with it the right to interest. Whenever money has been received by a party which *ex ae quo et bono* ought to be refunded, the right to interest follows, as a matter of course;
(iii) The said interest has to be calculated from the date of payment of such tax. (AY.1997-98)
UOI .v. Tata Chemicals Ltd (2014) 267 CTR 89/101 DTR 193/ 222 Taxman 225(Mag)/363 TTR 658(SC)
DIT .v. Reliance Infocom Ltd (2014) 267 CTR 89/ 101 DTR 193/363 TTR 658(SC)
DIT .v.Set Satellite (Singapore)Pte Ltd(2014) 267 CTR 89/101 DTR 193(SC)

S. 244A : Refunds-Interest-Refund of Self-Assessment tax is also entitled to interest.
The Tribunal held that a refund on account of self-assessment tax was entitled to interest u/s 244A(1)(b). On appeal by the department to the High Court HELD by the High Court dismissing the appeal:
In view of the judgement of the Madras High Court in CIT v. Cholamandalam Investment and Finance Ltd (2011) 294 ITR 438 (Special Leave Petition dismissed by the Supreme Court) and CIT v. Sutlaj Industries Ltd (2010) 325 ITR 331 (Del) and the fact that there is nothing contrary, the appeal of the department is dismissed.(ITA No. 801 of 2012, dt. 12/09/2014.)
CIT .v. Indian Oil Corporation (Bom.)(HC)www.itatonline.org

S. 244A : Refunds-Interest-Refund of self assessment tax-Interest is payable from the date of assessment order and not from the date when the date when assessee paid the self assessment tax .[S.140A, 244(IA)]
The court held that prayer on delayed refund of interest of Rs 6,76,002 from 1st April 1988 till payment could not be granted to the assessee, in exercise of powers under Art 226 of the Constitution.The assessee's claim for compensation is outside the statutory provisions. Even if the principle of moulding of relief is to be applied by the High Court in exercise of its jurisdiction under Art 226 of the Constitution, the same can be done only within statutory frame work and not otherwise. Accordingly the assessee is entitled to interest on refund attributable to payment of self assessment tax , however ,interest is payable from the date of assessment order and not from the date when the assesse paid the self assessment tax. Interest on delayed payment of interest is not payable.(AY. 1986-87)
Merck Ltd..v. Tarakehwar Sigh, CIT (2014) 270 CTR 355/108 DTR 35 (Bom.)(HC)

S. 244A:Refunds-Interest-Deduction at source-Department is liable to pay interest on the refund of TDS made to the assesse from the date of assessment of ITC in respect of the TDS till the date of refund.
Petitioner filed writ Petition requesting the department to refund the TDS amounts remitted to the account of the ITC, since the ITC had already paid the tax liability in making the TDS amounts remitted by the Petitioner. Thereafter department has refunded TDS amounts to the Petitioner; however, the Petitioner has claimed interest on TDS amounts from the date of remittance till refund. Department contended the petitioner is not an assessee and that the liability to pay interest on the refund arises only in respect of an assessee and in these transactions, the Petitioner is not an assessee and hence is not entitled to interest. Allowing the WP, the court held that assesse having deducted TDS from the Payments made to the ITC & remitted the same to the department, it is an assessee and also a deemed assesse and the said TDS being excess payment of tax liability of ITC, department is liable to pay interest on the refund of TDS made to the assesse from the date of assessment of ITC in respect of the TDS till the date of refund.
Raj & Company.v. UOI (2014) 264 CTR 209 (Gau.)(HC)

S. 244A : Refunds-Interest-When refund is pending delay cannot be held to be attributable to assessee.
Where the refund is pending before the authorities, failure to apply for the refund cannot be treated as delay attributable to the assessee within the meaning of s. 244A(2). (AY. 1992-93)
CIT .v. Sahara India Savings & Investment Corn Ltd (2014)101 DTR 93 (All.)(HC)

S.244A:Refunds–Interest–MAT credit-Entitle to interest. [S.115JB]
Assessee is entitled to interest under section 244A on refund arising to it under MAT credit. (AY. 2007-08 to 2009-10)
Shree Cement Ltd. .v. ACIT (2014) 100 DTR 33 (Jaipur)(Trib.)

S.245A(b): Settlement Commission–Case-Pendency ofassessment proceedings-Time to make assessment on return filed by assessee for assessment years 2007-08 to 2009-10 was barred by limitation when settlement application was filed-Assessment proceedings were not pending before Assessing Officer-Dismissal of application by settlement commission was valid-Writ petition of assessee was dismissed.[S.147,148,153, 245D, 245HA]
The exclusion clause in s. 245A(b) comes into play only on the issue of a notice u/s 148 which was admittedly not done up to March 7, 2013, when the application for settlement was filed by the assessee with the Settlement Commission. However, the proceedings u/s 147 / 148 by their very nature would only lie where the earlier assessment proceedings were not pending. This is self-evident as the jurisdictional requirement u/s 147 / 148 is that income chargeable to tax has escaped assessment. Therefore, where the assessment was still pending (in case where returns have been filed) no occasion of income escaping assessment can arise. The assessment will cease to be pending when the assessment proceedings are terminated. This termination can be either when the assessment is made or when the time to make the assessment comes to an end u/s 153. Thus, the period within which assessment could be made for the assessment years 2007-08 to 2009-10 had admittedly expired u/s 153. The time limit to make an assessment order in regular proceedings for the assessment years 2007-08 to 2009-10 had already long expired before March 7, 2013, when the application for settlement was made by the assessee to the Settlement Commission. Therefore, on the date of filing of the application, i.e., March 7, 2013, before the Settlement Commission there were no assessment proceedings pending with the AO as they stood terminated by efflux of time. Writ petition of assessee was dismissed. (AYs. 2007-2008, 2008-2009, 2009-2010)
Shriniwas Machine Craft P. Ltd. .v. ITSC (2014) 361 ITR 313 /98 DTR 161/265 CTR 113(Bom.)(HC)

S. 245BA : Settlement Commission–Powers–No power of rectification-Waiver of interest.[S.234A, 234B, 234C,245D(6A)].
The Settlement Commission provided for partial waiver of interest under sections 234A, 234B and 234C. The Revenue thereupon approached the Settlement Commission and requested for rectification of the order in connection with the interest portion. The Settlement Commission modified its direction with regard to charging of interest exercising powers of rectification. Held,that the Settlement Commission had no power of rectification as the statute stood at the relevant time. Therefore, the order of the Settlement Commission was quashed leaving it open to the Revenue to follow its remedies against the original order of the Settlement Commission.
Kakadia Builders P. Ltd. .v. ITO (2014) 362 ITR 342 (Guj.)(HC)

S. 245C : Settlement Commission–Pre-requisite for valid application–Full and true disclosure–Additional disclosure by way of goodwill measure- Does not establish original application did not contain a full and true disclosure-The court would be slow to exercise its power of judicial review of orders of the settlement commission interim or final unless there has been a basic flaw in the decision –making process which would include ignoring the statutory provisions.[S.245A, 245D(2C), 245D(4)]
At the conclusion of hearing before the Settlement Commission, the assessee made an additional offer of Rs. 150 crores with an intention to buy peace and avoid protracted litigation. It was particularly mentioned in the application that the income disclosed in the applications represented true and full disclosures and that additional income was declared without any evidence and with an intention to put quietus to the matter. The Special Bench of the Commission was of the view that prima facie that the disclosure was true and full.
Held, that the assessee in no way detracted from their earlier application representing full and true disclosure of its income. This further amount was offered as goodwill gesture and did not establish that the original application did not contain a full and true disclosure of its income by the assessees.

The Revenue had not led any evidence to show so. Thus, the further disclosure would not be hit by section 245C to make the entire exercise bad for failure to make full and true disclosure unless a specific finding to that effect is arrived at by the Commission at the time of final hearing stage u/s 245D(4).The court would be slow to exercise its power of judicial review of orders of the settlement commission interim or final unless there has been a basic flaw in the decision making process which would include ignoring the statutory. Petition of revenue was dismissed. (WP no 559 0f 2008 dt. 28-2-2014)

DIT(IT) .v. ITSC (2014) 365 ITR 108 (Bom.)(HC)

S. 245D : Settlement Commission-Jurisdiction of Settlement Commission-Time barred assessment-Commission has jurisdiction

It was held that contention of the assessee that assessments were to be completed within a time bound manner which was to expire on 29th Feb 2000 and that in the absence of any order by the Settlement Commission admitting the matter or proceeding further, the AO had lost the authority to pass any orders and consequently, the commission itself did not possess jurisdiction was not sustainable.

Ashwani Kumar Goel v. ITSC (2014) 101 DTR 139 / 43 Taxmann.com 421 / 364 ITR 492 / 267 CTR 1 (Delhi)(HC)

S. 245D(2C) : Settlement Commission–Settlement of cases–Pre-requisite for valid application–Full and true disclosure–Recording of satisfaction before proceeding further-Requirement of full and true disclosure satisfied cannot be postponed to later stage [S.245C, 245D(4)]

The error in the order of the Settlement Commission lay in permitting the application to proceed without that satisfaction being recorded by it, which is a fundamental aspect which goes to the root of its jurisdiction to entertain an application u/s 245C. The Settlement Commission had proceeded on the basis that at this stage it could not hold a view that the income offered in the statement of facts was not a true and full disclosure. In holding so, the Settlement Commission had moved over to the stage of section 245D(4) without entering upon the fundamental issue as to whether the application was or was not invalid. The Settlement Commission was completely in error in holding that unless it was established by a competent authority that the purchases were all bogus, the application at this stage could not be held to be invalid, though the Department may have in its possession certain evidence indicating the fact that the income had not been truly and fully disclosed. (AY. 2005-06 to 2009-10)(WP no 3900 of 2013 dt. 13-06-2013)/WP no 2135 of 2013 dt 28-2-2014)(AY.2005-06 to 2012-13)

CIT v. ITSC (No.1) (2014) 365 ITR 68 (Bom.)(HC)
CIT v. ITSC (No.2) (2014) 365 ITR 87 (Bom.)(HC)

S. 245F : Settlement Commission–Procedure– Natural justice-Addition was made on the basis of affidavit without giving an opportunity to confront-Order was set aside.[S.245C]

Addition was based on statement and affidavit received after conclusion of arguments. The Settlement Commission failed to confront the assessee with statement and affidavit. Order of Settlement Commission set aside as there was violation of natural justice. Matter was directed to be decided afresh.

Avtar Singh (Dr.) .v. ITSC (2014) 360 ITR 588 (P&H)(HC)

S. 245N : Advance ruling - There has to be either a transaction undertaken or proposed transaction to be undertaken by a non-resident to fall under the purview of AAR.

The assessee was an company registered in the UAE and was engaged in the business of developing and investing in the infrastructure and real estate sector. It intended to invest in a 100% subsidiary company in India under the prevailing FDI regulations. This Indian subsidiary company of the applicant intended to setup a consortium by way of partnership firm under the Partnership Act, 1932 with another Indian Company. The partnership firm would be engaged in the business of operating and maintaining various bridges and collecting toll from 5 entry points. The present Undertaking is eligible for tax deduction of 100% of its profits and gains from such undertaking for a period of 10 consecutive assessment years out of the 20 assessment years as per provisions of Section 80IA(4)(i).
The appellant sought rulings on various questions raised in connection with the above matters.

The AAR observed that there is no transaction or proposed transaction with the Indian companies mentioned in the question and in order to bring in the question within the scope of section 245N of the Act, there has to be either a transaction undertaken or proposed transaction to be undertaken by the non-resident applicant. The AAR held that the question relates to proposed setting up of the subsidiary and the partnership firm with the Indian company and as to whether the subsidiary or the partnership firm will be eligible to 100 per cent deduction u/s 80IA of the Income-tax Act and hence does not come under the purview of the AAR.

Trade Circle Enterprises LLC, In re (2014) 222 Taxman 52 / 266 CTR 65 / 99 DTR 344 (AAR)

S.245N: Advance ruling–Undertaken or proposed to be undertaken –Subsidiary not set up-Application was held to be not maintainable as question posed did not fall under the purview of the Authority.

Thenon-resident applicant was intending to invest in 100 per cent subsidiary company in Indiato be set up as a consortium by way of partnership with another Indian company. Ruling was sought on questions relating to allowability of deduction u/s 80-IA to the undertaking. Held, the 100 per cent subsidiary company must exist in reality and firm set up in order to make transaction or proposed transaction of applicant with Indian subsidiary. Thus, the questions posed were held not under purview of the Authority.(AAR No. 1242 of 2012 dt. 14-02-2014]

Trade Circle Enterprises LLC, In re (2014) 361 ITR 673 (AAR)

S. 245R : Advance ruling-Procedure on receipt of application - Only when issues are shown in return and notice u/s. 143(2) is issued, question will be considered as pending for adjudication before Income-tax Authorities. [S.143(2)]

The assessee was a resident company of Japan which had established a Branch Office in India. It filed its return of income on 30 November 2011 post which it filed an application before the AAR seeking ruling on taxability of its income. The AO, however, contended that since the assessee filed the application after filing its return of income the assessment was already pending adjudication before the Income-tax Authorities and hence the application was barred by proviso to section 245R(2).

The AAR, dismissing the stand of the AO followed its own ruling in the case of Hyosung Corporn. Korea and held that only when the issues were shown in the return of income and notice u/s. 143(2) were issued the case would be considered as pending adjudication before the Income-tax Authorities and hence the present case would be admitted before the AAR.

Mitsubishi Corporation, Japan, In re (2014) 222 Taxman 47 (AAR)

S. 245R : Advance ruling – Procedure – Application - An application seeking ruling of the Authority for Advanced Ruling (AAR) cannot be admitted when a return is filed and issues raised in the application are shown in return and a notice under section 143(2) is issued. [S. 143(2)]

The applicant, a foreign company, is manufacturer and merchant of sewing threads and yarns. It has entered into a Master Global Framework Agreement with another foreign company which provides data connectivity to Coats group companies and raises invoices on applicant who, in turn, recoups the cost incurred to its Coats group company. The applicant has also entered into an Applications Support and Wide Area Network Support Services Agreement with MCPL, an Indian company. Accordingly, the applicant raises periodic debit notes on MCPL for recovering a portion of the amount charged by said company to the applicant. The applicant approached the AAR to seek a ruling on whether a cost recouped by the applicant from MCPL would be in the nature of reimbursement of expenses and, hence, not subject to tax in India. Revenue objected to the admissibility of the application stating that return of income was filed before filing the application and, therefore, the matter is already pending before the Income Tax Authority before filing the application and the application is barred by proviso to section 245R(2).

The AAR, after hearing both the parties held that when the issues are shown in the return and a notice under section 143(2) is issued, the question raised in the application will be considered as pending for adjudication before the Income-tax Authorities. In the present case, not only the return of income was

filed but even notices under sections 143(2) and 142(1) were already issued before filing the application and hence, the application cannot be admitted.

J & P Coats Ltd., In re (2014) 360 ITR 686 / 264 CTR 494 / 221 Taxman 106/97 DTR 409 (AAR)

S. 245R : Advance ruling – Procedure – Application - Where a return is filed but notice for assessment is issued after filing an application before the AAR, application is to be admitted under section 245R.

The applicant, a foreign company, filed its return declaring income from management support services rendered to its wholly owned subsidiary in India. Thereafter; it approached the AAR to seek a ruling on whether fees received against said services are fees for technical services (FTS) or royalty as per Article 13.

The AAR, after hearing both the parties held that only when the issues are referred in the return and notice under section 143(2) is issued, the question raised in the application will be considered as pending for adjudication before the income-tax authorities. In the present case, the question cannot be said to be already pending before the income-tax authorities, as no notice under section 143(2) was issued before filing the application before AAR though return was filed. The application, therefore, was admitted under section 245R(2).

Aircom International Ltd, United Kingdom, In re (2014) 360 ITR 693 / 264 CTR 499 / 221 Taxman 110 (AAR)

S.245R : Advance ruling–Application–Pending-Notice-Return filed before filing application but notice issued after date of application-Application is maintainable.[S.139, 143(2)]

Assessee filed return of income prior to filing of application, but the notice under section 143(2) was issued after date of application. Application is maintainable. (AY. 2011-12)(AAR No. 1320 of 2011 dt. 14-02-2014)

LS Cable & System Ltd.,In re (2014) 362 ITR 18/266 CTR 75(AAR)

S.245R: Advance ruling–Application–Return filed but notice u/s.143(2) not issued-Application was not barred. [S. 139,143(2)]

When return of income is filed before application for advance ruling but notice under s. 143(2) issued thereafter, question cannot be said to be already pending before income-tax authorities. Hence, advance ruling application is not barred.(AYs. 2010-11, 2011-12)

Aircom International LtdUnited Kingdom, In re (2014) 360 ITR 693/221 Taxman 110/264 CTR 499/97 DTR 414(AAR)

S.245R: Advance ruling–Jurisdiction–Return filed and notice u/s.143(2) issued-Application was barred. [S.139, 142(1), 143(2)]

When return of income and revised return are filed and notice under s. 143(2) issued, question can be said to be pending before income-tax authorities. Hence, advance ruling application is barred.(AY.2008-09)

J and P Coats Ltd. In Re (2014) 360 ITR 686/221 Taxman 106/ 264 CTR 494/97 DTR 409 (AAR)

S.246 : Appeal-Commissioner(Appeals)-Appealable orders– Order of AO granting refund along with interest is held to be appealable. [S. 244(1A)]

The AO based on the order of the CIT(A) granted the refund, but no order for payment of interest under section 244(1A) on refund amount was passed. Aggrieved by the order omitting to grant interest, the assessee preferred an appeal before the CIT(A). The CIT(A) dismissed the appeal holding that an appeal for claiming interest under section 244(1A) was not entertainable in a case where the order giving the appeal effect itself was not being challenged on any ground. Tribunal held that order of AO granting refund but not interest under s. 244(1A) is in fact an order under S.143(3) and appeal to CIT(A) was maintainable. (AY.1986-1987)

CIT .v. Biswanath Pasari (2014) 101 DTR 133 / 44 Taxmann.com 128 / 264 ITR 404 / 267 CTR 290 (Cal.)(HC)

S.246:Appeal–Commissioner (Appeals)-Claim not made in the return-Return- Assessment-Deduction was not claimed in the return-Claim first time before CIT(A) was held to be valid.[S.80HHC, 80IB, 139]

Though the assessee did not raise a claim in the return for deduction u/s 80IB & 80HHC, it was entitled to raise the claim before the CIT(A) for the first time. If a claim though available in law is not made either inadvertently or on account of erroneous belief of complex legal position, such claim cannot be shut out for all times to come, merely because it is raised for the first time before the appellate authority without resorting to revising the return before the AO. Courts have taken a pragmatic view and not a technical one as to what is required to be determined in taxable income. In that sense assessment proceedings are not adversarial in nature. The decision in Goetze (India) Ltd. vs. CIT (SC)is confined to the powers of the AO and accepting a claim without revised return and does not affect the power of the CIT(A) or the Tribunal to entertain a new ground or a legal contention.(AY. 2003-04)

CIT .v. Mitesh Impex(2014)367 ITR 85/104 DTR 169/270 CTR 66/225 Taxman 168(Mag.) (Guj.)(HC)

S. 249(4): Appeal–Commissioner (Appeals)–Amount belonging to assessee available with revenue was far more excess of tax payable in terms of return and demand created-Adjustment against amount seized-Appeal was held to be maintainable.[S.132B,249(4)(a),250]

Amount belonging to assessee available with Revenue was far in excess of tax payable in terms of return and demand created u/s 143(1)(a). Therefore, requirements of s. 249(4)(a) were met. Held, assessee cannot be denied hearing on ground of non-payment of tax due on returned income. Appeal was held to be maintainable. Appeal of revenue was dismissed. (AY.1996-97)

CIT .v. Pramod Kumar Dang (2014) 361 ITR 137/98 DTR 33/265 CTR 1 (Delhi)(HC)

S. 249(4) : Appeal-Commissioner (Appeals)–Admitted tax-The only requirement of s. 249(4) is payment of tax due on returned income. There is no time limit prescribed for payment of such taxes. The delay in filing an appeal after payment of SA tax can be condoned.

(i) The only requirement of section 249(4) is payment of tax due on returned income and there is no time limit prescribed for payment of such taxes. Therefore, if an appeal is filed after making of payment, it cannot be said that the requirement of section 249(4) has not been complied with. The CIT(A) can use his discretionary power and admit the appeal if he is satisfied about the liquidity crunch or any other reasonable cause for nonpayment of taxes. Section 249(3) prescribes the CIT(A) may admit the appeal after the expiration of the said period if he is satisfied that the assessee had sufficient cause for non-presenting the appeal within the prescribed period. While sub section (3) of section 249 pertains to those assessees who have filed return and paid the tax but belatedly filed an appeal. On the other hand, sub-section (4) of section 249 pertains to those assessees who have defaulted in payment of tax or did not file the return.(ITA No. 238/Hyd/2014, Dt. 29.10.2014) (AY.2008-09)

Kanchenjunga Greenlands Pvt. Ltd. .v. DCIT (Hyd.)(Trib.); www.itatonline.org

S. 251 : Appeal - Commissioner (Appeals) – Powers –Show cause notice was held to be in excess of jurisdiction and are liable to be quashed.[S.2(17), 2(26), Constitution of India, Art 226]

The CIT(A) issued show cause under section 251(1)(a) of the Act directing the company raising doubts regarding the status of the assesse company as a 'company". The assesse challenged the said show cause notice by way of writ petition. While admitting the petition the Court held that it is well settled that writ petition challenging the show cause notice is not to be entertained in taxation matters, but in exceptional cases, where the authority goes beyond the statutory power or acts in excess of its jurisdiction , in those facts and circumstances , the writ petition can be entertained .The case in hand is one such exceptional case, warranting entertainment of the writ petition. The Court observed that the tenor of the show cause notice does not appear to be a notice merely for verification of the status of the assessee company .The CIT (A) issued impugned show cause notice raising doubts regarding the status of the assesse as a 'company". By a careful reading of the impugned show cause notices, it is seen that CIT (A) has expressed the view that assesse company, a public sector company will not be a company either under the Companies Act or under the Income –tax Act, 1961.The CIT (A) has not

only expressed the doubt regarding the status of the assesse company but also expressed the view that the assesse is not a company and the assesse had been incorrectly and unlawfully assessed in the status of a company. The CIT (A) by expressing the reasoning , indicates that CIT (A) has predetermined the matter that the assesse is not a company , had committed a serious error and exceeded jurisdiction in upsetting the settled status of the assesse company. Since the CIT (A) has expressed doubts that the assesse is not a company and is seeking to reopen assessment of the assesse company over the years, for which appeals are not pending , the impugned show cause notices are in excess of jurisdiction and are liable to be quashed .(AY. 2002-03 to 2009-10),

Central Coalfields Ltd..v. CIT (A) (2014) 97 DTR 130 (Jharkhand)(HC)
Central Mine Planning & Design Institute Ltd. .v. CIT(A) (2014) 97 DTR 130 (Jharkhand)(HC)

S. 251 : Appeal-Commissioner (Appeals)–Powers–Remand proceedings- When order of CIT (A) became final, in pursuance of remand proceedings, the AO could not make addition to that extent again to the assessee's taxable income .

During the course of assessment, the AO made certain additions to the assessee's income in respect of cash purchases which remained unexplained. The Commissioner (Appeals) deleted a part of the said addition. Against partial relief thus granted, Revenue did not file an appeal. On the assessee's appeal, the Tribunal remanded matter back to the AO. In remand proceedings, the AO again confirmed the entire addition. The assessee contended that since Revenue had not filed appeal against the relief granted by the Commissioner (appeals), the addition was, thus, deleted could not be confirmed again in the second round of proceedings. The Tribunal accepted the assessee's contention and, accordingly, the impugned addition was deleted. The High Court held that the Tribunal was seized only of the appeals filed by the assessee against the additions sustained by the CIT (A) in the first round of proceedings and, therefore, the restoration of the matter to the AO for fresh disposal was confined only to the additions sustained by the CIT (A) in those proceedings. Matters which have attained finality cannot be re-agitated. The Revenue has not fail to file appeals before the Tribunal challenging the relief granted by the CIT (A) in the first round of proceedings and therefore, that part of the assessment order, therefore, was merged with the order of the CIT (A), which became final. Therefore, it was held that it is not open to the AO to tamper with its finality, so far as the relief granted by the CIT (A) was concerned.

CIT .v. JRM Steel (P.) Ltd. (2014) 221 Taxman 198 (Mag.) (Delhi)(HC)

S.251:Appeal-Commissioner(Appeals)–Powers–Additional evidence- Adjournments-Hundred per cent export–Merits of claim not looked into–Matter remanded. [S.10B,Rule 46A]

Assessee sought to produce documents in support of claim for exemption as EOU. Remand report was called for from Assessing Officer which did not deal with the merits of claim but only referred to adjournments sought by the assessee. Held as there was no dispute as regards assessee's status as a 100% EOU for earlier year and that return filed within due date and copy of green card and certificate from chartered accountant produced, failure to go into merits of claim and dismissal of appeal on technical ground of lack of vigilant prosecution was not proper. Thus the orders of the Tribunal and the CIT(A) was set aside and the matter was remanded back to AO for considering the merits of the claim of assessee based on the documents filed before the CIT(A).(AY. 2008-09)

Venture Metal Products P. Ltd. .v. DCIT (2014) 362 ITR 122 / (2014) 101 DTR 403 / 222 Taxman 209 / 267 CTR 342 (Mad.)(HC)

S.251:Appeal-Commissioner (Appeals)–Powers-Appellate Authority has powers to give appropriate directions to A.O. only in regard to assessee before him and this power cannot relate to a third person, whose appeal is not pending before him.[S. 69A,150]

While deciding the appeal the Appellate Authority may give appropriate directions to the AO either in regard to the assessee in appeal before him or otherwise. However, these directions cannot travel outside the assessment year to which the appeal relates. In the same way the directions cannot relate to a third person, whose appeal is not pending before him. The policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not be reactivated beyond a particular stage.(AY. 2003-04)

Vijay Kumar Sarda .v. Dy. CIT (2014) 146 ITD 553 / (2013) 40 taxmann.com 113 (Mum.)(Trib.)

S. 253 : Appellate Tribunal -Powers-Tribunal has no power to examine validity of search u/s.132. [S.132]

It was held that in an appeal preferred against the block assessment made in pursuance of the search conducted by the IT Department, the validity of the search cannot be gone into by the Tribunal as search and seizure is an administrative power and not a quasi-judicial power. (BP. 1-4-1995 to 23-8-1995)

ACIT .v. P.N. Sanyal (2014) 101 DTR 385 / 45 taxmann.com 516/225 Taxman 193 (Mag.)(All.)(HC)

S. 253:Appellate Tribunal–Departmental appeal-Contempt-Filing appeals in disregard & wilful disobedience to the law laid down constitutes gross abuse of power and deserves to be punished for contempt of court and by award of exemplary costs. Action not pursued in view of written apology of concerned officials.[S.80IB(10)]

In AY 2004-05, the AO disallowed the assessee's claim for deduction u/s 80-IB(10). The CIT(A), Tribunal and High Court allowed the assessee's claim. Thereafter, pursuant to a search, the AO passed an order u/s 153A for AY 2004-05 in which he again disallowed the assessee's claim for deduction u/s 80-IB(10). The AO noted that in the assessee's own case for the same AY, the Bombay High Court had already decided the issue in favour of the assessee but he still made the disallowance on the ground that the matter was sub-judice before the Supreme Court. On appeal, the CIT(A) allowed the assessee's claim. On appeal by the department to the Tribunal HELD by the Tribunal dismissing the appeal:

(i) This case is one of gross misuse of powers by the lower authorities. The AO in complete disregard and disobedience to the orders of the Tribunal as well as of the Hon'ble High Court again confirmed the disallowance while framing assessment u/s 153A without any incriminating material being found during the search. The act of negating the orders of the higher authorities in the very same case and thereby disallowing the claim of the assessee in the s. 153A proceedings without any new evidence or incriminating material being found amounts to the gross abuse of process of law in complete disregard and disobedience to the orders of the higher authorities and is an act which tends to lower down the authority of the higher courts. We may observe that if at all the issue will be decided by the Hon'ble Supreme Court in favour of the Revenue, then the orders of the lower authorities in that event would automatically merge in the order of the Supreme Court and implemented accordingly. However, the mere filing of appeal before the Hon'ble Supreme Court gives no authority to the AO to negate, disobey and disrespect to the orders of the higher authorities in the very same case. We may further notice that even after the decision of the CIT(A) in favour of assessee, the concerned CIT-Admin has given approval for filing the second round of appeal in the same case ignoring and in complete disregard and disobedience to the orders of the Tribunal as well as of the High Court vide which the issue in dispute has already been settled;

(ii) The Bombay High Court in CIT vs. Sairang Developers and Promoters strongly discouraged the attitude of the authorities in filing the appeals without application of mind resulting in the pendency of the frivolous appeals before the High Court. The High Court has strongly disapproved the irresponsible attitude of the officers in not applying their mind while approving for the filing of appeals, which benefits no one and rather defeats larger public interest. The High Court taking strong note of such an act has imposed cost of Rs.50,000/- upon the Revenue. In CIT vs. Kishan Ratilal Choksey Share & Securities the High Court strongly discouraged the attitude of the Revenue for filing appeals on the issues which have already been settled and decided in the appeals pertaining to prior assessment years in the case of the very assessee. The High Court observed that it was a gross abuse of process of law and imposed Rs.1,00,000/- as cost. However, later on the assurance of the ld. counsel of the Revenue that hereafter the judicial orders and directions would be abided by in all matters and appropriate averments will be made to the effect that the order of the Tribunal for prior assessment years in the case of very assessee have been challenged or decided and the outcome of the decision thereof also will also be indicated. The High Court upon the such assurance of the ld. counsel of the Revenue re-called the direction to pay cost of Rs.1,00,000;

(iii) The Supreme Court in UOI vs. Kamalakshi Finance Corporation AIR 1992 SC 711 has categorically held that the principles of judicial discipline require that the orders of the higher

appellate authorities should be followed unreservedly by the subordinate authorities. The Supreme Court has further held that the mere fact that the order of the appellate authority is not "acceptable" to the department-in itself is an objectionable phrase and is not a ground for not following the same unless its operation has been suspended by a competent court. Since the present is a case not only of a gross abuse of process of law but also a case of willful disobedience and disregard of the orders of the higher authorities as well as of the acts which tends to lower down the authority of the higher court, hence we direct the concerned AO as well as the concerned CIT-Administration who accorded permission to file the present appeal to appear in person and explain their position as to why appropriate course of action be not taken against them including awarding of exemplary costs against them and also why a reference should not be sent to the High Court against them under the contempt of court's Act. Thereafter, the concerned officials appeared and submitted their written apologies. The said officials vide their letters have submitted that there was no intention to disrespect or disobey the orders of higher judicial authorities and further that the additions/ approval for filing the appeal were made on the basis of suggestions, directions and recommendations of other concerned officials for the purpose of protecting the interest of the Revenue and to maintain the consistency in the stand of the Revenue and keep the issue alive. In view of the submissions made by the above named officials, we feel that it will not be proper to proceed further against them as it was not only their decision, but it was the overall opinion of the team of officials to act in the above stated manner and also in view of their submission that there was no intention to disobey and disrespect the orders of their higher judicial authorities.(ITA No. 5820,5821 & 5822/Mum/2012, A. Y. 2004-05 to 2006-07, dt. 13.08.2014.)(AY.2004-05 to 2006-07)

ACIT v. Veena Developers (Mum.)(Trib.)www.itatonline.org.

S.253(4): Appellate Tribunal- Right of respondent to support the order appealed against.[S.254(1),ITAT.R. 27]

Grounds raised by assessee was rejected by Commissioner (Appeals) , but issue ultimately decided in favour of assesseee. Assessee can seek decision on ground as respondent before Tribunal but other party must be put to notice.(AY. 2008-09)

DCIT .v. Gupta Overses(2014) 30 ITR 738(Agra)(Trib.)

S.253(5):Appellate Tribunal-Delay of 1804 was not condoned as there was no reasonable cause.

The Tribunal held that on consideration of totality of facts and circumstances of the case it is quite certain that there is no reasonable cause for the delay and the filing of the present appeal is only a knee jerk reaction of the assessee. That being so, it is not a fit case for condonation of delay. The Tribunal rejected the plea of the assessee for condonation of delay (of 1804 days) and dismissed the appeal in limine as barred by limitation. Tribunal followed the decision of Apex court in the case of Post Master General & Others v. Living Media India Ltd. & Anr. (2012) 3 SCC 563.

Hyderabad Urban Development Authority .v. ACIT (2014) 159 TTJ 126 (Hyd.)(Trib.)

S.253(5):Appellate Tribunal-Affidavit–Chartered Accountants- Delay of 2984 days was not condoned-ITAT laments severe fall in standards of CA profession. Advices ICAI to take disciplinary proceedings against erring members & tackle issue on war footing.[S.254(1)]

The assessee filed appeals for AY 1994-95 & 1996-97 which were delayed by 2984 days. In support of the application for condonation of delay, the assessee claimed that his CA, M/s Rajesh Rajeev Associates, had advised him that as he had already filed an appeal for AY 1993-94 on the same point, which was pending before the Tribunal, he need not file appeals for AYs 1994-95 & 1996-97 and, instead, he could, after adjudication of the appeal for AY 1993-94 by the Tribunal, move a rectification application before the AO to bring the assessment order in conformity with the decision of the Tribunal. The CA filed an affidavit in which he confirmed having given the said advice. In the condonation application, the assessee pleaded that he ought not to be made to suffer for the "incorrect" advice given by the CA. HELD by the Tribunal dismissing the application and the appeals:

(i) The advice given by the CA firm shows signs of deteriorating standards with some of the Chartered Accountants in profession, which needs to be stopped on war footing by the ICAI. The assessee is having connection with many tax professionals and, in all probabilities, the assessee might

have had consultation with any one or more of them on the impugned problem. It is inconceivable that all the Chartered Accountants, whom the assessee might have had consultation or availed services, would have concurred with the view expressed by the above said C.A firm. If it is presumed for a moment that all the C.A.s have concurred with the said view, then it only shows that the C.A profession is losing its grip over the Income tax matters, which is another cause of concern for ICAI. The self study model coupled with 'on-site articled clerk training' embedded in the Chartered Accountancy course aims to achieve high quality education and training through undergoing practical training, inculcating the habit of thinking, self introspection, application of mind, analytical ability etc. and they enable the C.A students to have strong grip over the subjects and also to attain expertise in them… In the recent past, the methodology of self study is given a go-by by some C.A students and they have started depending more and more on the Commercial Coaching Centers, who undertake coaching of various subjects in the class room model. We notice that the ICAI does not appear to have taken steps to contain mushrooming growth of such coaching institutes, which indulge in manufacturing of Chartered Accountants through class room model, which may ultimately have undesirable effect on the quality of Chartered Accountants, since the habit of thinking, introspection, application of mind is replaced by spoon-feeding, which kind of teaching discourages independent thinking. There should not be any controversy on the fact that the Chartered Accountants, till date, have occupied pioneer position vis-à-vis their counterparts in other parts of the World. They also contribute a lot to the building, sustenance and growth of our National economy. Any compromise on the quality of Chartered Accountants would not only affect our Country very badly, but is also expected to endanger the pioneer position enjoyed by the Indian C.A fraternity vis-à-vis their counter parts in other parts of the world. In our view, the ICAI should seriously take note of these alarming practices slowly emerging in our Country and should take appropriate corrective steps, lest the confidence reposed in C.A.s by the public should get diluted;

(ii) In this back ground, in our view, the above said C.A. firm would have given the letter as well as the affidavit only to accommodate the assessee herein. We would like to mention here that we have come to such a conclusion, since a qualified C.A. firm would not commit such kind of silly mistakes while giving expert professional advice. If the C.A. firm has so accommodated the assessee, without even realising that it is detrimental to its reputation, then the conduct of the C.A. firm needs to be condemned strongly. In that case, we are of the view that the above said conduct of the C.A. firm not only denigrates its name/ reputation, but also badly affects the high standards, confidence, quality, prestige, reputation etc. enjoyed by the C.A. profession;

(iii) The advice claimed to have been given by M/s Rajesh Rajeev Associates, Chartered Accountants, if considered to have been really given, would create doubt about the efficacy of the CPE programmes, since such kind of advices is not expected from a Professional. Further these kind of advices claimed to have been given by a C.A firm clearly give signals that the CPE programmes might have failed to achieve the desired objectives with some of the Chartered Accountants. It is high time that the ICAI should take note of these practicalities and should take corrective steps in order to maintain/restore the high standards and quality expected from a C.A. professional. We have also expressed the view that the above said C.A firm might have given the affidavit only to accommodate the assessee, which conduct is also not expected from a Professional. If it is considered that the C.A firm has colluded with the assessee for giving such kind of affidavit, then it only warrants disciplinary action against them. Even, if it is considered that the said C.A. firm has really given such advices, then also it may require disciplinary action against them for giving such kind of advices, without proper verification of facts and without proper consideration of law. In our view, strict actions and fast disposal of disciplinary proceedings would not only instill discipline among the C.A fraternity, but also help curtail these kind of undesired practices adopted by some of the Chartered Accountants.(ITA No. 5418 and 5419/Mum/2011, dt. 20.08.2014.)(AY.1994-95 1996-97)

Vijay V. Meghani v. DCIT(2014) 109 DTR 57/165 TTJ 289/ 35 ITR 320(Mum.)(Trib.)

S. 254(1): Appellate Tribunal-Condonation of delay-Appeal signed by manager of assesse-Defects were removed by filing fresh appeal memo signed by office bearers of the society-Tribunal did not permit advocate to appear on the ground that he did not have a power of attorney-Rejection of appeal by Tribunal was held to be not justified-It would be a travesty of

justice to deny assesse reliefs it was otherwise entitled-Tribunal ought to have granted time to advocate to obtain power of attorney.

The assessment was reopened and additions were made in respect of amount collected from nonmembers as contribution towards transfer fees, betterment charges etc .CIT (A) also confirmed the addition. Tribunal rejected the appeal of the assesse on the ground that there was delay of forty five days in filing the same. The Tribunal observed that a defect memo had been issued which required the assessee to rectify defects with in ten days, which it had failed to do so. The tribunal therefore dismissed the appeal 'as un admitted' being barred by limitation .Tribunal also did not permit the assesse's advocate to appear on the ground that he did not have a power of attorney. Other three years the appeal was heard and relief was granted. The assesse challenged the said order by way of writ petition, allowing the petition the court observed that;it would be a travesty of justice to deny assesse reliefs it was otherwise entitled to on account of the alleged delay and negligence .The court also observed that even assuming that there was some negligence on its part, the same had caused the revenue no prejudice what so ever. Court also observed that the Tribunal ought to have in these circumstances, permitted the advocate the time to obtain a power of attorney. This was a mere formality. (AY.2004-05)

Bajaj Bhavan Owners Premises Co-op-Society Ltd..v. Income –tax Appellate Tribunal.(2014) 224 Taxman 206 (Mag.) (Bom.)(HC)

S. 254(1) : Appellate Tribunal – Powers to grant stay

The assessee filed a stay application before the Tribunal for a demand of Rs. 373.68 crores. However, the Tribunal rejected the stay of demand application and directed the assessee to pay Rs. 56 crores by a certain date and thereafter a sum of Rs. 10 crores per month until 60% of the demand was to be paid. In the Writ Petition filed before the High Court, the assessee submitted that in the previous years where similar issues were raised, the Tribunal had stayed the demand to the extent of 78% and in the present year the Tribunal had been unduly harsh on the assessee. The High Court allowing the assessee's petition held that since the Tribunal in the earlier years on the very same issue had held that the assessee had a prima facie case, the Tribunal in the present case the Tribunal ought not to have deviated from the practice adopted in the previous year. The High Court further directed the Tribunal that no recoveries could be made against the assessee till the disposal of the appeal by the Tribunal. (AY. 2008-2009)

Maruti Suzuki India Ltd. .v. Addl. CIT (2014) 222 Taxman 211 (Mag.)(Delhi)(HC)

S.254(1):Appellate Tribunal-Consistency-Statutory body like the ITAT is expected to show consistency - Change in constitution of Bench does not mean diametrically opposite views can be taken by the Members

The assessee filed a stay application before the Tribunal requesting stay of demand and early hearing of the appeal. The Tribunal passed an order holding that it was satisfied that the assessee has an arguable case. It granted stay of the demand and directed early hearing of the appeal in June 2013. However, as the bench of the ITAT was not available in June, the matter was adjourned to August 2013. The assessee filed an application requesting for a date in the next month on the basis that a senior counsel was to appear on its behalf. The Tribunal passed an order thereon stating that as the assessee sought an adjournment, "There thus does not appear to be any urgency for getting the dispute resolved by him". It also held that it was not "a good case for granting absolute stay" and that there was "no merit". It accordingly rejected the application for adjournment and the stay application. The assessee challenged this in a Writ Petition in the High Court. HELD by the High Court:

It is really surprising that the Tribunal having once held that the petitioner has a prima facie case while disposing of its stay petition, has taken diametrically opposite view when it later dismissed the stay petition. Moreover, when the stay petition was already dismissed, which stay petition was again dismissed, is not clear. Notwithstanding change of composition of the bench, a certain amount of consistency is expected in the working of a statutory Tribunal like the ITAT. The learned senior counsel is right when he argues that if the Tribunal had formed an opinion, albeit tentatively, in the matter, it should have heard and decided the appeal itself. Having regard to the fact that already when the Tribunal had earlier observed that petitioner had an arguable case, this Court deems it appropriate

to dispose of the writ petition directing the Tribunal to finally hear and decide the appeal (W.P. No 19662/2013, dt. 11/11/2013.)

Unique Artage .v. UOI(2014) 360 ITR 468/102 DTR 350/ 267 CTR 456(Raj) (HC)

S. 254(1): Appellate Tribunal–Duty of Tribunal-Duty to consider transactions in detail and record reasons for reversing the order of CIT (A)-Matter remanded.[S.255(6)]

The dispute raised by the assessee related to the share transactions falling under both heads - business income and capital gains. When the specific case of the assessee was that the income arising from the sale of shares could not be treated as income from business, in fairness to the claim of the assessee, the Tribunal ought to have considered it in detail to arrive at a factual finding-Matter remanded. (AY.2005-06)

Altius Securities Trading P. Ltd. .v. DCIT (2014) 361 ITR 332 (Mad.)(HC)
C.Srikant .v. Dy. CIT(2014) 361 ITR 332 (Mad.)(HC)

S. 254(1) : Appellate Tribunal-Cross objection-Respondent can raise an additional ground in a Cross-Objection.[Form no 36A]

The Hon'ble Guwahati High Court in CIT v. PurbanchalParbahanGosthi (1998) 234 ITR 663 (Gau.) has stated that there is no distinction between an appeal and a cross objection except for the time limit for filing the appeal being 120 days and that of CO being 30 days. Therefore, the learned DR's objection that even a pure question of law cannot be taken up in a cross objection is without any merit.

DCIT .v. Silver Line (Delhi)(Trib.);www.itatonline.org

S. 254(1) : Appellate Tribunal –Additional grounds-Reassessment-Entitle to raise fresh ground of appeal at the Tribunal stage as the relevant facts were already on records.[S.147, 148]

According to the appellant, the issue relating to the validity of the proceedings initiated under s. 147/148 of the Act goes to the root of the matter and it is further contended that the same being a point of law the assessee is entitled to raise the same for the first time before the Tribunal also having regard to the parity of reasoning laid down by the Hon'ble Supreme Court in the case of National Thermal Power Co. Ltd. v. CIT[1998] 229 ITR 383. It is also pointed out that the facts relevant to adjudicate the aforesaid controversy are on record and prayed that the aforesaid ground be admitted for adjudication. The learned Departmental Representative has not opposed the prayer of the assessee seeking adjudication of the aforesaid ground of appeal, which has been raised for the first time before the Tribunal and was not raised before the CIT(A).

With regard to the admission of the additional ground of appeal referred to as grounds of appeal Nos. 1 and 1.1 in the Memo of Appeal filed by the assessee, it is evident that the same involves a point of law and is emerging from record. The aforesaid ground is also relevant to determine the ultimate tax liability of the assessee and therefore following the ratio of Hon'ble Supreme Court in the case of National Thermal Powers Co. Ltd. (supra) the same is admitted for adjudication. (AYs.2003-04 to 2005-06)

Nath Developers v. ACIT (2014) 61 SOT 8(URO)/(2013) 40 taxmann.com 137 (Pune)(Trib.)

S. 254(1): Appellate Tribunal–Duty of Tribunal-Reasons to be given – Matter remanded. [S.32AB,154,255(6)]

The Appellate Tribunal, being the final fact finding authority, is expected to give reasons supporting its finding. If there are no reasons to support the finding and the order displays total non-application of mind, such order cannot be sustained in the eye of law and is liable to be set aside on that ground alone. An appeal cannot be disposed of without application of mind to the various materials which are placed before the Tribunal. In these circumstances, the law requires the Tribunal to record the findings supported by reasons to sustain the order. (AY. 1987-88)

CIT .v. GEC Alsthom India Ltd. (2014) 361 ITR 304 (Mad.)(HC)

S.254(1):Appellate Tribunal-Duties-Additional grounds-If a legal issue is raised (even for the first time) ITAT has the duty to deal with it and cannot remand it to lower authorities.

Before the Tribunal, the assessee raised an additional ground claiming that the penalty order was not valid as it had been passed on an assessee which was not in existence pursuant to an order of amalgamation. The Tribunal admitted the additional ground of appeal and held that as it had been raised for the first time, the matter should be remanded to the AO for fresh consideration. The assessee filed an appeal in the high Court claiming that as the issue was a legal one, the Tribunal ought to have decided the issue and not remanded it. HELD by the High Court allowing the appeal:
The Tribunal should have answered the legal issue itself. The Tribunal was not prevented in any manner and in law from considering a purely legal issue for the first time, more so, if this legal issue goes to the root of the matter. The issue was an impact and legal effect of a order of amalgamation and winding up of the assessee thereto on the penalty proceedings have been initiated and were continuing. If they were initiated prior to the order of the winding up passed or the scheme of amalgamation being sanctioned, then, whether the subsequent act of a order sanctioning the scheme would permit continuation of the proceedings against an entity or company which is wound up and in terms of the provisions contained in the Act was, thus, a clear legal issue. It should have been answered by the Tribunal, particularly when it had admitted the question or ground and also the additional evidence filed by the assessee. The only two documents which required to be looked into were the scheme of amalgamation and the order passed in pursuance thereof by this Court. If that was the admitted factual position and based on which the legal issue was raised, then, the Tribunal was obliged to answer the legal question. Its omission to answer it, therefore, is vitiated in law. The Tribunal is a last fact finding Court and equally if it could have been approached by the assessee both on law and fact, then, in the given circumstances, the Tribunal should have answered this issue and its failure to do so can safely be termed as not performing its duty in law. The direction to remit and to remand it to the AO is not justified and in the peculiar facts and circumstances noted above(ITA No. 1030 of 2011,dt. 06/05/2014.)
Kansai Nerolac Paints Ltd. .v. DCIT (Bom.)(HC),www.itatonline.org

S.254(1): Appellate Tribunal–Powers–Additional evidence admitted by CIT (A) without giving opportunity to AO.
CIT (A) set aside the order of the AO rejecting books of accounts after production of additional evidence without giving the AO opportunity of being heard. Held, Tribunal justified in remanding matter to the AO.(AY.2008-09)
JayeshRaichand Shah .v. ACIT (2014) 360 ITR 387 (Guj.)(HC)

S.254(1):Appellate Tribunal-Power--Prima facie case-Recovery of tax-authorities must give some reasons before rejecting the stay application-The question of irreparable loss is not the only consideration while dealing with an application for stay-Order of Tribuanl and AO was setaside.[S.220(6]
Demand had beencreated mainly because of AMP expenses .Assessee's stay petition was rejected by the AO and the Tribunal. The assesse filed writ pettion before High Court.On the facts of the case court held that while disposing the stay application authorities must give the reasons and the question of irreparable loss cannot be the only consideration while dealing with stay application. Court also observed that several aspects must be considered while dealing with stay.Denail of stay without considering the merit was held to be not proper.Stay can not be rejected melry on the ground no irreparable loss shown was held to be not proper. Order of Tribunal was quashed. The Court also referred the judgment in KEC International Ltd .v. B.R.Balakrishnan (2001) 251 ITR 158 (Bom)(HC) and UTI Mutual Fund v. ITO (2012) 345 ITR 71 (Bom)(HC).(AY. 2007-08, 2008-09)
Coca-Cola India (P) Ltd .v. Asst Registrar ITAT (2014) 223 Taxman 58/364 ITR 567/268 CTR 417/103 DTR 337 (Bom)(HC)

S.254(1): Appellate Tribunal-Duty-Reasoned order-Tribunal has to be pass reasoned order after dealing with arguments of both the parties.
Court observed that arguments advanced /points urged deserves to be dealt with, reasons from affirmation have to be indicated though in appropriate cases they may be briefly stated. Recording of reasons is part of fair procedure and reasons are harbinger between the mind of the maker of the decision in the controversy and the decision or conclusion arrived at and they always substitute

subjectivity with objectivity. Court set aside 81 matters to Tribunal by observing that the judgements of Tribunal being stereo typed, non speaking, unreasoned, arbitrary and whimsical. Court also noted the observation of the Karnataka High Court in CIT .v. Gauthamchand Bhandari (2012) 347 ITR 491(Karn)(HC)(491) "We feel sorry that the confidence posed by the legislature is not being justified by passing orders that are outcome from the Tribunal now –a- days. It is high time the method of recruitment of Tribunal Members is also reviewed by the authority concerned and at least hence forth it is ensured that the members of some standing integrity and competence are put in place as members of the Tribunal and not all sundry." The copy of the order was sent to Law commission of India, Department of revenue, Ministry of Law and Parliamentary Affairs and CBDT. (AY.1995-96)
CIT .v. Ram Singh and others (2014)266 CTR 122/99 DTR 217/363 TTR 417(Raj.)(HC)

S.254(1):Appellate Tribunal-Order-Undue delay in passing order causes prejudice & results in loss of confidence in the judicial body. Such a delayed order has to be set aside
It is very clear that the authorities under the Act are obliged to dispose of proceedings before them as expeditiously as possible after the conclusion of the hearing. This alone would ensure that all the submissions made by a party are considered in the order passed and ensure that the litigant also has a satisfaction of noting that all his submissions have been considered and an appropriate order has been passed. It is most important that the litigant must have complete confidence in the process of litigation and that this confidence would be shaken if there is excessive delay between the conclusion of the hearing and delivery of judgment.(WP. No. 12124 of 2013, dt. 11/02/2014.)
Emco Ltd. .v. UOI (Bom.)(HC),www.itatonline.org

S.254(1):Appellate Tribunal-Powers-Stay –Collection and recovery-Financial position-Rejection of stay application by ITAT on the ground that "the -Financial position of the assessee is very sound" and "government also needs liquid funds to manage its day to day affairs" & without discussing prima facie case.[S.220(6), 271(1)(C)]
The assessee filed a revised return in which it withdrew a claim for deduction of Rs.5.86 crore paid to its AE. The assessee claimed s. 10A deduction on the enhanced income. The AO held that the revised return was filed to get over s. 92-C(4) and the proviso thereto which provides that no deduction u/s 10-A would be allowed in respect of income enhanced having regard to the Arms Length Price (ALP). The AO's stand was upheld by the Tribunal. The AO levied penalty of Rs. 2.05 crore and refused to grant stay. The assessee filed a Writ Petition. The High Court held that that the assessee held a prima facie case on merits and granted partial stay of the demand till the decision of the CIT(A). Subsequently, the CIT(A) dismissed the penalty appeal and the assessee filed a stay application before the Tribunal. The Tribunal rejected the stay application on the ground that "the financial position of the assessee is very sound" and "government also needs liquid funds to manage its day to day affairs". The assessee filed a Writ Petition to challenge the said order of the Tribunal. HELD by the High Court:
The impugned order of the Tribunal has been passed in total disregard of the principles laid down in KEC International Ltd v. B.R. Balkrishanan & Ors. (2001) 251 ITR 158 (Bom) wherein a Division Bench of this Court laid down parameters to be observed by the Authorities while considering the stay application. The Tribunal has not even given short prima facie reasons recording the Petitioner's case. The Petitioner does have strong prima facie case on merits before the Tribunal. Thus, having regard to the fact that the Petitioner has already paid the full tax amount and also 25% of the penalty amount earlier, the Tribunal ought not to have required the Petitioner to deposit a further sum of Rs.50.00 lakhs. In fact, the Tribunal while passing the impugned order has not only ignored the directions in KEC but also the observations made by this Court in the Petitioner's own case (WP (L) No. 235 of 2014,dt. 12/02/2014.)
Deloitte Consulting India Pvt. Ltd. v. ACIT(2014) 362 ITR 46/224 Taxman 209 (Mag) (Bom.) (HC)

S.254(1):Appellate Tribunal-Powers-Stay-Collection and recovery - Assessee deemed in default-AO's action of coercive recovery is illegal and shocks the conscience. The Tribunal cannot remain a silent spectator to such illegal action. [S 220(6)].

The assessee received the order of the CIT(A) on 16.11.2013. It filed an appeal before the Tribunal on 18.11.2013 which was the next working day. The assessee also filed an application before the Tribunal requesting stay of demand. The said application was fixed for hearing on 22.11.2013. However, the AO, without awaiting the outcome of the stay application, attached the assessee's bank account u/s 226(3) on 18.11.2013 and withdrew Rs. 159.84 crore. The assessee argued before the Tribunal that the coercive action of the AO was wrong because (i) the AO had taken coercive action before the expiry of time of filing the appeal against the order of the CIT(A), (ii) the action was taken even prior to the disposal of the stay application by the Tribunal and (iii) no prior notice was given to the assessee before taking the recovery action u/s 226(3). The Tribunal accepted the submissions of the assessee and held that the action of the AO in recovering the outstanding without affording the assessee minimum reasonable time to take remedial steps is a misuse of powers and a gross violation of the directions laid down by the Courts as well as the basic rule of law and principles of natural justice. It directed the Revenue to refund the entire amount of Rs. 159.84 crore to the assessee within 10 days from the receipt of this order. The department filed a Writ Petition to challenge the said order of the Tribunal. HELD by the High Court dismissing the Petition:

(i) The action of the AO is in defiance of the directions laid down in UTI Mutual Funds v. ITO and others (2012)345 ITR 71 (Bom) that no recovery of tax should be made before the expiry of the time limit for filing an appeal before the higher forum has expired. The Court also has directed that when the bank account has been attached the revenue would not withdraw the amount unless it has furnished a reasonable prior notice to the assessee to enable the assessee to seek recourse to a remedy in law. The action of the AO in not only attaching the bank account but withdrawing the money from the bank was before the expiry of the time limit for filing appeal was only with a view to foreclose the option of the assessee of obtaining a stay from the Tribunal. The assessee received the order of the CIT(A) only on 16.11.2013 and had 60 days time to prefer an appeal there from. However, the AO attached the bank account of the assessee on 18.11.2013 itself i.e. within two days of communication of the order of the CIT(A). Further, not only the bank account was attached but the amounts were forcibly withdrawn on that date itself from the bank so as to completely foreclose the remedy available to the assessee under the Act;

(ii) The above action of the AO was against the elementary principles of rule of law. The State is expected to act fairly. The undue haste on the part of the AO in recovering a sum of Rs.159.84 crores was not only contrary to the binding decisions of this Court but also shocking to the judicial conscience. The entire action appears to have been directed to make the Tribunal and the assessee helpless so that no relief can be granted in favour of the assessee. Leaving aside the case laws in favour of the assessee, on first principles itself, no appellate authority and much less the Tribunal can be a silent spectator to the arbitrary and illegal actions on the part of the Assessing Officer so as to frustrate the legal process provided under the Act;

(iii) The grant of refund was in the exercise of Tribunal's inherent powers to ensure that the assessee is not left high and dry only on account of illegal and high-handed actions on the part of the AO;

(iv) The revenue would do well to remember that we live in State which is governed by Rule of law. It is primary obligation of the officers of the State that it follows the law laid down by the Courts in letter and spirit before taking any coercive action.(WP (L) No. 3174 of 2013. dt. 04/02/2014)

DIT .v. Maharashtra Housing & Area Development Authority (Bom.)(HC);www.itatonline.org

S. 254(1) : Appellate Tribunal–Power-Additional grounds–Claim not made in the return-Claim which was not in the return can be made before appellate authorities.[S.143(3)]

Assessee company did not claim depreciation and other expenses in ROI but such claim was made in assessment proceedings.AO refused to admit such claim for deductions claimed through revised computation.The ITAT held that, A.O. cannot entertain a claim made otherwise than by way of revised return. The issue is limited to the power of the AO and does not impinge on the power of the ITAT u/s 254. The ITAT has set aside the impugned order and remit the matter to the file of the AOfor question of deductibility in respect of such fresh claims as per law.(AYs. 2006-07, 2007-08)

Ricoh India Ltd. .v. Dy. CIT 146 ITD 798 / (2013) 38 taxmann.com 264 (Mum.)(Trib.)

S.254(1):Appellate Tribunal–Additional evidence-Additional evidence can be admited without a formal application-Additional evidence filed by the revenue was admitted. [S.131,255(6),Rule 29 of the ITAT Rules,Rule 46A(4)]

The department filed an application under Rule 29 of the ITAT Rules requesting permission to produce before the Tribunal the "LinkedIn profiles" of the assessee's employees and a whistleblower petition filed in the High Court in support of the contention that the assessee had a permanent establishment in India. The assessee opposed the admission of the said evidence on various grounds. HELD by the Tribunal allowing production of the LinkedIn profiles but rejecting the whistleblower petition:

(i) S. 254(1) provides that the Tribunal may "pass such orders therein as it thinks fit". S. 255 (6) confers upon the Tribunal all the powers vested in it which are vested in the income-tax authorities with reference to s. 131. S. 131 confers powers regarding discovery, production of evidence etc. Rule 29 of the ITAT Rules empowers the Tribunal to admit additional evidence if it comes to the conclusion that a particular document would be necessary for consideration to enable it to pas orders or for any other substantial cause. The document can be brought to the notice of Tribunal by either party. The Tribunal is final fact finding body and, therefore, the powers have been conferred on it u/s 131 and Rule 29 to enable it to record a factual finding after considering the entire evidence. At the time of admission of additional evidence the Tribunal is required to examine whether prima facie the evidence is relevant to the facts in issue or not. As per s. 3 of the Evidence Act, one fact is set to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of Evidence Act relating to the relevancy of facts. The fact in issue u/s 3 of the Evidence Act means and includes any fact from which either by itself or in connection with other facts the existence/ non-existence nature or extent of any right, liability or possibility asserted or denied in any suit or proceedings necessarily follows. Section 5 of the Evidence Act deals with the relevancy of facts and provides that evidence may be given in any suit or proceeding of the acceptance or non-acceptance of every fact in issue and of such other facts as are herein declared to be relevant and of no others;

(ii) On the issue regarding existence of a PE, a factual finding is required to be recorded on the basis of evidence on record and, if the Tribunal considers that additional evidence is relevant to the fact in issue, which is existence or not of PE, then in order to advance the cause of justice, the additional evidence should be admitted. In order to enable the Tribunal to decide disputes before it in a lawful, fair and judicious manner, it necessarily is required to look into and consider such and other material having a direct nexus and bearing on the subject matter of the appeal. Merely because the linkedin profiles was available in public domain and was not referred to by the AO the department cannot be prevented from bringing that information on record so as to arrive at the correct factual finding on the issue regarding PE. This cannot be said to be a case of inordinate delay because the AO had drawn an adverse inference on account of non-furnishing of information by assessee and when assessee is trying to take mileage out of its conduct, the department is bringing on record additional evidence in the form of linkedin profile of employees to demonstrate that the conclusion drawn by department was fully justified. All the cases relied upon by the assesse &CIT(DR) are with reference to additional evidence brought before the Tribunal for the first time by assessee. But none of the cases deals with a situation where the assessee withholds some information from the department and then claims that information relevant to the facts in issue should not be admitted. The inordinate delay theory cannot be invoked in a case where cause of justice will be defeated rather than being sub-served;

(iii) Rule 46A(4) also gives wide powers to the CIT(A) to entertain fresh evidence for sub-serving the cause of justice. The assessee cannot be permitted to first scuttle the investigations/ inquiries by not furnishing the necessary information and then claim benefit out of the same. At the end of the day it is the determination of correct taxability of assessee, which should guide the proper course of action. There is no gain saying that pitted against the technicalities and cause of justice, cause of justice should prevail. It is true that either party cannot make out a new case by implanting additional evidence but where the additional evidence only supplements the information on the basis of which a factual finding is to be arrived at and not supplant the information, then the Tribunal can and should look into those details. It would be travesty of justice to ignore the additional evidence at admission stage only before arriving at a correct finding of fact. As a matter of fact assessee should have no complaints in getting the relevant information being brought on record from the appreciation of which

correct factual finding can be arrived at. In the present case the Linkedin profiles sought to be filed by the department has considerable bearing on the subject matter of appeal and therefore should be admitted by the Tribunal. The assessee will be free to rebut the information contained in the Linkedin profiles by bringing on record contrary facts to dislodge the claims made in the Linkedin profiles.(AY. 2001-02)

GE Energy Parts Inc .v. ADIT (3014) 33 ITR 411/106 DTR 265/163 TTJ 697(Delhi)(Trib.)

S.254(1): Appellate Tribunal-Stay-Stay was granted for period of six months by making payment of two installments and furnishing corporate guarantee to the satisfaction of AO.[S.220]

The Tribunal granted the stay for a period of six months or till the disposal of assessee's appeal whichever is earlier on the condition that the assessee should pay Rs. 200 crs. in two equal installments and furnish corporate guarantee(s) for the balance demand of Rs. 3538.49 crs. to the satisfaction of the Assessing Officer. (AY. 2008-09)

Vodafone India Services (P) Ltd. .v. ACIT (2014) 159 TTJ 294 /30 ITR 218(Mum.)(Trib.)

S.254(1): Appellate Tribunal – Orders - Double taxation relief-Claim not made in the return-Tribunal directed the AO to allow the claim as per law.[S.90, 139(1),143(3)]

Assessee had inadvertently mentioned as "Advance tax" in the electronically filed tax return, instead of putting the eligible amount of double taxation credit u/s. 90.The AO rejected the assessee's contention on the ground that no claim shall be allowed otherwise than by way of return or revised return of income. He followed the ratio of Goetage India Ltd v.CIT (2006)284 ITR 323(SC).Tribunal held that the judgment provides that operation is restricted to the AO and it does not, in any way, affect the powers of the Tribunal u/s. 254 of the Act.Therefore, the ITAT directed the AO to examine and allow assessee's claim about the eligible amount of double taxation credit as per law after allowing a reasonable opportunity of being heard to the assessee. (AY. 2007 – 2008)

Tecnimont ICB Ltd. .v. Dy. CIT (2014)146 ITD 219 / [2013] 32 taxmann.com 357 (Mum.)(Trib.)

S.254(1): Appellate Tribunal-Additional grounds-Deduction of tax at source-Liability borne by the assessee whether deductible is question of law-Matter remitted to the AO for verification. [S.201]

Liability bone by the assessee under section 201 which is not recovered from the recipients of payments without deduction of tax at source is deductible in computation of asessee's income is question of a legal issue additional ground was admitted. Matter was remitted to the AO for adjudication denovo.(AY.2008-09)

Bharti Airtel Ltd .v. Add.CIT(2014) 101 ITR 154 (Delhi) (Trib)

S.254(1): Appellate Tribunal-Precedent-Decision of non-Jurisdictional High Court-Binding to Tribunal including Special Bench-Authorised representative-Appearnce by ex-members of the Income –tax Appellate Tribunal.[S.253,288]

Tribunal being a subordinate Court ,is expected to follow in latter and spirit an order of the non-jurisdictional High Court and the Trribunal is no longer at liberty to rely upon its earlier decision may, be a decision of a Special Bench unless and until it is reversed by the Apex Court or by an order of the Jurisdcitional High court taking a contrary view.Tribunal has no inherant jurisdiction to decide the question as to whether an ex-member of the Tribunal can appear and practice before its benches and therefore the vires of Rule 13 of ITAT Members (Recruitment and Conditions of Service)Rules, 1963 ,whether it is ultra vires or intra vires is a subject not falling with in the jurisdiction of the Tribunal.

Nanubahi D.Desai .v.ACIT (2014) 104 DTR 1/162 TTJ 673/149 ITD 16 (SB)(Ahd)(Trib)

S. 254(2): Appellate Tribunal –Remand-Rectification of mistake-Unnecessary remand by the ITAT causes prejudice and amounts to a failure to exercise jurisdiction-Tribunal should not have refused to consider and decide the issue realting to service chrges-Writ petition was allowed.[Art 226,Constitution of India]

In AY 1997-98 the assessee claimed deduction for service charges paid to a connected party. The AO & CIT(A) disallowed a part of the expenditure on the ground that benefit from the expenditure was

derived by the bottler & brand owner. The Tribunal, instead of deciding the issue, remanded the matter back to the AO for fresh consideration. The assessee filed a Writ Petition on which the High Court held (290 ITR 464) that as the CIT(A) had given specific grounds for the disallowance, the Tribunal ought to have decided the specific issues on merits and not simply remanded it. Thereafter, the Tribunal decided the issue on merits and allowed the assessee's claim (Coco cola India (P) Ltd. v. Dy. CIT (2008) 116 TTJ 880). In AY 1998-99, though the CIT(A)'s order was passed on the same date as the order passed for AY 1997-98 and the Tribunal was aware of the High Court's order for AY 1997-98, it still remanded the issue to the AO for fresh consideration. The assessee filed a MA which was dismissed on the ground that the remand order was a "conscious" decision and not an "apparent mistake". On a Writ Petition filed by the assessee HELD by the High Court:

The Tribunal should not have refused to consider and decide the issue relating to service charges, more so, when an identical view taken by it earlier has not found favour of this Court. This Court repeatedly reminded the Tribunal of its duty as a last fact finding authority of dealing with all factual and legal issues. The Tribunal failed to take any note of the caution which has been administered by this Court and particularly of not remanding cases unnecessarily and without any proper direction. A blanket remand causes serious prejudice to parties. None benefits by non-adjudication or non-consideration of an issue of fact and law by an Appellate Authority and by wholesale remand of the case back to the original authority. This is a clear failure of duty which has to be performed by the Appellate Authority in law. Once the Appellate Authority fails to perform such duty and is corrected on one occasion by this Court, and in relation to the same assessee, then, the least that was expected from the Tribunal was to follow the order and direction of this Court and abide by it even for this later assessment year. If the same claim and which was dealt with by the Court earlier and for which the note of caution was issued, then, the Tribunal was bound in law to take due note of the same and follow the course for the later assessment years. We are of the view that the refusal of the Tribunal to follow the order of this Court and equally to correct its obvious and apparent mistake is vitiated as above. It is vitiated by a serious error of law apparent on the face of the record. The Tribunal has misdirected itself completely and in law in refusing to decide and consider the claim in relation to service charges. (WP No. 3650 of 2014, dt. 14/08/2014.) (AY. 1998-99 to 2004-05)

Coca-Cola India (P) Ltd v. Asstt.Registrar,ITAT(2014) 271 CTR 60/109 DTR 94 (HC) (Bom.)(HC)

S. 254(2): Appellate Tribunal-Rectification of mistake apparent from the record -Non consideration of decision of Jurisdictional High Court or Supreme Court constitute mistake apparent on record-Employees contribution of ESI & EPF.[S. 43B, 139(1)]

During the course of assessment proceedings, AO added amounts of the employees contributions towards ESI & EPF which was deposited beyond the stipulated period and accordingly made an addition. CIT(A) allowed the appeal . On revenue's appeal in Tribunal, Tribunal allowed the appeal and sustained the addition made by the AO relying on CIT v. Avery Cycle Industries (P) Ltd (2007) 292 ITR 198 while the assessee relied on CIT v. Vinay Cement ltd (2007) 213 CTR (SC) 268 . Accordingly assesse filed an MA u/s 254(2) citing CIT v. Saurashtra Kutch Stock Exchange Ltd (2008) 219 CTR (SC) 90 but Tribunal dismissed the Miscellaneous Application. On an appeal in High Court, High Court allowed the appeal of the assessee wherein the only point in dispute was whether non-consideration of a decision of jurisdictional High Court or the Supreme Court can be said to be a "Mistake apparent from the record?" The Hon'ble High Court allowed the appeal and held that non-consideration of the jurisdictional High Court or the Supreme Court would constitute mistake apparent from the record. In the present case assesse has deposited the amounts under ESI & EPF contributions prior to the filing of the return u/s 139(1). (AY. 2003-04)

R. M Exports v. CIT (2014) 264 CTR 206/226 Taxman 55(Mag.)(P&H)(HC)

S. 254(2) : Appellate Tribunal-Rectification of mistake Apparent from the record – Limitation-Filing the application on last date of completion of four years –Held to be within period of limitation.

Where the assessee submits a miscellaneous application under s. 254(2), it is required to be made within a period of four years from the date of actual receipt of the order passed by the Tribunal. It was held that even if the application is submitted on the last day of completion of four years from the date

of receipt of the order the same is required to be decided on merits and in such a situation the assessee is not required to give any explanation for the delay in filing the application for the period between the actual date of receipt of the order which is sought to be reviewed and the date on which the miscellaneous application is submitted.(AY.1996-1997)

Peterplast Synthetics (P) Ltd. .v. ACIT (2014) 101 DTR 83 / 364 ITR 16 (Guj.)(HC)

S. 254(2): Appellate Tribunal–Refusal to rectify order–Appeal is not maintainable–Writ is maintainable.[S. 260A, Art. 226]

Appeal to High Court is not maintainable from order refusing to rectify order. Held, writ petition against such order was maintainable.(AY.1999-2000)

Madhav Marbles and Granites .v. ITAT (2014) 362 ITR 647 (Raj.)(HC)

S. 254(2): Appellate Tribunal–Rectification of mistake–Bad debts-Tribunal erred in not rectifying the order-Matter remanded.[S.36(1)(vii)]

The Tribunal held that bad debts were not deductible on ground assessee did not establish that such advances had become bad. Assessee's application for rectification of this mistake was rejected. Held, Tribunal erred in not rectifying mistake apparent from record as, after 1-4-1989, debt need no longer be proved to have turned bad and that merely writing off such advances or debts as bad debts in books of account and debiting in profit and loss account was sufficient compliance. Matter remanded to Tribunal to pass fresh order under section 254(2). (AY. 1999-2000)

Madhav Marbles and Granites .v. ITAT (2014) 362 ITR 647 (Raj.)(HC)

S.254(2): Appellate Tribunal – Rectification of mistake apparent from the record- Failure to apply judgment of jurisdictional High Court-Mistake apparent on record-Applicability of interest.[S. 234D]

Failure to apply judgment of jurisdictional High Court is a mistake apparent on record, and the Tribunal has jurisdiction to rectify such mistake. Irrespective of the year of assessment ,the interest is to be levied under section 234D w.e.f. 1 st June , 2003 , even if the assessment year referred to was prior to Ist June, 2003.(AY.2002-03)

South India Corporation Ltd. .v. ACIT (2014) 360 ITR 39 /266 CTR 105(Ker.)(HC)

S.254(2):Appellate Tribunal-Rectification of mistake apparent from the record-The duty is limited to the points raised before it-Tribunal is not required to consider pleadings, material etc to which its pointed attention is not drawn-Tribunal was justified in not rectifying the mistke.

It is true, as held by the Supreme Court in a long line of cases that the Tribunal is duty-bound to consider all the grounds, the evidence produced and consider the contentions of the parties before it and all other material brought to its notice in a judicial spirit and should not feel incommoded by technicalities. The duty is limited to the points raised before it. It would be placing an impossible burden on the Tribunal if it is ordained to rule upon aspects and contentions which were not raised by the parties before it or to deal with pleadings, evidence or material to which its pointed attention was not drawn in the course of the proceedings and which lies buried in the forest of papers filed by the parties. Writ petition was dismissed.(AY.1998-99, 1999-2000)

Dholadhar Investment Pvt. Ltd. v. CIT(2014) 362 ITR 111 (Delhi)(HC)

S. 254(2):Appellate Tribunal-Rectification of mistake apparent from the record-Pendency of an appeal filed in the High Court u/s.260A bars the hearing of a MA filed u/s 254(2) even if the appeal is not admitted.

The assessee has moved an instant Miscellaneous Application (MA) against the order of the ITAT. At the time of hearing, the AR for the assessee-appellant informed that the assessee has filed an appeal u/s 260A before the Hon'ble Bombay High Court, but is yet to be admitted. Since the appeal has been filed before the Hon'ble Bombay High Court, the judicial propriety does not allow the assessee to seek efficacious remedy simultaneously before two authorities and in particular where the issue is seized by a higher judicial forum, even if pending admission. On this ground, the instant MA is rejected.(MA No. 194/Mum/2013, AY. 2007-08, dt.12.03.2014.)

RW Promotions Pvt. Ltd. .v. ACIT (Mum.)(Trib.), www.itatonline.org

S.254(2):Appellate Tribunal-Rectification of mistake apparent from the record-Conclusion arrived by Tribunal is based on wrong recording of facts-Order is liable to be recalled.
Third member heldthat the decision of the Tribunal in sustaining penalty rested on two considerations,one turned out to be factually in correct.Thus the decision of the Tribunal was influenced partly by incorrect fact.If a factual aspect which is of immense importance on the ultimate decision has not been understood correctly, it is likely to prejudice the ultimate decision of the Bench.In such a situation, it is a duty, rather than prerogative of the Bench to recall its order based on such incorrect assumption of fact and thereafter order fresh hearing so that a correct decision can be arrived at.(MA no 583/Mum/2012 dt 5-11-2013 Bench AY.2006-07)
Amzel Ltd. .v.ACIT (Mum.)(Trib.)www.ctconline.org

S.254(2):Appellate Tribunal-Rectification of mistake apparent from the record-Tribunal relied on 22 cases of Tribunal ,High Courts and Apex court, without giving an opportunity to assessee-Miscellaneous application was allowed.
Assesseehas filed miscellaneous application stating that the author of the order relied on 22 cases of Tribunal, High Courts and Apex court in the order which was not cited at the time of hearing.Honorable Judicial Member held that the order required to be recalled However Accountant Member has passed dissenting order. The matter was referred to third member. Third member agreed with the judicial member and held that Tribunal having relied upon and considered as many as 22 cases of various Benches of Tribunals , various High Courts and Apex Court without giving opportunity to the parties to put forth their views on those decisions, it is violation of rule of natural justice which caused prejudice to the assessee, and therefore assessee's miscellaneous application is allowed by the recalling the appellate order of the Tribunal.(AY. 2006-07)
Deepak Dalela .v. ITO (2014) 101 DTR 334/161 TTJ 718/ 147 ITD 19(TM) (Jaipur)(Trib.)

S. 254(2A) : Appellate Tribunal–Power of granting stay of demand –Limited to 365 days – Held, stay to operate till disposal of appeal.
The Tribunal has power to grant stay only till 365 days. In the instant case, the Tribunal had heard the appeal but had not disposed it off. Held, since the non-disposal was not occasioned due to default of the Petitioner, the stay was to operate till such disposal. The Tribunal was requested to dispose of the appeal expeditiously and preferably within three months of receipt of certified copy of this order.
Adobe Systems India P. Ltd. .v. JCIT (2014) 365 ITR 376 (All.)(HC)

S. 254(2A): Appellate Tribunal–Stay–Reasons to be given-Order not stating prima facie demand of tax is arguable on merits case-If adjournment is sought by assessee to deposit 50 percent of tax if adjournment at instance of assessee.
The assesse a public charitable trust. It claimed exemption under section 11, alternatively it claimed exemption in respect of its long term capital gains dividend income and income from mutual funds under section 10. However the AO did not accept the contention and assessed income at Rs.714 crores. This was confirmed by CIT(A).Out of total demand of Rs.300 crores, the assessee paid an amount of Rs.10 crores. Tribunal granted stay of the outstanding demand of tax of Rs.290 crores under the first proviso to section 254(2A). Revenue filed writ petition against the order of Tribunal. Allowing the petition the Court stated that the order of stay must record briefly assessee's case, look at questions involved in appeal and amount required to be deposited considering issue in appeal. In the instant case, order did not state even prima facie how demand of tax is arguable on merits. Held, pending appeal, Assessee to deposit further 50% of demand of tax if adjournment was sought by it.(AY. 2010-11)
DIT(E) .v. Jamshetji Tata Trust (2014) 362 ITR 357 / 101 DTR 145 / 267 CTR 157 (Bom.)(HC)

S. 254(2A): Appellate Tribunal–Stay-For a maximum of 365 days from date of initial order-No power to grant stay beyond outer limit stipulated in the statutory provision.
The Income–tax Appellate Tribunal is not an authority akin to a court but a special Tribunal with limited jurisdiction as indicated in the statutory provisions. Section 254 of the Income tax Act 1961, deals with the manner of its functioning.The third proviso to section 254(2A)was inserted with effect

from October 1, 2008.The third proviso merely indicates that the extension of stay order cannot be beyond a total number of 365 days but also indicates that even assuming an order of this nature had been passed, such an order of stay shall stand vacated after the expiry of the outer limit of 365 days.Held accordingly, that the Tribunal had committed a positive error in consciously extending the interim order of stay granted in the pending appeal beyond the period of 365 days, which is the outer limit stipulated in the statutory provision.

CIT .v.Ecom Gill Coffee Trading P.Ltd. (2014) 362 ITR 204 (Karn.)(HC)
CIT .v. B. Fouress P. Ltd. (2014) 362 ITR 204 (Karn.)(HC)

S.254(2A):Appellate Tribunal-Stay- The Tribunal has no power to extend stay of demand beyond 365 days even if the assessee is not at fault. If department seeks an adjournment, ITAT may either refuse it or department should undertake not to recover the demand-Assessee can file writ petition for stay and High Court can grant stay and issue direction to Tribunal as required-Appeals filed by revenue in court is disproportinatly large percentage of cases.

The Tribunal {probably following the Special Bench judgement in Tata Communications Ltd. v. Asst. CIT (2011) 138 TTJ 257 (Mum) } extended the stay beyond 365 days as the assessee was not responsible for the delay in disposal of the appeal. The department challenged the decision of the Tribunal by way of a Writ Petition to the High Court on the ground that after the insertion of the third Proviso to s. 254(2A), the Tribunal had no power to extend stay beyond 365 days even if the assessee was not at fault. HELD by the High Court allowing the Petition:

(i) In view of the third proviso to s. 254(2A) of the Act substituted by Finance Act, 2008 with effect from 1st October, 2008, the Tribunal cannot extend stay beyond the period of 365 days from the date of first order of stay;

(ii) In case default and delay is due to lapse on the part of the Revenue, the Tribunal is at liberty to conclude hearing and decide the appeal, if there is likelihood that the third proviso to Section 254 (2A) would come into operation;

(iii) The third proviso to Section 254 (2A) does not bar or prohibit the Revenue or departmental representative from making a statement that they would not take coercive steps to recover the impugned demand and on such statement being made, it will be open to the Tribunal to adjourn the matter at the request of the Revenue;

(iv) An assessee can file a writ petition in the High Court pleading and asking for stay and the High Court has power and jurisdiction to grant stay and issue directions to the Tribunal as may be required;

(v) Section 254(2A) does not prohibit/bar the High Court from issuing appropriate directions, including granting stay of recovery;

(vii) The constitutional validity of the provisos to Section 254 (2A) of the Act has not been examined and the issue is left open. Court also observed that revenue is appellant before High Court in disproportinattely large percentage of cases , being aggrieved by finding/adjudication by Tribunal on question of law and fcat.Appelas are preferred by revenue mostly in cases where tax demand is Rs 10 lakhs or above.(AY.2007-08)

CIT .v. Maruti Suzuki (India) LTD (2014) 362 ITR 215/ 100 DTR 265 /266 CTR 337/2014 (305)E.L.T.199(Delhi)(HC)
CIT .v.ITAT (2014) 362 ITR 215 /100 DTR 265/266 CTR337(Delhi)(HC)

S. 254(2B) :Appellate Tribunal-Award cost- Even though action of the CIT in canceling registration u/s.12AA(3) is illegal, costs cannot be awarded as the said action is in discharge of duty & not mala fide. [S.12AA(3), 13]

The assessee filed an appeal challenging the order of the CIT u/s 12AA(3) canceling the registration granted to the assessee trust. The assessee also pleaded for award of costs u/s 254(2B) on the ground that the action of the department of canceling registration was illegal and an abuse of powers and that it had has caused serious prejudice and injustice to the assessee. It was pointed out that wrong signals had been transmitted in the society that the assessee trust is a big fraud and that this had adversely affected the reputation of the trust and its trustees who are eminent medical practitioners. It was also claimed that there is an unpleasant social environment in Ratnagiri and that since the trustees are from the minority community, the department's action have embarrassed the trustees and the trust. HELD by the Tribunal:

(i) As per s. 12AA(3) the CIT can cancel the registration granted earlier if he /she is satisfied that the activities of such trust or institution are not genuine or are not being carried out in accordance with the objects of the trust or the institution. In the instant case, there is no such finding given by the CIT that the activities of the trust are not genuine or are not being carried out in accordance with the objects of the trust. While granting registration u/s 12A, the CIT has gone through the objects of the trust and the genuineness of the activities. There is no change in the objects of the trust in the meantime. The CIT has not brought on record any material to show that the activities of the Trust are not being carried out in accordance with the objects of the Trust or the institution. Once registration is granted to the trust/institution and if subsequently the AO finds during the assessment proceedings that the income of the charitable trust is applied directly or indirectly for the benefit of the persons referred to in s. 13(3), then he has ample power to deny exemption to that extent u/s 13(1)(c) of the Act
(ii) The CIT has passed the order u/s 12AA(3) of the Act during the course of discharge of her duty as CIT. While discharging her duty, her action might have caused some hardship to the assessee due to error of judgement but that in our opinion does not warrant levy of cost on the department. In Pooran Mal vs. Director of inspection (1974) 93 ITR 505 (SC), it was noted that s. 132 causes serious invasion of the privacy of a person. Still it was held that even though the innocent is likely to be harassed by a raid for the purpose of search and seizure, that cannot be helped. In the instant case, there is no such action of search and seizure which causes serious invasion in the privacy of the person. The CIT was discharging her quasi-judicial duty. Further, there is nothing on record to suggest that the action of the CIT was mala fide. Therefore, there is no merit in the claim for award of costs for the action of the CIT in cancelling the registration granted earlier u/s 12AA of the Act .
Parkar Medical Foundation .v. DCIT(2014) 34 ITR 286 (Pune) (Trib.)

S. 260A : Appeal-High Court-Perverse-A factual decision is perverse if the authority has acted without any evidence or on view of facts, which cannot be reasonably entertained. A perverse finding is one, if it is arrived at without any material or if it is arrived at or inference is made on material, which would not have been accepted or relied upon by a reasonable person conversant with the law. [S.132]
This Court while exercising appellate jurisdiction under Section 260A of the Act is not an appellate Court for facts reprise. Factual findings can be challenged only on the ground that the factual findings recorded are perverse or relevant evidence has not been considered or irrelevant material has been relied. In such cases, pleadings in this regard have to be specific, erudite and the should indicate clearly the error or mistake. This Court in CIT v. Sunaero Limited [2012] 345 ITR 163, at page 187, regarding perversity of a decision of the Tribunal, has observed. "*A factual decision is perverse if the authority has acted without any evidence or on view of facts, which cannot be reasonably entertained. A perverse finding is one, if it is arrived at without any material or if it is arrived at or inference is made on material, which would not have been accepted or relied upon by a reasonable person conversant with the law. If the finding is based upon surmises, conjectures or suspicion and is not rationally possible. A factual conclusion is regarded as perverse when no person duly instructed or acting judicially could act upon the record before him, have reached the conclusion arrived at by the tribunal/authority*"
CIT .v. Rama Krishna Jewellers (Delhi)(HC); www.itatonline.org

S. 260A : Appeal–High Court-Issue covered by Supreme Court- Decision Senior officers of the department summoned and strictures passed for 'Irresponsible conduct' of filing an appeal on a point which is admittedly covered against the department by a judgement of the Supreme Court-Appeal of revenue was dismissed. [Art. 261]
The department conceded before the Tribunal that the issue in the appeal was covered in favour of the assessee by the judgement of the Supreme Court in CIT v/s Tulsyan NEC Ltd 330 ITR 226 (SC). However, despite this, the department filed an appeal before the High Court to challenge the order of the Tribunal. HELD by the High Court:
These state of affairs can hardly be termed as satisfactory. It is unfortunate that the Revenue is unable to make any distinction with regard to the legal position noted in the judgment of the Supreme Court of India and it is bound by the said judgment of the highest court in the country. The Revenue seems to be unaware of Article 141 of the Constitution of India and mandate thereof. Once there is nothing

to the contrary, then, the authoritative pronouncement should bind all. The Tribunal then cannot be approached and equally this Court to complain about an adverse order. We are shocked that when such is the concession recorded that the Appeals of this nature are brought before this Court and it's precious judicial time is wasted. Let the concerned Commissioner and who advised that such Appeal should be filed before this Court, remain present before us on the next date of hearing. After giving him an opportunity we would then record our dissatisfaction and proceed to impose costs. It is only to comply with the principles of natural justice and equally fairness and equity that we adopt this course.
It is very unfortunate that we had to secure the presence of the highest officers in the department of Income Tax, for seeking an explanation on the points which we have raised in our order dated 12.09.2014.
The only intent to secure personal appearance of higher officials is to impress on the Revenue that larger public interest mandates and requires it not to waste precious time of the highest Court in the State by engaging it in frivolous Appeals and applications. It may be that, at the departmental level, the officers are not satisfied with adverse orders and desire to contest the issue or raise it before the Income Tax Appellate Tribunal. However, when the Tribunal follows and applies the ratio of a judgment of the Hon'ble Supreme Court of India, then, we would expect the officers to gracefully accept an adverse verdict. Where no distinguishing feature can be pointed out, then, the law of the land must be allowed to prevail. The mandate of Article 141 of the Constitution of India is known to all. The further mandate of the Constitution as enshrined in Article 261(1) is giving of full faith and credit to public acts, records and judicial proceedings of the union and of every State. Therefore, the law declared by the Supreme Court binds all and cannot be brushed aside. The repeated attempts to raise the same issues and questions in relation to same Assessee and year after year results in loss of precious judicial time and public revenue. We do not expect hereafter such an irresponsible conduct from the higher officers. Ordinarily, we would have in the absence of any explanation forthcoming, passed severe structures against the department and the officers in particular but we refrain from doing so since the concerned officials present in Court sincerely apologized for the lapse and urged that the Appeal may be disposed against the Revenue and in terms of our earlier orders so also the judgment of the Hon'ble Supreme Court of India, both of which are binding on us. Hence, the Appeal is dismissed.(ITA No. 803 of 2012, dt. 12/09/2014.)
CIT .v. Reliance Infrastructure Ltd. (Bom.)(HC); www.itatonline.org

S. 260A : Appeal-High Court-Condonation of delay-Delay of 117 days in filing of appeal and 1248 days in filing the review petition-Delay was not condoned- Copy was forwarded to Chief commissioner and secretary Finance Government of India for remedial action.
Where affidavits filed by revenue for condonation of delay provided misleading statements and failed to offer any explanation for in ordinate delay, merely because revenue took plea as large public interest was involved and that its officers had admitted lapses , would not be ground for condonation of delay. Copy of order was forwarded to Chief Commissioner and Secretary in the department of Finance , Government of India so that suitable remedial action is taken.
CIT .v. Harinagar Sugar Mills Ltd. (2014) 226 Taxman 190 (Bom.)(HC)

S.260A : Appeal-High Court-Substantial question of law-Issue which was not raised before the Tribunal cannot be raised before the High Court for the first time.
An issue which has not been raised before the Tribunal and not discussed by the Tribunal, cannot be raised before the High Court for the first time.(ITA no 874 of 2013 dt 9-06-2014)(AY.2004-05)
CIT v. Parvez Poonawala (Bom.)(HC)(Un reported)

S.260A : Appeal-High Court-Tribunal following its earlier view on same facts and same assessee– No substantial question of law.[S.254]
The Tribunal has not deviated from its earlier order on facts and in respect of the same assessee. No substantial question of law arises.
CIT .v. Deepak Fertilizers and Petrochemicals Corporation Ltd. (2014) 363 ITR 484/226 Taxman 42 (Mag.) (Bom.)(HC)

S. 260A : Appeal - High Court –Penalty-Concealment-Frivolous appeals by department results in harassment to assessee & wastage of judicial time. Department to pay costs of Rs. 3 Lakhs. Costs may be recovered from and disciplinary action be taken against, concerned official. [S.271(1)(c)]

The Tribunal deleted the levy of penalty u/s 271(1)(c) by following the judgement of the Supreme Court in CIT .v. Reliance PetroproductsPvt. Ltd. (2010) 322 ITR 158 (SC). On appeal by the department to the High Court HELD dismissing the appeal:

(i) We are surprised if not shocked that such appeals are being brought before us and precious judicial time is being wasted that too by the Revenue. The least and minimum that is expected from the Revenue officers is to accept and abide by the Tribunal's findings in such matters and when they are based on settled principles of law. If they are not deviating from such principles and are not perverse but consistent with the material on record, then, we do not find justification for filing of such appeals. We have found that merely expressing displeasure orally is not serving any purpose;

(ii) Time and again we have to deal with such Appeals. Merely because they are filed that they get listed on the Daily Admission Board. The Advocates filing them and routinely, so also those instructing them do not have authority to withdraw them. Consequently, they are pressed and argued resulting in a hearing, may be brief and an order of this Court dismissing them. Some times there are at least 35 such cases on our daily board. We do not understand why higher officials do not have the courage to take bold decisions particularly of not pursuing such matters upto this court or higher. Because the assessee is a leading Public Limited Company should not act as a deterrent for them to take a informed, rational decision and subserving larger Public Interest. A realization of this nature is a need of the hour as higher courts do not have to deal with Tax and Revenue matters only but all those involving life and liberty of citizens, their property rights, Rights of Children, Women and Senior Citizens. These rights are also precious and the legitimate expectations of such persons or groups of easy and expeditious justice also have to be fulfilled by the higher judiciary. The biggest litigant, namely, the State ought to be aware of the Pendency of Cases in High Courts of Bombay, Madras, Calcutta and Allahabad for example. If their policies particularly on litigations are not aimed at reducing frivolous and speculative litigations, then, the least that can be said is that the State has failed to act for public good and in Public Interest. The State is expected to act as a Model Litigant. It must set an example for the Public to follow and we hope that this order acts as a reminder for all concerned to at least now take remedial steps and measures. It is therefore that despite the persuasive skills of Mr. Sureshkumar, who fervently pleaded not to pass any order imposing costs, that we are constrained to impose costs;

(iii) The Revenue officers must realize that just like other powers an executive power conferred in them is in the nature of a Trust. They hold office as trustees of the public at large. They deal with public revenue and public money and that cannot be wasted in such frivolous litigation. We, therefore, dismiss these appeals with costs quantified at Rs.1,00,000/each (for three appeals);

(iv) It would be open for the superior/competent authority to recover the costs personally from the officer responsible and equally take disciplinary action against him if the power to decide about filing such appeals is abused or the decision making authority is utilized to harass innocent Assessees. Every case must be dealt with on its merit and no routine exercise ought to be undertaken merely because the Revenue impact is higher or the status or financial position of the Assessee is influential and strong. That cannot be the only yardstick or criteria

CIT . .v. Larsen and Toubro Ltd(2014)366 ITR 502(Bom.)(HC)

S. 260A: Appeal-High Court-Rectification of mistake-Rejection of application for rectification-Appeal is not maintainable-Writ petition against such order is maintainable.[S.254(2), Art. 226, Constitution of India]

Appeal to High Court is not maintainable from order refusing to rectify order. Held, writ petition against such order was maintainable.(AY. 1999-2000)

Madhav Marbles and Granites .v. ITAT (2014) 362 ITR 647 (Raj.)(HC)

S. 260A: Appeal-High Court–New ground–Grounds not raised before Tribunal-Revenue could not be permitted to urge for the first time before High Court.

New ground not raised before Tribunal cannot be raised before High Court. (AYs.2003-2004, 2005-2006)

CIT .v. Jayshree Gems and Jewellery (2014) 362 ITR 272 (Delhi)(HC)

S.260A:Appeal-High Court- Substantial question of law-Binding nature of finding nature of fcat-Question involves legal effect of proven facts or documents-Question of law arises.

The Apex Court while considering the substantial question of law question observed that ,normanlly, a finding of a fact decided by the last finding authority is final and ought not to be lightly interfered with by the High Court in an appeal. The appellate Courts, however,ought to be cautious while weeding out such questions and should the question in examination involve examination of finding of fact , excautela abundanti the appellate courts would require to examine whether the question invoves merely a finding of fact or the legal effect of such proven facts or documents in appeal.While the former would be a question of fact which may or may not be interfered with , the latter is necesaarily a question of law would require consideration.Often questions of law and fact are intricately entwined, some times to the extent of blurring the domains in which they ought to be considered and therefore , require cautious consideration.Aquestion where the legal effect of proven facts is intrinsically in appeal has to be differentiated from a question where afinding of a fact is only assailed.

CIT .v. Dawoodi Bohara Jamat(2014)364 ITR 31/102DTR 361/222 Taxman 228(Mag)(SC)

S.260A:Appeal-High Court- Cost-Block assessment- bHigh Court imposes costs of Rs.50,000 on AO for filing frivolous appeal & wasting public money & judicial time.[S. 158BC]

Though the Bench clearly indicated to the department's counsel that the appeal had no merit and gave the department an opportunity to withdraw, the department did not do so. HELD by the High Court, passing strictures and imposing costs:

"We do not find how Officers lower down in the hierarchy can take decisions to file Appeals and that too against the decision of the Tribunal. The tendency not to accept any adverse verdict on facts results in frivolous Appeals being filed in this Court. That causes huge loss to the public exchequer and results in wastage of precious judicial time of this Court. All this ought to have been discouraged long time back. The High Court has not adopted a strict approach and that has possibly encouraged the Revenue in filing Appeals to challenge essentially findings of fact and with regard to matters which should stand concluded at the level of the authorities. The officials should realize that the authorities like CIT(A) and the ITAT are envisaged as appellate and possibly final fact finding authorities and at least the Tribunal is last in that hierarchy. The fact finding therefore if demonstrably perverse or palpably erroneous and as would amount to unsettling the settled position in law alone should be questioned by filing Appeals to this Court. However, a routine exercise and by people who do not wish to take any responsibility, results in number of Appeals being filed and pending. This benefits no one and rather defeats larger public interest. The Revenue collection and equally the participation of the assessee in the exercise undertaken by the authorities to assess their income, therefore is affected adversely. None takes a position or decision because of pendency of matters and for a long time. In these circumstances, while dismissing this Appeal, we impose costs quantified at Rs.50,000/. The costs be paid to the assessee within four weeks from today. We at least now expect the authorities to take cognizance and initiate proceedings for recovery of this amount personally from such of the Officers who do not take decisions or postpone them endlessly. A copy of this order be forwarded to the CIT Pune. It should also be forwarded to the Chief CIT, Pune who may decide as to who should pay the costs personally as between them or anybody else who has brought about this situation."(ITA No. 2603 of 2011, dt.28/04/2014.)

CIT .v. Sairang Developers and Promoters Pvt. Ltd.(2014) 364 ITR 593/108 DTR 400S (Bom.)(HC)

S.260A:Appeal-High Court-Monetary limit-CBDT's low tax effect circulars have prospective effect.[S.119, 268A]

The department filed an appeal in the High Court in 2008, the tax effect of which was more than Rs. 4 lakhs but less than Rs. 10 lakhs. The assessee claimed, relying on SureshchandraDurgaprasadKhatod

(HUF) & CIT v. Madhukar K. Inamdar(HUF) (2009) 318 ITR 149 (Bom.)(HC), that as Instruction No. 3 of 2011 dated 9.2.2011 issued by the CBDT applied to pending appeals and as the tax effect was lower than the sum of Rs. 10 lakhs prescribed therein, the appeal was not maintainable. The department argued that the maintainability of the appeal had to be decided on the basis of the CBDT Instruction dated 15.5.2008 which was in force at the time of filing the appeal. The matter was referred to the Full Bench of the High Court. HELD by the Full Bench:
Clause 11 of Instruction No. 3/2011 dated 9.2.2011 specifically states that "this instruction will apply to appeals filed on or after 9.02.2011. However, the cases where appeals have been filed before 9.02.2011 will be governed by the instructions on this subject, operative at the time when such appeal was filed." Similarly, clause 11 of instruction No. 5/2008 dated 15.5.2008 specifically provides that "this instruction will apply to appeals filed on or after 15.05.2008. However, the cases where appeals have been filed before 15.05.2008 will be governed by the instructions on this subject, operative at the time when such appeal was filed". There is, thus, no ambiguity in the instructions of either 2011 or 2008 as regards the applicability of those instructions in respect of the appeals, and, at the same time, it has also been made clear that if those appeals are not filed after the given dates mentioned in those instructions, the fate of the appeals will be governed in accordance with the instructions prevailing on the date of presentation of such appeals. In view of such clear legislative intention, we are unable to hold that even if an appeal is filed prior to 9.02.2011, the same would be barred notwithstanding the fact that at the time of filing such appeal, the same was not barred by the then instructions of the CBDT.
CIT .v. Shambhubhai Mahadev Ahir(2014)102 DTR 321/363 TTR 572/224 Taxman 184(FB)(Guj.) (HC)

S.260A:Appeal-High Court-Adjournments-High Court lays down zero-tolerance policy over adjournments-Appeal may be dismissed, hear them ex-parte or and/or impose costs if counsel are not prepared.
(i) We have noted that the Final Hearing Board consists of all Appeals of 2002. First two matters have been adjourned by us only because the Department or the Advocate for Appellant sought accommodation. They did not have either papers or were not ready with the case. Such state of affairs will not be tolerated hereafter. In the event, the Counsel engaged by the Department is absent without a justifiable or reasonable cause, we will invariably impose costs and to be paid by the Counsel personally. Equally, we would proceed in his absence. In the event, the Appellant or his Advocate is absent, we will proceed to dismiss the Appeal for non prosecution. Thereafter, no application for restoration of the Appeal will be considered unless the Appellant makes out a sufficient cause for absence;
(ii) We would also expect the Department and equally the Excise, Customs, Income Tax, all of which are stated to have engaged separate Advocates, to inform and caution their Advocates that their absence would result in either this Court proceeding ex-parte or the Appeals of the Department being dismissed for non prosecution. This Court will not hereafter countenance that the matters are adjourned and not heard due to absence of the Advocates. The Department is equally responsible to the Court and must ensure the presence of their Advocates. In the event only one Advocate is being briefed, the Department may consider handing over and entrusting the papers to an additional Advocate so as not to cause inconvenience to this Court. The disobedience of this order or inconvenience to this Court, would result in the Joint Secretary, Department of Law & Judiciary, Government of India, so also, the Secretary, Department of Law & Judiciary, Government of India, remaining present in the Court.(ITA No. 17 of 2002. order dt. 04/03/2014.)
Thermax Babcock & Wilcox Ltd. .v. CIT (Bom.)(HC),www.itatonline.org

S.260A: Appeal-High Court – Substantial question of law – Ground not raised before Tribunal-Can be raised before High Court if it is substantial question of law.
High Court in an appropriate case where no dispute arises on factual ground but purely legal issues arises in the case, may consider a substantial question of law even though it may not have been raised/adjudicated before the Tribunal. (AY. 2007-08)
Dr. Raghuvendra Singh .v. CIT (2014) 98 DTR 255(P&H)(HC)

S.260A: Appeal-High Court-Costs of Rs.1 lakh levied on dept for *"gross abuse of process of Court"*. Later revoked on assurance that judicial orders would be abided.

The department did not point out that its appeal for the earlier years in the case of the same assessee had been dismissed by the High Court. The High Court took a serious view of the matter and levied costs of Rs. 1 lakh on the department while observing:

"*It is unfortunate that the Revenue insists in arguing Appeals in this manner and for subsequent Assessment Years. The Revenue ought to have been fair and brought to the notice of this Court the fact that its Appeal challenging the very findings and conclusions for prior Assessment Years has been dismissed by this Court on merits. The reasons assigned ought to have been pointed out to us and thereafter, any explanation should have been offered for admission of this Appeal … It is a gross abuse of the process of this Court. It is dismissed with costs quantified at Rs.1,00,000/ (Rupees One lakh). Costs be paid to the assessee within 4(four) weeks from today*."

However, later, based on the assurance of the department that hereafter judicial orders and directions would be abided by in all matters, the order on levy of costs was recalled. The Court made it clear that appropriate averments have to be made in the memo of Appeal as to whether the orders of the Tribunal for prior assessment years and in the case of very assessee have been either challenged or otherwise. If the challenge is pending even that statement has to be made and if it is decided, the outcome thereof has to be indicated.(ITA No. 1001 of 2011, dt. 17/04/2014.)

CIT .v. Kisan Ratilal Choksey share & Securities (Bom.)(HC); www.itatonline.org

S.260A: Appeal-High Court-Dept given "*last opportunity*" and warned of "*heavy costs*" for wasting judicial time by filing appeal on covered matters.

The assessee received an incentive/ subsidy from SICOM for setting up a new undertaking. The assessee claimed that the subsidy was a capital receipt. However, the AO held the receipt to be a revenue receipt. The CIT(A) and Tribunal upheld the assessee's claim on the basis that the issue was covered by CIT v. Chaphalkar Brothers(2013) 351 ITR 309 (Bom) & CIT v. Ponni Sugars & Chemicals Ltd. & Ors. (2008) 306 ITR 392 (SC). The Department filed an appeal to the High Court. HELD dismissing the appeal:

We are afraid that if the Revenue persists with such stand and as has been turned down repeatedly, that would defeat the very object and purpose of the schemes and packages devised by the States. That would also result in frustrating the entrepreneurs and defeating the purpose of setting up new industries and particularly in backward areas. The Revenue, therefore, should bear in mind that in every such case and whenever the funds or receipts are from the schemes and packages devised by the State, it should note the object and purpose of the same. If that is of the nature specified in the judgments of this Court and equally that of the Hon'ble Supreme Court, then, the Revenue must act accordingly. We hope that this much is enough so as to dissuade the Revenue from bringing such matters repeatedly to this Court. Ordinarily and for wasting judicial time and which is precious, we would have imposed heavy costs on the Revenue while dismissing this Appeal, but we refrain from doing so by giving last opportunity to the Revenue.(1997-98)

CIT .v. Kirloskar Oil Engines Ltd(2014) 364 ITR 88.(Bom.)(HC)

S. 263 : Commissioner-Revision of orders prejudicial to revenue-Amounts withdrawn from the reserve created-Two views-Revision was held to be not valid. [S.36(1)(vii)]

The assessee claimed deduction in respect of amount withdrawn from the reserves created in terms of section 36(1)(vii) in the financial year 1996-97. The AO allowed the claim. On revision the Commissioner withdrew the deduction and directed computation of total income of the assessee after including the amounts withdrawn. The Tribunal quashed the order passed by the Commissioner holding that two views were possible on the applicability of section 36(1)(vii). On appeal by revenue the Court held that amendment with effect from 1-4-1998 creating obligation not only to create special reserve but also maintain it. AO allowing deduction of sums withdrawn from fund created prior to 1-4-1998, one of two views possible, hence revision was not valid.(AYs. 2003-04, 2004-05)

CIT .v. LIC Housing Finance Ltd. (2014) 367 ITR 458 (Bom.)(HC)

S. 263 : Commissioner-Revision of orders prejudicial to revenue- Sales tax deferment Scheme, 1989-Capital receipt-Two views-Revision was held to be not valid. [S.4]

The surplus arising on pre payment of loan amount was credited to profit and loss account and treated as capital receipt. AO completed the assessment accepting the claim of assessee. CIT revised holding that amount in question was revenue receipt. Tribunal set aside the order of Commissioner. On appeal by revenue dismissing the appeal to Court held that no attempt was to show that the AO's view was not possible one. Even otherwise there was enough material in law to indicating that the legal position is otherwise. In such circumstances, the impugned order of Tribunal was upheld.(AY.2005-06)
CIT .v. Grasim Industries Ltd. (2014) 226 Taxman 165 (Bom.)(HC)

S. 263 : Commissioner–Revision of orders prejudicial to revenue- Provision does not envisage separate recording of satisfaction before issue of notice- Alternative remedy-Writ petition is not maintainable. [S.253, Art.226]
The Commissioner received the records prior to the issuance of the notice and opined that the Assessing Officer failed to apply his mind objectively and failed to conduct an inquiry over the subscription to shares by various subscribers at a high premium. Section 263 does not envisage separate recording of the satisfaction before issuance of the notice and if it is clearly discernible from the facts narrated in the notice that the order of the Assessing Officer appears to be erroneous and prejudice is caused to the Revenue, it would render the notice legal and valid. The Commissioner had indicated this sufficiently in the notice and afforded opportunity to the assessee to file a reply thereto which, in fact, had been done. Whether the order was sustainable on the legal parameters or not, could be tested by a higher authority who had been bestowed with the power of appeal. Section 253 provides a remedy of appeal against an order passed under section 263 by the Commissioner and, therefore, the assessee could have recourse to such remedy. Writ petition was held not maintainable.
Zigma Commodities P. Ltd. .v. ITO (2014) 365 ITR 276 (Cal.)(HC)

S. 263 : Commissioner–Revision of orders prejudicial to revenue- Gifts-Gift from aunt-Revision was held to be not valid -Gifts from strangers-Revision was held to be valid.
Mere identification of donor and showing movement of gift amount through banking channels was held not sufficient to prove genuineness of gift. The burden on recipient is not only to establish identity of person making gift but also his capacity to make a gift and that it had actually been received as a gift. Since the recipient failed to do so, revision was held valid.
However, since one of the donors was the real aunt of the assessee the amount of Rs. 1 lakh gifted by her was to be excluded from the purview of fresh assessment proceedings. (AY. 2000-2001)
CIT .v. Rippen Ahuja (2014) 365 ITR 150 (P&H)(HC)

S. 263 : Commissioner-Revision of orders prejudicial to revenue-Two views-Transfer pricing-TPO's acceptance of ALP shows two views are possible & CIT has no jurisdiction to revise assessment.[S. 92CA]
The assessee filed a ROI for AY 2002-03 which was accepted u/s 143(1). The AO issued a notice u/s 148 dated 01.04.2004 to reopen the assessment. Before the assessee filed a ROI in response to the notice, the TPO issued a notice dated 12.04.2004 u/s 92CA seeking details about the international transactions entered into by the assessee with its group companies. The assessee thereafter filed a ROI on 21.04.2004. The TPO passed an order u/s 92CA in which he did not make any adjustments. The CIT passed an order u/s 263 setting aside the assessment order on the ground that it was erroneous and prejudicial to the interest of the revenue. On appeal by the assessee, the Tribunalquashed the CIT's order on the ground that (i) two views are possible when the TPO has accepted the arms' length valuation and the CIT had no jurisdiction to interfere with the said order u/s 263 & (ii) on the day the reference was made by the AO to the TPO, there was no return pending for consideration. On appeal by the department to the High Court HELD dismissing the appeal:
On the day the reference was made by the AO to the TPO, there was no return pending for consideration by him and therefore, the very reference was bad. Even otherwise, the said Transfer Pricing Authority did not find fault with the adjudication of determining arms length price by the Assessing Authority. In those circumstances, the CIT committed an error in exercising his power u/s 263 and the Tribunal was justified in interfering with the said order. (ITA No. 842 of 2008, dt. 25/08/2014.) (AY.2002-03)
CIT .v. SAP labs Pvt. Ltd(2014) 109 DTR 175 (Karn.)(HC)

S.263 : Commissioner - Revision of orders prejudicial to revenue –Foreign currency Convertible Bonds-Revision of order was held to be not justified.[S.37(1)]

During the relevant year assesse issued Foreign Currency Convertible Bonds (FCCBs).FCCB holders have exercised option to convert said bonds in to equity shares with in a period of one month from the date of issue of bonds. AO allowed the claim for deduction of expenditure incurred on FCCB.CIT held that FCCB's in real sense were equity shares right from the beginning and that conversion of bonds was only routine technical compliance as per regulations and guidelines. He accordingly passed an order under section 263 rejecting the assessee's claim for deduction of expenses. On appeal the Tribunal observed that the conversion is not automatic and that unless option was specifically exercised by bond holders , conversion thereof was not permissible .Accordingly the Tribunal held that the view taken by the AO was could not have been termed as prejudicial to interest of revenue .The Order of Commissioner was set aside. On appeal by revenue the Court held that Tribunal was justified in setting aside impugned revision order.(AY.1998-99)

CIT v. Tata Teleservices (Mah.) Ltd. (2014) 225 Taxman 5 (Bom.)(HC)

S. 263 : Revision-Revision of orders prejudicial to revenue- Merely because CIT held a different opinion holding that addition ought to be treated as undisclosed income-Revision was held to be invalid.

Assessee disclosed the amount received by it as advance towards sale of agricultural land. The A.O. treated the amount as business income of the assessee and taxed the same as such. The CIT invoked jurisdiction under section 263 of the Act and set aside the order of the A.O., merely because he held a different opinion that, the addition ought to have been made by the A.O. as undisclosed income was held not justified as the order of the A.O. could not be erroneous or prejudicial to the interest of Revenue. (AY. 1996 – 97)

CIT v. Hari Singh & Associates (2014) 102 DTR 306 / 267 CTR 442 (Raj.)(HC)

S.263:Commissioner-Revision of orders prejudicial to revenue –Survey-Reasonableness of the income offered has not been properly examined by the AO while making assessment –Revision of order was up held by the Tribunal-No substantial question of law.[S.133A, 143(3),260A]

A survey was conducted u/s. 133 A of the Act in the business premises of the Assessee Books of accounts and documents were impounded. The assessee proposed a particular estimation of income. It was proposed to estimate the income of the assesseeat an average rate of 2%of the income earned by the assessee's firm as per the assessee's proposal. However the income assessed by the AO in order u/s. 143 r.w.147 of the Act, was less than 2 %. This in view of the CIT was prima facie erroneous and prejudicial to the interest of the revenue. Order of revision was upheld by Tribunal.On appeal the Court held that the CIT found that the issue relating to reasonableness of income offered has not been properly examined by the AO while making assessment. It was also noted that the rate of 2% was mentioned in a vague manner in the assessment order without proper working. This finding was also verified by the Tribunal. The court therefore held that no question of law arose from the order of the tribunal. (AY. 2004-05)

Popular Mini Finance v. CIT (2014) 97 DTR 407(Ker.)(HC)

S. 263 : Commissioner–Revision of orders prejudicial to revenue- Deduction u/s.80HHF- profits and gains from export of Film Software - AO examined the matter in detail during the assessment proceedings- revision proceedings not valid u/s.263. [S. 80HHF, 143(3)]

Assessee claimed deduction u/s 80HHFof profits and gains from export of Film Software. During the original assessment proceedings u/s 143(3) AO delved deep into the issue of allowability of the deduction and allowed the deduction to the assessee. Commissioner initiated revision proceedings u/s 263 on few grounds including, inter alia, that the rights of the material exported remained with the assessee, then how can it be termed as an export. Accordingly, the commissioner set aside the assessment order after giving a finding that there was absence of proper enquiry. High Court held that AO during the assessment proceedings had examined the issue in great detail and was satisfied about the allowabilty of the deduction. Further, the commissioner did not give any valid reason as to why the order was erroneous. Consequently, it held that, one of the condition for invoking section 263 that

order being erroneous being not fulfilled, commissioner cannot set aside the order by invoking section 263. (A. Y. 2002-03)
CIT .v. New Delhi Television Ltd. (2014) 220 Taxman 43 (Mag.) (Delhi) (HC.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue – Assessment Order cannot be said to be prejudicial to interest of revenue merely because discussion not made. [S.143(3)]
While passing assessment order u/s 143(3), Assessing Officer had taken into account all details but also disallowed some expenditure and made addition wherever same was required. CIT(Appeals) thereby invoked revisionary powers u/s 263 on account of lack of enquiry. Tribunal concluded that decision of Assessing Officer could not be prejudicial to interest of revenue simply because it did not make detailed discussion as assessing Officer made enquiries on issue under consideration and assessee had given a detailed explanation by letter furnishing data. On appeal before High Court, dismissing the appeal, held that Assessing Officer has not only taken into account all the details, but also granted disallowance and addition wherever he found that the same are required to be given. It is not correct to say that the Assessing Officer did not consider all the details, as alleged. The findings of the learned Tribunal are in consonance with law and are correct.
CIT .v. Anand Food Products (2014) 220 Taxman 40 (Mag.) / (2013) 39 Taxmann.com 187 (AP) (HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - exemption of income from property held under trust – Permissibility of new plea [S.11,12A]
Assessee-trust filed nil return. The AO found that assessee had incurred more than 85 per cent of expenditure during year in question and allowed exemption under section 11 and section 12A. The Commissioner revised said order on ground that families of trustees had been paid interest in violation of terms of deed of trust, no proper records of the development fund were maintained and other discrepancies in depreciation and repayment of term loan. On appeal, the Tribunal upheld the order of the Commissioner. Before the High Court, the assessee took the plea that even if all such additions were made, still tax effect was nil and therefore, it could not be said that order of AO was prejudicial to interest of revenue. However, the High Court dismissed the appeal holding that, it had never been the stand of the assessee that even if the said aspects were taken into consideration, the income of the assessee would still be nil. In the absence of any plea that the additions made would not cause loss to the Revenue, the assessee would not be permitted to raise such questions in appeal without a factual basis. (AY. 2004-05)
Kandi Friends Educational Trust .v. CIT(2013) 357 ITR 84/40 taxmann.com 122 / (2014) 220 Taxman 50 (Mag.)(P&H)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue-Revision was held to be justified.
The Assessee maintained book of accounts of construction activities carried out abroad for which payment was received in foreign currency. Assessing officer opined that entire difference with Indian rupees credited to profit and loss account relate to fixed assets/long term liabilities, and thus exchange variation reserve account (EVR) was not liable to be taxed. The CIT passed a revision order u/s 263 with an observation that there is no mention of any reasons as to why entire EVR should relate to fixed assets. AO's silence on the issue is without meaning. On appeal, the Tribunal observed that CIT calculated the variation pertaining to three categories, i.e. income and expenditure, current assets and current liabilities and fixed assets – head office account/depreciation reserve, so it was for the assessee to explain. Hence the Tribunal dismissed Assessee's appeal. The High Court confirmed the remand to the lower authorities and declined to answer the questions of law in the said appeals. (AY. 1988-89 to 1990-91)
U. P. State Bridge Corpn. Ltd. .v. CIT (2014) 220 Taxman 13 (Mag.) (All.)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue -Expenditure incurred in relation to exempt income-Order is not erroneous unless CIT holds how it is erroneous [S.14A]
During the assessment year 2006-07, assessee had earned dividend income of Rs. 24,12,482 through investments made out of borrowed funds. After netting interest paid on loan obtained against interest

earned from deposits, assessee offered Rs. 94,47,712 as disallowance under section 14A. Assessing Officer had conducted inquiry and accepted disallowance which was surrendered by assessee. The CIT passed order u/s 263 and recorded that the assessing officer should have conducted further inquiries and correct disallowance should have been made under Section 14A read with Rule 8D. The Tribunal held that the Commissioner had not given or formed any opinion as to whether or not said disallowance was satisfactory or not, though Assessing Officer had applied his mind and accepted offer made by assessee. On further appeal the High Court held that the assessment order does not become erroneous because the assessing officer after verification accepts the claim/disallowance. It will be erroneous if the Commissioner holds that the finding recorded by the assessing officer is incorrect or contrary to law. In such matters, to remand the matter/issue to the Assessing Officer would imply and mean the Commissioner of Income-tax has not examined and decided whether or not the order is erroneous but has directed the Assessing Officer to decide the aspect/question. An order is not erroneous, unless the Commissioner of Income-tax hold and records reasons why it is erroneous. Therefore the application and appeal was dismissed. (AY. 2006-07)

CIT .v. Galileo India (P.) Ltd. (2014) 220 Taxman 115(Mag.) (Delhi)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - No proper notice to assessee but proper opportunity of being heard given to assessee–Order of revision was held to be valid.

CIT issued notice u/s.263 proposing to revise the assessment order but in the said notice it was mentioned that the assessment order was set-aside. However, the assessee was given a number of opportunities of being heard. Revision order was held to be valid. (AY.2007-08)

Ashutosh Bandopadhyay .v. CIT (2014) 363 ITR 168 /107 DTR 344/270 CTR 556(Tripura)(HC)

S.263: Commissioner - Revision of orders prejudicial to revenue –Housing project- Deduction was allowed withoutapplication of mind by Assessing Officer – Revision was held to be valid. [S.80IB(10)]

Assessing Officer even though taking a view that there existed possibility of violation of approved building plan, allowed assessee's claim for deduction under section 80-IB(10) as assessment was getting time barred, it being a case of non-application of mind, Commissioner was justified in setting aside assessment in exercise of revisional power (AY.2005-06 , 2006-07).

CIT .v.Abad Constructions (P.) Ltd (2014) 363 ITR 372/225 Taxman 151 (Mag.)/103 DTR 439 (Ker)(HC)

S. 263: Commissioner - Revision of orders prejudicial to revenue –Order must be erroneous and also prejudicial to revenue-Commissioner cannot invoke his revisional power to correct each and every mistakes committed by the AO [S. 11, 13]

In case of a charitable trust, it is only income from investment or deposit which has been made in violation of section 11(5) that is liable to be taxed and that violation under section 13(1)(d) does not tantamount to denial of exemption under section 11 on total income of assessee-trust. Revisional order held to be not valid. (AY.2000-01, 2001-02)

CIT .v.Fr. Mullers Charitable Institutions (2014) 363 ITR 230 (Karn.)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue-Derived- Deduction u/s. 80-I was allowed on Interest-Revision was held to be justified.

It was held that Deduction u/s. 80I having wrongly been allowed in respect of interest on short term deposit and transportation charges, as they are not derived from industrial undertaking, CIT was justified in exercising jurisdiction under s. 263.(AY 1993-1994,1994-1995).

Krishak Bharati Co-op Ltd .v. CIT (2014) 101 DTR 345 (Delhi)(HC)

S. 263: Commissioner– Revision of orders prejudicial to revenue-Error in computing income u/s.115JA and failure to apply s. 14A-Revision order was held to be justified.[S.14A, 115JA]

Revision order was held justified as the AO made error in computing income u/s.115JA and also failed to apply s.14A. (AYs. 2000-01, 2001-02)

CIT .v. Goetze (India) Ltd. (2014) 361 ITR 505/97 DTR 169/225 Taxman 133 (Mag.) (Delhi)(HC)

CIT v.Federal Mogul Goetage (India)Ltd (2014) 97 DTR 169(Delhi)(HC)

S.263: Commissioner–Revision of orders prejudicial to revenue- Block assessment-Order of Tribunal on block assessment attaining finality-Revision was held to be not valid.[S.143(3), 158BC]

There was no overlapping of the block assessment and the regular assessment made under s. 143(3). Thus, when the regular assessment procedures were kept intact providing for appeal, revision and other remedies, when the assessment made by the AO was erroneous and prejudicial to the interests of the Revenue, the Commissioner was justified in exercising his jurisdiction under s. 263.On the facts the Court held that facts found by the Tribunal that the transactions were reflected in the books of account and they were all genuine transactions and the order of Tribunal on the block assessment appeal having became final . Notice of revision solely on the basis of block assessment not valid for denying the deduction and depreciation. Accordingly the order of tribunal was seta side.(AY.1995-96, 1996-97)

Seshasayee Paper and Boards Ltd. .v. DCIT (2014) 360 ITR 483/97 DTR 416/265 CTR 405 (Mad.)(HC)

S.263: Commissioner–Revision of orders prejudicial to revnue-Erroneous and prejudicial to interests of revenue-Revision was held to be justified.[S.143(3)]

The Tribunal while analysing the issue confirmed that there was no application of mind while considering assessment under s. 143. The procedure adopted would have implication on tax computation. Held, original assessment order was not only erroneous but also prejudicial to interests of Revenue, and hence, s. 263 was rightly invoked by the Commissioner.

AppolloTyres Ltd. .v. DCIT (2014) 360 ITR 36/224 Taxman 143 (Mag) (Ker)(HC)

S.263: Commissioner – Revision of ordrs prejudicial to revenue-When an order passed under section 263 was set aside-Order passed in pursuance of revision order automatically becomes infructuous.[S.143(3)]

Where order of revision passed by Commissioner under section 263 was set aside , assessment order passed by Commissioner under section 143(3) in pursuance of such revision order automatically became infructuous. Appeal of revenue was dismissed.(AY. 2006-07)

CIT .v. Aditi Developers (2014) 223 Taxman 14(Mag.) (Bom.)(HC)

S.263: Commissioner - Revision of orders prejudicial to revenue –Allowed deduction without considering the provision of section 80IA(9),80IB(13)- Revision was held to be justified.[S.80HHC,80IA(9),80IB(13)]

AO allowed deduction u/s. 80IB as also under s. 80HHC without making any reference to the provisions of s. 80IB(13) and s. 80IA(9). The view taken the AO was unsustainable in law and therefore, revision by CIT was sustainable. (AYs. 2001-02 & 2003-04)

Broadway Overseas Ltd. .v. CIT (2014)98 DTR 73/223 Taxman 218(Mag.)/265 CTR 49(P&H)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue -

Transfer pricing - Aggregate value of international transactions entered into by assessee exceeded Rs. 5 crore, AO. did not refer matter to TPO in terms of Instruction No. 3-Revision order of Commissioner was up held.[S.92CA]

AO did not refer matter to TPO in terms of Instruction no 3 dated 20-05-2013 . Commissioner set aside assessment order . On appeal Tribunal held that in view of order in Ranbaxy Laboratories Ltd v.CIT (2012) 345 ITR 193 (Delhi(HC) , the revision order was held to be justified.(AY.2003-04)

Agilisys IT Services India (P.) Ltd. .v. CIT (2014) 149 ITD 176 / 41 taxmann.com 415 (Visakhapatnam)(Trib.)

S. 263 : Commissioner-Revision of orders prejudicial to revenue-Decision of the Assessing Officer cannot be held to be erroneous simply because in his order he does not make an elaborate discussion. [S.10B(3)]

It is trite that an order can be revised only and only if twin conditions of 'error in the order' and 'prejudice caused to the Revenue' co-exist. The subject of 'revision under section 263' has been vastly examined and analyzed by various Courts including that of Hon'ble Apex Court. The revisional power conferred on the CIT vide section 263 is of vide amplitude. It enables the CIT to call for and examine the records of any proceeding under the Act. It empowers the CIT to make or cause to be made such an enquiry as he deems necessary in order to find out if any order passed by Assessing Officer is erroneous in so far as it is prejudicial to the interests of the Revenue. The only limitation on his powers is that he must have some material(s) which would enable him to form a prima facie opinion that the order passed by the Assessing Officer is erroneous in so far as it is prejudicial to the interest of the Revenue. Once he comes to the above conclusion on the basis of the 'material' that the order of the Assessing Officer is erroneous and also prejudicial to the interests of the Revenue, the CIT is empowered to pass an order as the circumstances of the case may warrant. He may pass an order enhancing the assessment or he may modify the assessment. He is also empowered to cancel the assessment and direct to frame a fresh assessment. He is empowered to take recourse to any of the three courses indicated in section 263. So, it is clear that the CIT does not have unfettered and unchequred discretion to revise an order. The CIT is required to exercise revisional power within the bounds of the law and has to satisfy the need of fairness in administrative action and fair play with due respect to the principle of audialterampartem as envisaged in the Constitution of India as well as in section 263. An order can be treated as 'erroneous' if it was passed in utter ignorance or in violation of any law; or passed without taking into consideration all the relevant facts or by taking into consideration irrelevant facts. The 'prejudice' that is contemplated under section 263 is the prejudice to the Income Tax administration as a whole. The revision has to be done for the purpose of setting right distortions and prejudices caused to the Revenue in the above context. The fundamental principles which emerge from the several cases regarding the powers of the CIT under section 263 may be summarized below:

(i) The CIT must record satisfaction that the order of the Assessing Officer is erroneous and prejudicial to the interests of the revenue. Both the conditions must be fulfilled.

(ii) Section 263 cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer and it is only when an order is erroneous, that the section will be attracted.

(iii) An incorrect assumption of facts or an incorrect application of law will suffice for the requirement or order being erroneous.

(iv) If the order is passed without application of mind, such order will fall under the category of erroneous order.

(v) Every loss of revenue cannot be treated as prejudicial to the interest of the revenue and if the Assessing Officer has adopted one of the courses permissible under law or where two views are possible and the Assessing Officer has taken one view under with which the CIT does not agree, it cannot be treated as an erroneous order, unless the view taken by the Assessing Officer is unsustainable under the law.

(vi) If while making the assessment, the Assessing Officer examines the accounts, makes enquiries, applies his mind to the facts and circumstances of the case and determines the income, the CIT, while exercising his power under section 263, is not permitted to substitute his estimate of income in place of the income estimated by the Assessing Officer.

(vii) The Assessing Officer exercise quasi-judicial power vested in him and if he exercise such power in accordance with law and arrives as a conclusion, such conclusion cannot be termed to be erroneous simply because the CIT does not feel satisfied with the conclusion.

(viii) The CIT, before exercising his jurisdiction under section 263, must have material on record to arrive at a satisfaction.

(ix) If the Assessing Officer has made enquiries during the course of assessment proceedings on the relevant issues and the assessee has given detailed explanation be a letter in writing and the Assessing Officer allowed the claim on being satisfied with the explanation of the assessee, the decision of the Assessing Officer cannot be held to be erroneous simply because in his order he does not make an elaborate discussion in that regard.

Meditech .v. JCIT (Jodh.)(Trib.) www.itatonline.org

S. 263 : Revision- Revision of orders prejudicial to revenue - Share capital- Creation of shell companies and subscribing for shares at high premium constitutes tax evasion by money laundering. It is a case of clear human ingenuinity with the clear and contumacious intention to defraud the revenue-Revision was held to be valid.[S.56(viib)]

The first question comes to our mind is as to why this hurry in completing the reassessment proceedings especially when substantial time is still available and detailed inquiry is expected. Normally, once reopening is done by issuance of notice under section 148, the full time as available under the Act is used by the AO but conspicuously in all such cases the assessments are closed fast. These are special cases where within such a short period of issuance of notice under section 148, assessment stands concluded without any investigation or verification or inquiry worth its name. One is left wondering as to whether it is on purpose and design or whether it was in the normal course as this feature is special only to such companies where large share capital has been introduced.

It is relevant because the creation of the shell companies and introduction of the share capital is not the only issue that comes up. This is but the tip of the iceberg. A perusal of the Balance sheet and Profit & Loss account in the case of the assessee shows that the share application monies received by the assessee along with the premium are represented in the Balance sheet in the form of current assets being the unquoted equity shares in other such companies. That is the share application money received by the assessee is used for making further investments in other such similar shell companies from whom cash is taken and rerouted through cheques. These shell companies which are acquired by the interested third parties purchase these companies at a fractional amount of the value of the shares.

These are cases of clear human ingenuinity with the clear and contumacious intention to defraud the revenue. It is not the handiwork of one person alone. One person has created the shell, another has funded the shell with an intention to launder unaccounted funds and after having acquired the shell has used it for converting its funds also. There is no information as to who are the latest beneficiaries of such shell companies and for what purpose the companies are being used. This is just the reason why the provision of section 56(viib) has been introduced.

Receipt of share application money with huge share premium warranted detailed enquiry by the AO and not a perfunctory enquiry. (ITA No. 1493/Kol/2013., Dt. 19.09.2014.)(AY. 2008-09)

Bisakha Sales Pvt. Ltd. .v. CIT (Kol.)(Trib.); www.itatonline.org

S. 263 : Commissioner-Revision of orders prejudicial to revenue -Residence in India-Amendment to section 6(6)(a) has come w.e.f. from 01.04.2004, therefore, same was not applicable to Assessment year under consideration-Revision order was set a-side. [S. 6(6)]

Assessee employee of foreign company filed return of income claiming status of 'Resident but not ordinarily Resident'. CIT initiated proceedings u/s 263 based upon interpretation of section 6(6) and held assessee as Resident and accordingly directed AO to consider assessee's global income also. Assessee had claimed that he continued to be NOR as per provisions of section 6(6)(a) as he was not Resident in India in nine out of ten previous years preceding relevant previous year. Opinion of Assessee was supported by judgment of Hon'ble Supreme Court in case of Pradip J. Mehta vs. CIT (300 ITR 231) Held, reversing decision of High Court, that assessee was "not ordinarily Resident" in India within meaning of section 6(6)(a) as he was not Resident for 9 out of 10 years. A person would become an ordinary Resident only (a) f he had been residing in India in 9 out of 10 preceding years, and (b) he had been in India for at least 730 days in previous seven years."

Amendment to section 6(6)(a) has come w.e.f. from 01.04.2004, therefore, same was not applicable to Assessment year under consideration. In view of interpretation given by Hon'ble Supreme Court to then existing law, in a way AO excluded income earned outside India and ultimately assessee was taxed on income earned in India. Therefore, to that extent there was no prejudice caused to revenue on basis of interpretation of law relevant for assessment year 2003-04. Therefore, in our opinion order u/s. 263 by CIT was bad in law and order of AO was not erroneous or prejudicial to interests of revenue. Tribunal consequently, set aside order u/s. 263 passed by the CIT. Assessee's grounds were allowed. Appeal was allowed.(AY. 2003-04)

Mihir J. Doshi v. ACIT (2014) 61 SOT 14(URO.) /(2013) 26 ITR 652(Mum.)(Trib.)

S:263:Commissioner - Revision of orders prejudicial to revenue - AO allowed part deduction-Revision was held to be not valid.[S.80IA]

AO examined eligibility of assessee to claim deduction and held that assessee had fulfilled all conditions as prescribed under section 80-IA but he allowed part deduction to assessee as deduction in respect of profit earned by assessee from a contract with a builder and interest income on FDRs was inadmissible. Commissioner invoked its power u/s 263 on the ground that as per Explanation to section 80-IA, assessee was not eligible for deduction under section 80-IA and, thus, Assessing Officer did not carry out proper enquiries. Facts revealed that Assessing Officer after examination of records and recording clear facts had allowed part deduction to assessee. Therefore, the order passed by AO was in accordance with law and could not be said to be erroneous and liable for Revision u/s 263 of the Act.(2008-09)

Shree Narayan Built Up (I) (P) Ltd. v. CIT (2014) 61 SOT 79(URO)/(2013) 40 taxmann.com 104 (Agra)(Trib.)

S.263: Commissioner - Revision of orders prejudicial to revenue -Residence in India-Revision order was set a-side. [S. 6(6)]

Assessee employee of foreign company filed return of income claiming status of 'Resident but not ordinarily Resident'. CIT initiated proceedings u/s 263 based upon interpretation of section 6(6) and held assessee as Resident and accordingly directed AO to consider assessee's global income also. Assessee had claimed that he continued to be NOR as per provisions of section 6(6)(a) as he was not Resident in India in nine out of ten previous years preceding relevant previous year. Opinion of Assessee was supported by judgment of Hon'ble Supreme Court in case of Pradip J. Mehta vs. CIT (300 ITR 231) Held, reversing decision of High Court, that assessee was "not ordinarily Resident" in India within meaning of section 6(6)(a) as he was not Resident for 9 out of 10 years. A person would become an ordinary Resident only (a) f he had been residing in India in 9 out of 10 preceding years, and (b) he had been in India for at least 730 days in previous seven years."

Amendment to section 6(6)(a) has come w.e.f. from 01.04.2004, therefore, same was not applicable to Assessment year under consideration. In view of interpretation given by Hon'ble Supreme Court to then existing law, in a way AO excluded income earned outside India and ultimately assessee was taxed in income earned in India. Therefore, to that extent there was no prejudice caused to revenue on basis of interpretation of law relevant for assessment year 2003-04. Therefore, in our opinion order u/s. 263 by CIT was bad in law and order of AO was not erroneous or prejudicial to interests of revenue, Tribunal Consequently, set aside order u/s. 263 passed by the CIT. Assessee's grounds are allowed. Appeal was allowed.(AY. 2003-04)

Mihir J. Doshi .v. ACIT (2014) 61 SOT 14(URO.) / (2013) 26 ITR 652 (Mum.)(Trib.)

S.263:Commissioner-Revision of orders prejudicial to revenue–Detailed explanation was filed before the AO-Revision of order held to be not valid.[S.143(3),154]

Assessee filed several replies, as well as details,evidences before the AO.AO passed order u/s. 143(3). Tribunal held that the order of AO could not be said to be erroneous insofar prejudicial to interest of revenue. When all discrepancies were pointed out in rectification application u/s. 154, Commissioner should have verified all facts and should not have forwarded rectification application to A. O. for verifying discrepancies pointed out by assesse. Commissioner was not justified in revising assessment order in proceedings u/s. 263. (AY. 2009-10)

PyareLalJaiswal .v. CIT (2014) 146 ITD 555 / (2014) 41 taxmann.com 278 (All.)(Trib.)

S.263: Commissioner - Revision of orders prejudicial to revenue – Short term capital gains or business income – revision not justified - Computation of peak fund deficiency - excess outflow of cash not examined by AO - revision justified.

The Tribunal held that since the rate of tax for STCG and business income was the same, there was no loss to revenue and hence the pre-condition as mentioned in s. 263 i.e. 'prejudicial to the interest of the revenue' was not satisfied to the extent of taxing short term capital gains as business income. Further, the Tribunal also noted that closing stock was credited to the P&L under revenue-cost matching principle and this would not impact the profit from business. Accordingly, the revision proceedings initiated by the CIT for this too were quashed. The Tribunal observed that there was a huge difference in the 'peak fund deficiency' as calculated by AO and CIT, which showed that AO

had not applied his mind during the assessment proceedings and to that extent the revision powers exercised by CIT were justified and accordingly resorted the matter to the AO. (AY.2007-08)
K.V. Balagangadharan .v. DCIT (2014) 29 ITR 539 (Cochin)(Trib.)

S.263: Commissioner - Revision of orders prejudicial to revenue –Transfer pricing-Binding order-CIT cannot revise the TPO's transfer pricing order passed u/s 92CA(3). CIT also cannot revise s. 143(3) order because such order is not erroneous if it follows binding order of TPO.[S.92CA(3),143(3)]
The Commissioner cannot exercise revisionary jurisdiction u/s 263 on the transfer pricing order passed u/s 92CA(3) by the TPO. As regards the assessment order, it cannot be said to be "erroneous" because the AO is bound by the transfer pricing order u/s 92CA(4) is binding on the AO. Consequently, the CIT's order is without jurisdiction. (ITA No. 3121/Mum/2013, 20/12/2013) (AY. 2005-06)
Tata Communication Limited .v. DCIT (Mum.)(Trib.), www.itatonline.org

S.263: Commissioner - Revision of orders prejudicial to revenue –Autorised activities-There was enough material on record to hold that transfer of 'B' building to associate concern constituted authorized activity, hence there was no error in order of A.O. allowing deduction under section 80-IAB.Revision order was quashed.[S.80IAB,143(3)]
Assessee company is engaged in business of real estate development and leasing of constructed properties. Proposal for development of a sector in Special Economic Zone [SEZ] was granted by Board of approval [BOA]. Assessee claimed deduction under section 80-IAB in respect of profit derived from transfer of building. A.O. completed assessment u/s. 143(3) and allowed claim. Commissioner passed the order on the ground that the AO has allowed the claim without conducting proper enquiries and examining of its eligibility as envisaged in the approval of the BOA. On appeal tribunal held that, since there was enough material on record to hold that transfer of 'B' building to associate concern constituted authorized activity, there was no error in order of A.O. allowing deduction under section 80-IAB.Revision order was quashed .(AY. 2007-08)
DLF Info city Developers (Chennai) Ltd. .v. ACIT (2014) 146 ITD 123 / (2013) 37 taxmann.com 311/162 TTJ 531/103 DTR 322 (Delhi)(Trib.)

S.267:Amendment of assessment on appeal-Assessment-Limitation- Benefit of extended period of limitation to pass assessment order pursuant to finding/ direction of appellate authority not available if affected party not heard-Matter remanded.[S.153(3), 160,251]
In the assessment of the trust, the CIT(A) held that the trust was not valid and that its income had to be taxed in the hands of the trustees. The CIT(A), however, did not hear the trustees before issuing the said direction. Pursuant to the said direction, the AO passed an assessment order u/s. 267 r.w.s. 251 in the case of the trustee and assessed the income in his hands. The assessee filed an appeal before the Tribunal in which he claimed that as he was not given any opportunity of hearing by the CIT(A) at the stage of holding that the income of the trust was to be taxed in his hands, the assessment order was barred by limitation and not valid. HELD by the Tribunal:
U/s 267, the CIT(A) and Tribunal are empowered, while making a change in the assessment of a body of individuals or an association of persons, to direct the AO to amend/ make a fresh assessment on any member of the body or association. Under Explanation 3 to s. 153(3), the time limit for making an assessment in such a case of finding or direction does not apply provided such other person was given an opportunity of being heard before the said order was passed. The opportunity of hearing to the assessee in whose hands income of the assessee in appeal is to be added is a condition precedent for giving any finding adverse to such assessee vis-à-vis the time limits for completion of his assessment, reassessment or recomputations are concerned. That is the unambiguous scheme of Explanation 3 to s. 153(3). If an appellate authority does not do so, the affected assesseecannot be put to any disadvantage as far as the statutory time limits for completion of assessments, reassessment or recomputations. An opportunity to be so given should be a specific opportunity and the affected assessee is required to be put to notice on that issue. A general hearing given to the representative of the trusts in question cannot be equated with such specific opportunity to the affected assessee and the affected assessee being put to notice about the conclusions adversely affecting him. The scheme of the

Income Tax Act fiercely guards the rule of finality to income tax proceedings, whether in assessment, reassessment, revisions, rectifications or any other proceedings, and once the time limit for that course of action is over, the finality thereto cannot be disturbed except under the specific provisions of the Act. The only thing which can help the cause of the revenue is thus a specific notice of hearing having been given to the assessee before us, as mandated by Explanation 3 to s. 153(3). It is only when the AO can demonstrate that this assessee was given a specific opportunity of hearing, before the appellate order was passed in the cases of the Trust that the impugned assessment order can be treated as legally valid.Matter remnded.(AY. 2002-03)

Gaurav Luthara .v. ITO(2014)149 ITD 410/105 DTR 201/163 TTJ 129(Agra)(Trib.)

S. 269SS : Acceptance of loans and deposits–Exigency–Loan taken for discharge of another bank loan could have been taken by cheque-Failure to show reasonable cause-Levy of penalty was held to be justified.[S.271D].

The CIT (A) noticed that the plea of due exigency was not acceptable as the loan was taken for discharging another bank loan which could be by cheque as well. Held, the lower authorities had takena plausible view and it could not be said that there was error in their approach. Penalty u/s 271D was upheld. (A.Y. 2006-07)

Charan Dass Ashok Kumar .v. CIT (2014) 365 ITR 367 (P&H)(HC)

S. 269SS : Acceptance of loans and deposits–Reasonable cause - Agriculturists living in remote village–Identity of payers established- Cancellation of penalty was held to be justified. [S. 273B, 271D].

Instead of taking loan in account payee cheque or bank draft, assessee took loans in cash exceeding Rs. 20,000 from agriculturists living in remote village. The assessee not only substantiated evidence like 7/12 extracts from land records were produced, but, also additionally, transactions were reflected in accounts of assessee and advancement of loan to assessee had been reflected in books of account of those persons from whom loan had been received. Identity of those persons had also been well established. Assessee also had given satisfactory reasons for taking such loan. Held, since genuineness of the very transactions was never doubted by revenue authorities, and breach was due to reason that agriculturists were living in remote areas, default was to be treated as a mere technical or venial breach and penalty was not to be levied on assessee. (AY. 2006-07)

CIT .v. MAA Khodiyar Construction (2014) 365 ITR 474 (Guj.)(HC)

S. 269SS : Acceptance of loans and deposits - Otherwise than by account payee cheque or account payee bank draft-Book entries –Provision is not attracted. [S.269T, 271D, 271E]

As the transactions of loans & advances were not cash transactions and were merely book entries by way of adjustment entries, there is no violation of Section 269SS/269T of the Act and no question of levy of penalty u/s.271D/ 271E.(AY.1994-95)

CIT .v. Saurabh enterprises (2014) 269 CTR 451(All.)(HC)

S. 269SS : Acceptance of loans and deposits-Otherwise than by account payee cheque or account payee bank draft-Book entries-limitation-Bar in S. 269SS/ 269T does not apply to loans/ advances accepted/ repaid via journal entries- Limitation period for s. 271D penalty is as per s. 275(1)(c) & not 275(1)(a). [S. 271D, 275(1)(c), 275)(1)(a)]

PACL India Ltd purchased lands on behalf of assessee from several land owners. PACL made payments through demand drafts to the said land owners. The assessee showed the land in its books and the amount as being due to PACL. The AO passed an assessment order dated 30.12.2009 in which he held that the transaction amounted to a loan from PACL to the assessee which contravened s. 269SS/ 269T as it was not be 'account payee' cheque. A penalty order u/s.271D dated 10.03.2012 was passed for the said contravention. The said penalty was deleted on the ground that the penalty order was barred by limitation and also that s. 269SS did not apply to journal entries. On appeal by the department to the High Court HELD dismissing the appeal:

(i) Penalty u/s 269SS is independent of the assessment. The action inviting imposition of penalty is granting of loans above the prescribed limit otherwise than through banking channels and as such infringement of s. 269SS is not related to the income that may be assessed or finally adjudicated.

Accordingly, the time limit in s. 275(1)(a) would not be applicable. The time limit in s. 275(1)(c) is applicable.
(ii) On merits, no offence u/s 269SS is made out. S. 269SS applies to a transaction where a deposit or a loan is accepted by an assessee, otherwise than by an account payee cheque or an account payee draft. The section is restricted to transactions involving acceptance of money and not intended to affect cases where a debt or a liability arises on account of book entries. The object of the section is to prevent transactions in currency. This is also clearly explicit from clause (iii) of the explanation to s. 269SS which defines loan or deposit to mean "loan or deposit of money". The liability recorded in the books of accounts by way of journal entries, i.e. crediting the account of a party to whom monies are payable or debiting the account of a party from whom monies are receivable in the books of accounts, is clearly outside the ambit of s. 269SS because passing such entries does not involve acceptance of any loan or deposit of money. (AY.2007-08)
CIT .v. Worldwide township Project Ltd.(2014) 367 ITR 433/106 DTR 139 / 269 CTR 444(Delhi)(HC)

S. 269SS : Acceptance of loans and deposits-Otherwise than by account payee cheque or account payee bank draft-Audit report and balance sheet showing outstanding amount as loan received from twelve persons-Imposition of penalty was justified.[S.271DD]
The AO imposed the penalty mainly on the ground that the assessee firm had received the cash in excess of Rs.20,000/- in violation of section 269SS.The assessee contended that the persons who have paid the cash were supposed to be partners and the investment made by the respective partners capital account was genuine and there was no violation of section 269SS.The authorities and Tribunal on verification of the material on record came to the finding that the audit report and the balance sheet of the assesse had shown the outstanding amount as loans received from the twelve persons. On appeal the Court held that on facts and materials relied on by the assessee,it was found by the authorities that the contribution made by the respective persons was treated as a loan and the explanation that they were to be made partners later was not accepted.Hence, factual issues could not be reopened and challenged in appeal. The findings of fact by the authorities were nether perverse nor illegal in any form Appeal of assessee was dismissed. (AY. 2005-06)
Soundarya Textiles .v. ACIT (2014) 362 ITR 488 (Ker.)(HC)

S. 269SS : Deposits - Mode of taking/accepting Cheque discounting - Discounting of cheque does not amount to acceptance of deposit or loan within meaning of s. 269SS or s.269T. [S. 269T,271D]
Assessee was engaged in cheque discounting business. In the course of his business, he discounted post-dated crossed cheques of farmers who received those cheques from traders on sale of their produce. Transactions in question would not amount to loan or deposit in hands of assessee and, therefore, provisions of s. 269SS were not applicable and no penalty could be levied u/s. 271D. (AY.2006-07)
ITO v. Dineshchandra Shantilal Shah (HUF) (2014) 149 ITD 79 / (2013) 34 taxmann.com 187 (Ahd)(Trib.)

S. 269SS : Acceptance of loans and deposits-Otherwise than by account payee cheque or account payee bank draft-limitation-Journal entries-Penalty cannot be levied if the transactions are bona fide & genuine- The time limit for penalty u/s.271D & 271E is governed by s. 275(1)(c) & not 275(1)(a).[S.129,269T, 271D, 271E,273B,275(1)(c), 275(1)(a)]
The AO passed an assessment order dated 5.12.2011 in which he took the view that the act of the assessee of accepting and repaying loans and advances by way of journal entries was in contravention of s. 269SS & 269T of the Act as the said transactions were "not by way of account-payee cheque or demand draft". The Addl.CIT thereafter passed a penalty order dated 28.9.2012 by which he levied penalty u/s 271D and 271E for contravention of s. 269SS & 269T. Before the Tribunal the assessee argued (i) that the said penalty order was beyond the limitation period set out in s. 271(1)(c) and (ii) that the passing of journal entries did not attract the prohibition in s. 269SS & 269T. HELD by the Tribunal allowing the appeal:

(i) The time limit in s. 275(1)(a) covers those cases where the penalty proceedings are in respect of a default related to principal assessment for a particular assessment year and the penalty proceedings are required to be initiated in the course of that proceedings only. The time limit in s. 275(1)(c) applies to case where the penalty proceedings are independent and not directly linked to the assessment proceedings. The time limit for penalty u/s 271D/ 271E for contravention of S. 269SS & 269T falls under s. 275(1)(c) (ii) The acceptance and repayment of loans vide journal entries attracts s. 269SS & 269T as held in Triumph International 345 ITR 370 (Bom.). However, in that case penalty u/s.271E was deleted on the basis that there was "reasonable cause" u/s 273B as the transactions were bona fide and genuine and did not involve unaccounted money. On facts, there is no finding by the AO that the transactions constitute unaccounted money or that they are not bona fide or not genuine. The assessee's explanation for the journal entries, viz that they are alternate mode of raising funds, assignment of receivables, squaring up transactions, operational efficiencies/MIS purpose, consolidation of family member debts, correction of errors, etc are commercial in nature and not non-business. Also, what is the point in issuing hundreds of account payee cheques / account payee bank drafts between sister concerns of the group, when transactions can be accounted in books using journal entries, which is also an accepted mode of accounting? Journal entries should enjoy equal immunity on par with account payee cheques or bank drafts provided the transactions are for business purposes and do not involve unaccounted money and are genuine. In fact, such journal entries shall save large number of cheque books for the banks. There is consequently reasonable cause to delete the penalty. (ITA No. 476/Mum/2014, AY. 2009-10,dt.27.06.2014.)

Lodha Builders Pvt. Ltd. .v. ACIT(2014) 106 DTR 226/163 TTJ 778/34 ITR 157(Mum.)(Trib.)
Aadinath Builder (P) Ltd .v. ACIT(2014) 106 DTR 226 /163 TTJ 778(Mum.)(Trib.)
Aasthavinayak Real Estate (P) Ltd .v. ACIT(2014) 106 DTR 226/163 TTJ 778 (Mum.)(Trib)
Ajitnath Hi –Tech Builders (P) Ltd .v. ACIT(2014) 106 DTR 226/163 TTJ 778 (Mum.)(Trib)
Lodha Crown Buildment (P) Ltd.v. ACIT (2014) 106 DTR 226 /163 TTJ 778(Mum.)(Trib)
Lodha Properties Development (P) Ltd (2014) 106 DTR 226 /163 TTJ 778(Mum.)(Trib)

S. 269UD : Purchase by Central Government of immoveable properties – Order –No effort was made even to prima facie determine the fair market value- Action of compulsory action was held to be vitiated and bad in law.

Petitioner entered in to an agreement for transfer of its leasehold rights in a piece of land in their favour . Appropriate authority placing reliance upon sale instance of another property took the view that sale consideration disclosed by the assessee was understated hence passed the order under chapter XXC of the Act.The assessee challenged the said order. Allowing the petition the Court observed that it was noted from records that before passing the order appropriate authority had not even determined fair market value of property. Further,property under consideration was an open land situated outside limits of Municipal corporation where as comparable sale instance property was a constructed premises on first floor of a building which was situated within area of municipal corporation. The Court held that no effort was made even to prima facie determine the fair market value- Action of compulsory action was held to be vitiated and bad in law.

Indraprastha Premises (P) Ltd..v. UOI (2014) 225 Taxman 206(Mag.)(Bom.)(HC)

S. 271AAA : Penalty – Search initiated on or after 1st June, 2007 –Neither in the assessment order nor in the order imposing penalty there was discussion-Matter remanded.[S. 132(4),(264]

Assessee had not filed regular return for the year under assessment. Search & seizure Operation was conducted on 6/2/2009 itself i.e. during the continuance of the AY concerned. In its statement u/s 132(4) , the assessee submitted that the estimated tentative income on assumptive basis would be around 35 crores , but offered tax to an aggregate sum of Rs.60 crores . He also claimed to have specified the manner in which such income was derived and adduced documents to substantiate manner in which undisclosed income was derived. Accordingly the AO levied penalty u/s 271AAA. On revision Commissioner dismissed the petition and confirmed penalty by observing that above conduct shows that assessee has not acted in bonafides manner in filing initial return with lesser income, hence is liable for penal proceedings. In revision proceedings, CIT affirmed CIT's order without looking into these facts whether conditions u/s.271AAA(2) of the Act was complied.There was no discussion with respect to s/271AAA in the entire assessment order. The court held that CIT &

the AO respectively have not looked into this aspect of the matter, therefore the matter was remanded to the AO. The court referred the judgment of Apex Court in Competition Commission of India v.Steel Authority of India Ltd , 2010 JT 26 para 68." Clarity of thoughts leads to clarity of vision and therefore , proper reasoning is foundation of a just and fair decision". (AY. 2009-10)
Crossings Infrastructure (P) Ltd. .v. CIT (2014) 99 DTR 436 /267 CTR 519(All)(HC)

S.271AAA: Penalty – Search initiated on or after 1st June, 2007 –Failure to specify the manner in which undisclosed income had been derived, penalty cannot be levied in the absence of query by the authorized officer during course of statement under section 132(4).[S.132(4),271(1)(c),Explanation 5]
On basis of certain documents found and seized during search at his premises, assessee surrendered certain amount as undisclosed income and also paid tax due thereon. In statement u/s. 132(4), assessee stated income was derived from forward/speculative and property transactions carried out in F.Y. 2009-2010.Being not satisfied with assessee's explanation, A.O. imposed penalty. The Tribunal held that when authorized officer had not raised any query during course of recording of statement under section 132(4) about manner in which undisclosed income had been derived and about its substantiation. A.O. was not justified in imposing penalty under section 271AAA, specifically when offered undisclosed income had been accepted and taxes due thereon had been paid by assessee.(AY.2010-2011)
Neerat Singal .v. ACIT (2014) 146 ITD 152 / (2013) 37 taxmann.com 189 /161 TTJ 483/101 DTR 238(Delhi)(Trib.)

S.271(1)(c): Penalty–Concealment-Non-offering of stamp duty/DVO value as consideration for capital gains does not attract penalty if facts are on record.[S.50C]
The assessee was the owner of office premises which were sold in AY 2004-05 for Rs. 2 crore. The AO noted that the stamp duty valuation of the property was Rs.3,72,42,000 and that the DVO had valued the property at Rs. 2,70,03,920. The value adopted by the DVO was taken as the consideration for sale of the property u/s 50C and capital gains was assessed on that basis. The assessee accepted the same. The AO levied penalty u/s 271(1)(c) for furnishing inaccurate particulars of income. This was upheld by the CIT(A) though deleted by the Tribunal. Before the High Court, the department relied on Chuharmal vs. CIT (1988) 172 ITR 250 (SC) and argued that even though s. 50C created a liability for deemed income, still penalty u/s 271(1)(c) could be levied. HELD by the High Court dismissing the appeal:
The Tribunal finding that the case was not one of furnishing inaccurate particulars of income or of concealment inasmuch as there was a registered sale deed and the consideration was mentioned therein cannot be faulted. Also, the DVO determined the value at a figure from that of the stamp value. The larger question posed for consideration as to whether s. 271(1)(c) penalty can apply to deemed income is left open for consideration in an appropriate case. (ITA No. 1164 of 2012, dt. 26/09/2014.)
CIT .v. Foutune Hotels and Estates Pvt. Ltd.(Bom.)(HC) www.itatonline.org

S.271(1)(c):Penalty-Concealment-Accrual of income. The word "conceal" inherently and per-se refers to an element of mens rea, albeit the expression "furnishing of inaccurate particulars" is much wider in scope-Penalty should not be imposed if the contention of the assessee was plausible and bona fide. Of course full facts should be disclosed. While applying the test of bonafide, we have to also keep in mind that even best of legal minds can have difference of opinion. It is not uncommon to have dissenting opinion on the question of law, in the courts.
The word "conceal" inherently and per-se refers to an element of mens rea, albeit the expression "furnishing of inaccurate particulars" is much wider in scope. The word "conceal" implies intention to hide an item of income or a portion thereof. It amounts to suppression of truth or a factum so as to cause injury to the other. (See CIT vs. A. Subramania Pillai [1997] 226 ITR 403 (Mad). The word 'conceal' means to hide or to keep secret. As held in Law Lexicon, the said word is derived from the latin word 'concelare' which implies 'con' & 'celare' to hide. It means to hide or withdraw from observation; to cover or keep from sight; to prevent discovery of; to withhold knowledge of. The word 'inaccurate' in Webster's Dictionary has been defined as 'not accurate; not exact or correct; not

according to truth; erroneous; as inaccurate statement, copy or transcript'. The word 'particular' means detail or details of a claim or separate items of an account [see Commissioner of Income Tax vs. Reliance Petroproducts Pvt. Ltd**.** [2010] 322 ITR 158(SC)]. Thus the words "furnished inaccurate particulars" is broader and would refer to inaccuracy which would cause under-declaration or escapement of income. It may refer to particulars which should have been furnished or were required to be furnished or recorded in the books of accounts etc. [See CIT vs. Raj Trading Co. (1996) 217 ITR 208 (Raj.)] Inaccuracy or wrong furnishing of income would be covered by the said expression, though there are decisions that adhoc addition per se without other or corroborating circumstances may not reflect "furnished inaccurate particulars". Lastly, at times and it is fairly common, the charge of concealment and "furnishing of inaccurate particulars" may overlap.

Primary issue which arises for consideration is whether the conduct of the assessee was bonafide. We have used very strong words like erroneous, fallacious, untenable etc. with reference to various contentions and submissions made by the assessee in the quantum appeal, but we do not think we will be contradicting ourselves when we hold that the conduct of the assessee was bonafide and the onus to show and establish bonafides has been discharged. The observations and adjectives used by us in the quantum appeal rejecting the submission of the assessee have been made after having advantage and benefit of the assessment order, appellate orders and hearing arguments of the counsel for the appellant assessee and the Revenue. Hindsight results in greater clarity and wisdom. Test of bona fide has to be applied keeping in mind the position as it existed, when the return of income was filed. The Act, i.e. the Income Tax Act, is a complex legislation involving intricate and often debatable legal positions. The legal issue involved may relate to principles of accountancy. Invariably, on questions of interpretation, the assessees do adopt a legal position which they perceived as most beneficial or suitable. This would not be construed as lack of bona fides as long as the legal position so adopted is not per se contrary to the language of the statute or an undebatable legal position not capable of a different connotation and understanding. When two legal interpretations were plausible and there was a genuine or credible plea, penalty for concealment/furnishing of inaccurate particulars, should not and cannot be imposed. If the view taken by the assessee required consideration and was reasonably arguable, he should not be penalized for taking the position. The tax statutes are convoluted and complex and there can be manifold opinions on interpretation and understanding of a provision or the tax treatment. In such cases, even when the interpretation placed by the Revenue is accepted, penalty should not be imposed if the contention of the assessee was plausible and bona fide. Of course full facts should be disclosed. While applying the test of bonafide, we have to also keep in mind that even best of legal minds can have difference of opinion. It is not uncommon to have dissenting opinion on the question of law, in the courts.

New Holland Tractors (India) Pvt. Ltd. .v. CIT (Delhi)(HC);www.itatonline.org

S. 271(1)(c): Penalty –Concealment-Search and direction for special audit - Discrepancies in accounts found by special auditor--No explanation regarding discrepancies-Assessment on basis of estimate--Reduction of estimate not relevant--Income concealed by assessee-Imposition of penalty was held to be justified.[S. 142(2A)]

Held, allowing the appeal, that the number of discrepancies and irregularities listed by the special auditor in his report which were reproduced in the assessment order bore testimony to the fact that the books of account maintained by the assessee were wholly unreliable. The Assessing Officer gave due opportunity to the assessee to explain the discrepancies and also to show why the profit rate of 11 per cent. could not be adopted but these opportunities were not availed of by the assessee. He also had recorded in the assessment order that the assessee was permitted to inspect the seized documents and was given photocopies of the desired documents. This was not denied by the assessee. In these circumstances, the mere fact that the estimate was reduced by the Tribunal to 8 per cent.would in no way take away the guilt of the assessee or explain its failure to prove that the failure to return the correct income did not arise from any fraud or any gross or willful neglect on its part. The imposition of penalty was justified.(AY. 1995-96)

CIT .v. Kalindi Rail Nirman Engg. Ltd. (2014) 365 ITR 304 (Delhi) (HC)

S. 271(1)(c) : Penalty-Concealment-Setoff and carry forward of loss of earlier years-Belated filing of return-No penalty is leviable.[S. 72,139(1), 139(4)

The assesse claimed setoff and carry forward of loss of earlier years which was disputed by the revenue that assessee ought not to have claimed setoff of loss carried forward of the AY: 1998-99 despite the assesse being informed by the revenue wherein it was clearly informed that he was not entitled to carry forward the business loss since the return of income for the ay; 1998-99 was filed belatedly , was not sustainable . The revenue levied penalty u/s 271(1)(c) of the act for the concealment & filing inaccurate particulars of income . Dismissing the penalty court held that assessee claimed setoff of the loss carried forward of the AY: 1998-99. Merely because the assesse claimed set off of the loss carried forward would not mean that there was concealment of income as alleged or such claim would amount to furnishing inaccurate particulars. As a matter of fact, the particulars that were furnished were based on the facts of loss. It was not in dispute that the assessee did not suffer loss or the loss shown in the return for A.Y: 1998-99 was not suffered by the assessee. That being so, claiming set off of the loss carried forward of the A.Y: 1998-99 would not amount to furnishing inaccurate particulars of income. That being so, claiming set off of the loss carried forward of the A.Y: 1998-99 would not amount to furnishing inaccurate particulars of Income. That would amount to furnishing incorrect return of Income. Court further held that assessee who is otherwise not entitled to claim set off of the loss carried forward of the A. Y : 1998-99 would not amount to furnishing inaccurate particulars of income . Court further held that assesse who is otherwise not entitled to claim set off of the loss carried forward of the business should avoid making such claim . But such claim would not attract levy of penalty. (AY.2002-03)

CIT .v. Makino Asia (P) Ltd. (2014) 264 CTR 172(Karn.)(HC)

S.271(1)(c):Penalty-Concealment-Revised return-Long term capital gains on sale of agricultural land-Levy of penalty was held to be not justified.[S.148]

Assessee filed original return of income. On receiving 148 notice, revised return of income was filed by the assesse which was accepted by the AO. Penalty proceeding was initiated against assesse considering it as a deliberate concealment of Income. CIT (A) cancelled penalty. On an appeal in Tribunal, Tribunal upheld CIT (A)'s order. On further appeal in HC, HC held that CIT(A) & Tribunal both have considered the matter in detail and finally arrived at conclusion that the income declared by the assessee from the Long Term Capital Gain by selling agricultural land , was disclosed by the assesse in his return of Income filed u/s 148 which was accepted by the assessing authority and there was no material available on record by which there could be inference drawn by the authority that it was a deliberate concealment on the part of assessee and it could not be considered that there was inaccurate particulars of Income that was made the basis for inflicting penalty u/s. 271(1)(c) of Act. (AY.2004-05)

CIT v. Puspendra Surana (2014) 264 CTR 204 (Raj.)(HC)

S.271(1)(c):Penalty–Concealment-Merely because the quantum appeal is admitted by High Court penalty does not become unsustainable .

The court held that admission of a tax appeal by the High Court, in many a cases is ex parte and without recording even prima facie reasons. Further the admission of a tax appeal by the High Court only indicates that a prima facie case has been made out and the court feels that the issue requires further consideration, Mere admission of an appeal by the High Court cannot be an indication that the issue is debatable one so as to delete the penalty under section 271(1)(c), unless there is some indication in the order of admission itself that the issue is a debatable one. (ITA no 189 of 2014 dt 9-06-2014)(AY. ?)

CIT v. Dharamshi Shah (Guj.)(HC)(Un reported)

S.271(1)(c):Penalty-Concealment-Revision-Penalty cannot be levied in the absence of satisfaction recorded by the Commissioner under section 263.[S.263]

Commissioner directed the AO to complete the assessment. Commissioner neither recorded the satisfaction about the concealment nor gave any such directions to the AO for initiation of penalty proceedings. Assessment in pursuance to revision initiated the penalty proceedings . Court held that in an assessment pursuant to section 263 , the AO cannot levy penalty , in absence of any satisfaction recorded by Commissioner.(ITA no 541 of 2013 dt 27 -05-2014)

CIT v. Padmini Mishra (Delhi)(HC) (Un reported)

S.271(1)(c):Penalty-Concealment-Recording of satisfaction-There being no specific direction in the AO's order for initiation of penalty proceedings, Tribunal was justified in setting aside the order imposing penalty , more so when there was no finding as to concealment.[S.271(IB)]

Assessee made a claim of diminution in value of investment. On scrutiny, when explanation was sought for, said claim was withdrawn. Assessing Authority was not satisfied that there was any concealment. However, at end of assessment order, it was merely written that 'Penalty under section 271(1)(c) be initiated separately'. The AO levied the penalty. Tribunal set aside the order levying penalty. On appeal by the revenue the Court held that a direction by a statutory authority should be in nature of an order requiring positive compliance and when an option is left open to income tax officer, whether or not to take action, such a writing cannot be described as a direction. In such circumstances penalty under section 271(1)(c) could not be levied, as there was no concealment and, furthermore, no direction for initiation of penalty proceeding could be gathered from assessment order. Mere mention of 'Penalty proceedings under section 271(1)(c) initiated separately' in assessment order, does not amount to a direction under section 271(1)(c) for levy of penalty. Order of Tribunal cancelling the levy of penalty was up held.(AY. 2002-03)

CIT v. MWP Ltd. (2014) 97 DTR 395 (Karn.)(HC)

S.271(1)(c):Penalty-Concealment-Disallowance of claim-Liquidated damages on delay in execution of work-Levy of penalty was not justified.[S.37(1)]

Assessee entered into a contract with a company named HIML for supply, procurement and erection of automobile assembly equipment. Contract provided for a clause by which HMIL could claim liquidated damages from assessee for delay caused in executing work. Though HMIL did not invoke said provision, assessee took precaution and provided for penalty and, claimed same as deduction in earliest point of time as provision for liquidated damages. Assessing Officer disallowed said claim on ground that no such claim was raised against assessee by HMIL. Further, he levied penalty. Tribunal deleted the penalty.On appeal by revenue the Court held that, penalty being a civil liability, requirement of mens rea is not an essential element, but claim of assessee should be bona fide and mere submission of inaccurate particulars by itself cannot be held against assesse. On the facts the assessee's claim for deduction could not be stated to be lacking in bona fides or with mala fide intention and, thus, concealment penalty was not leviable, therefore deletion of penalty by the Tribunal was held to be justified .(AY.1998-99)

CIT v. Durr India Pvt.Ltd. (2014) 97 DTR 160(Mad.)(HC)

S.271(1)(c):Penalty-Concealment-Addition on account of shortage of stock-Surrender of income-Levy of penalty was held to be not justified.[S.133A]

Addition was made by the AO on shortage of stock. It was the case that the assessee has given reasonable explanation for excess of stock. It was also the case that the assessee had disclosed in the return and also had paid tax on the surrendered income and the AO had accepted the return filed by the assessee in this regards. Both the appellate authorities observed that there was no deliberate or intentional concealment and therefore on this count penalty could not be imposed. On appeal by revenue the court held that it was not a deliberate intention of the assessee and interference with the penalty imposed would arise only if it is found and established that the concealment was deliberate. Once the concurrent findings with regards to excess stock is held not to be a concealment, no question of law arises. (AY. 2001- 02)

CIT .v. Home De Royal (2014) 97 DTR 374 (MP)(HC)

S. 271(1)(c) : Penalty – Concealment-Disallowance of claim-Levy of penalty was held to be not justified.

Court held that merely because the assesse raised a claim which was eventually disallowed that did not mean that the ingredients of clause (c) were satisfied or fulfilled so as to justify imposing of a penalty. Such a finding essentially based on the facts and in the circumstances peculiar to the assesse , did not raise any substantial question of law. Court awarded cost of Rs 1lakh each on the revenue for filing unwarranted appeals. Followed CIT v. Reliance Petroproducts Pvt Ltd (2010) 322 ITR 158 (SC)

CIT v. Larsen and Toubro Ltd (2014) 366 ITR 502 (Bom)(HC)

S. 271(1)(c) : Penalty – Concealment – Assessed Income is a loss

The Tribunal deleted the penalty on the ground that the assessed income is loss. On appeal by revenue to High Court, penalty was confirmed on the basis that as per Explanation 4(a) to section 271(1)(c) (which was substituted by the Finance Act, 2002, with effect from April 1, 2003) is retrospective in operation as held by decision of Apex Court in CIT .v. Gold Coin Health Food (P.) Ltd. [2008] 304 ITR 308]) penalty is leviable not only in a case where after addition of concealed income, a loss returned, after assessment becomes positive income but also in a case where addition of concealed income reduces the returned loss and finally the assessed income is also a loss or a minus figure. (AY. 1990-91)

CIT .v. Balaramakrishna Engineering Contractor Corporation (2013) 356 ITR 524 / 38 Taxmann.com 135 / (2014) 220 Taxman 91(Mag.) (AP)(HC)

S. 271(1)(c) : Penalty – Concealment – Disallowance made on account of curtailment of deduction under section 80-IB, duty drawback and dividend income from foreign companies was offered to tax by assessee voluntarily – No penalty. [S.80IB]

During assessment, deduction claimed under section 80-IB of the Act was curtailed, duty draw back was disallowed and dividend income from foreign companies was taxed. Thereby Penalty was levied. CIT(Appeals) and Tribunal deleted the penalty on the basis that amounts were offered to tax by the assessee on its own and not after detection on the part of the Assessing Officer. On appeal by revenue to High Court, Tribunal's order was upheld. (AY. 2001 – 02)

CIT .v. Blue Star Ltd. (2013) 357 ITR 669 / 40 Taxmann.com 109 / (2014) 220 Taxman 91(Mag.) (Bom.)(HC)

S. 271(1)(c) : Penalty – Concealment - Mere admission of Appeal by High Court on substantial question of law is sufficient to disbar levy of concealment penalty. [S.260A]

In quantum proceedings, the Tribunal upheld the addition of three items of income. The assessee filed an appeal to the High Court which was admitted. The AO levied penalty u/s 271(1)(c) in respect of the said three items. The penalty was upheld by the CIT (A). The Tribunal deleted the penalty on the ground that when the High Court admits substantial question of law on an addition, it becomes apparent that the addition is certainly debatable. In such circumstances penalty cannot be levied u/s 271(1) (c). It held that the admission of substantial question of law by the High Court lends credence to the bona fides of the assessee in claiming deduction. It added that once it turns out that the claim of the assessee could have been considered for deduction as per a person properly instructed in law and is not completely debarred at all, the mere fact of confirmation of disallowance would not per se lead to the imposition of penalty. On appeal by the department to the High Court HELD dismissing the appeal:

This Appeal cannot be entertained as it does not raise any substantial question of law. The imposition of penalty was found not to be justified and the Appeal was allowed. As a proof that the penalty was debatable and arguable issue, the Tribunal referred to the order on Assessee's Appeal in Quantum proceedings and the substantial questions of law which have been framed therein. We have also perused that order dated 27.09.2010 admitting Income Tax Appeal No.2368 of 2009. In our view, there was no case made out for imposition of penalty and the same was rightly set aside.(ITA No. 415 of 2012, dt. 08/07/2014.)

CIT .v. Nayan Builders and Development (Bom.)(HC) www. itatonline.org

S. 271(1)(c) : Penalty – Concealment – Revised Return-levy of penalty was held to be not valid.

It was held that mere fact that the assessee could not obtain confirmation letter of the outstanding entries from only five traders out of twenty in no manner can be said that in his return, he mentioned inaccurate particulars and hence Penalty under s. 271(1)(c) was not leviable. (AY. 1991-92)

CIT .v. Mathura Commercial Co. (2014) 101 DTR 371 / 45 taxmann.com 515 / 226 Taxman 109 (All)(HC)

to give confirmation letters.The case of the assessee was not a case of mentioning of inaccurate particulars or concealment. Appeal of revenue was dismissed. (AY. 1991-91)

CIT .v. Mathura Commercial Co. (2014) 361 ITR 380 (All.)(HC)

S. 271(1)(c): Penalty–Concealment-Wrong claim of deduction–Explanation bona fide-No penalty was imposable.

It is only when there is an attempt to evade tax by offering an explanation which is found to be false or not bona fide, that penalty can be imposed. A wrong claim was made for deduction and an explanation was

S.271(1)(c):Penalty–Concealment-Nonfurnishing of confirmations from traders–Levy of penalty was not justified.

Assessee could not obtain confirmation letters from five out of 15 traders as those traders left the town during communal riots or otherwise refused

offered; in the absence of a finding that the assessee had failed to prove such explanation was bona fide, no penalty could be imposed. As long as there was no finding by the Commissioner (Appeals) that the explanation offered was not a bona fide one, the imposition of penalty for the first time in the appellate proceedings was illegal.

CIT .v. Sandur Manganese and Iron Ores Ltd. (2014) 362 ITR 160 (Karn.)(HC)

S.271(1)(c):Penalty–Concealment-Lease found bogus–Depreciation-Sale and lease back-Penalty was held to be justified.[S.133A]

Depreciation was claimed on lease. However, the lease was found to be bogus. Hence, penalty was rightly levied. (AY. 1997-1998)

CIT .v. BPL Sanyo Finance Ltd. (2014) 362 ITR 630 (Karn.)(HC)

S.271(1)(c):Penalty-Concealment-Book profits-Penalty for concealment cannot be levied under normal provisions if the income is assessed on the basis of book profits.[S.115JB]

No doubt, there was concealment but that had its repercussions only when the assessment was done under the normal procedure. The assessment as per the normal procedure was, however, not acted upon. On the contrary, it is the deemed income assessed u/s 115JB which has become the basis of assessment as it was higher of the two. Tax is thus paid on the income assessed u/s.115JB. Hence, when the computation was made u/s.115JB, the concealment had no role to play and was totally irrelevant. Therefore, the concealment did not lead to tax evasion at all and no penalty u/s.271(1)(c) is leviable.

CIT .v. Jindal Polyester & Steel Ltd.(2014) 365 ITR 225/221 Taxman 30 / 105 DTR 253 (All.)(HC)

S.271(1)(c):Penalty-concealment-Satisfaction-If, in the assessment order, AO directs initiation of penalty on specific issues but not on others, he is not entitled to levy penalty on the other issues.[S.271(IB].

Section 271(1)(c) empowers the AO, where he is satisfied in the course of any proceedings under the Act that the assessee had concealed the particulars of his income or furnished inaccurate particulars of such income, to direct the payment of penalty. Sub-section (1B) was inserted with retrospective effect from 01.04.1989 to provide that where any amount is added or disallowed in computing the total income or loss of an assessee and the assessment order contains a direction for initiation of penalty proceedings, such an order of assessment shall be deemed to constitute satisfaction of the AO for initiation of penalty proceedings under s. 271(1)(c). In order that the deeming fiction in sub-section (1B) must apply, two requirements must be fulfilled. The first requirement is that an amount must have been added or disallowed in computing the total income or loss of an assessee in any order of assessment or reassessment. The second is that the order of assessment must contain a direction for the initiation of penalty proceedings under clause (c) of sub-section (1) of s. 271. Where both the conditions as aforesaid are fulfilled, the order of assessment must be deemed to constitute satisfaction of the AO for initiating penalty proceedings. In the present case, it is abundantly clear that in respect of those heads where the AO considered it appropriate to initiate penalty proceedings u/s 271(1)(c), he made a specific direction to that effect. In respect of the claim of interest on the SDF loan, there is no direction by the AO. The absence of a reference to the initiation of proceedings u/s 271(1)(c) is not an inadvertent omission since it is clear that in respect of several other heads, where the AO did consider

it appropriate to initiate penalty proceedings, he made an observation to that effect. In fact, even in the concluding part of his order, the AO issued a direction for initiating penalty notice u/s 271(1)(c) "as discussed above". The expression "as discussed above" is material because it refers to those heads in respect of which a specific direction was issued by him for initiating steps u/s 271(1)(c). (ITA No. 103 of 2014. dated;26/05/2014.)

CIT .v. Triveni Engineering & Industries Ltd. (All.)(HC),www.itatonline.org

S. 271(1)(c): Penalty–Concealment-Bona fide claim-Exemption from capital gain-Agricultural land-Deletion of penalty was held to be justified.

The assessee annexed a note to the return claiming exemption from capital gains tax. He pleaded before the AO that the property was situated beyond 8 kms from the municipal limits of Sonepat. After collecting information regarding the distance from various authorities, the AO came to the conclusion that the property was situated within 8 kms of the municipal limits of Sonepat. Consequently, the AO rejected the claim of the assessee and brought the capital gains to tax. He levied penalty. The Tribunal noticed that the assessee had furnished a certificate dated June 19, 1996, from the Sub-Divisional Engineer Maintenance Sub Division, B & R wherein it was specified that the distance from Sonepat Municipal Committee to village Kamaspur, Tehsil and District Sonepat was 8.2 kms. It was also noticed that there were various certificates wherein different distances had been mentioned. After considering the matter, the Tribunal came to the conclusion that there was no intention on the part of the assessee to furnish inaccurate particulars. Held, order of the Tribunal was justified.(AY.1996-97)

CIT .v. Rajiv Bhatara (2014) 360 ITR 121 (P&H)(HC)

S.271(1)(c):Penalty-Concealment-Disallowance of claim under section 80IA-Quantum was confirmed by Tribunal-Levy of penalty was not justified.

Assessee filed the return of income claiming the deduction under section 80IA.In appeal Tribunal dismissed the claim of assesse in respect of deduction under section 80IA, however the penalty was deleted. On appeal by revenue dismissing the appeal the court held that as the claim was bonafide, mere disallowance of claimlevy of penalty was not justified.(AY.1994-95)

CIT .v. Petals Engineers (P) Ltd (2014) 223 Taxman 15(Mag.)/264 CTR 577/97 DTR251(Bom.)(HC)

S. 271(1)(c) : Penalty – concealment-Reassessment-Disclosure after reassessment notice- Levy of penalty was justified only in first assessment year.[S.148].

Tribunal held that assessee, at first instance, had not accounted for amount in question and when notice under section 148 was issued then only assessee chose to disclose receipt, therefore levy of penalty was justified when assessee had been continuing with this practice of alleged concealment and furnishing inaccurate particulars in all six assessment years. Adopting 'Doctrine of continuity' and concurrence penalty was confirmed only in first assessment year.(AY. 2000-01 to 2005-06)

Dr.BapujiCherukuri .v. Dy.CIT (2014) 149 ITD 502 / (2013) 21 ITR(T) 714 /33 taxmann.com 406 (Chennai)(Trib.)

S. 271(1)(c) : Penalty–Concealment- Disallowance on Transfer pricing provision-Levy of penalty was not justified.[S.92C]

The Tribunal held that the disallowance of an amount that too on transfer pricing provisions does not attract penalty as it cannot be considered as either the concealment of income or furnishing of inaccurate particulars. (A.Y. 2005-06)

TNS India (P) Ltd. .v. ACIT (2014) 163 TTJ 576 (Hyd.)(Trib.)

S. 271(1)(c) : Penalty – Concealment – Capital gains-Wrong claim of exemption-Surrender of claim of exemption-Levy of penalty was held to be justified. [S.54B]

The assessee declared the capital gain as long term capital gain and never filed any revised return before the issue of notice under section 143(2) and mistake was not brought to the notice of the Assessing Officer suo motu before it was detected by the Department where after the assessee had to

surrender the claim of exemption. The CIT(A) was not justified in deleting the penalty levied by the Assessing Officer. (A.Y. 2007-08)
ACIT .v. Vinay A. Joneja (2014) 163 TTJ 652 (Pune)(Trib.)

S. 271(1)(c):Penalty-Concealment-Depreciation-Finance lease-Wrong claim for depreciation by showing a finance or loan transaction as a lease transaction-Levy of penalty was held to be justified.
Tribunal held that the detailed findings of the AO, the assessee not agitating the findings of the AO in quantum proceedings, no plea of factual discrepancies during quantum proceedings and appeals, even no such plea before AO during penalty proceedings and no rebuttal to the findings of the AO that the transactions were bogus and sham are sufficient facts to hold that the assessee had put a false claim of depreciation during the assessment proceedings. The plea of the assessee that he did not contest the addition to avoid litigation or to buy peace etc. even does not seem plausible. The Hon'ble Supreme Court, in the case of "MAK Data P. Ltd. vs. Commissioner of Income Tax-II" civil appeal No.9772 of 2013 date of decision 30.10.13, has categorically held that it is the statutory duty of the assessee to record all its transactions correctly and to clear its true income in the return of income. The AO should not be carried away by the plea of the assessee like "voluntary disclosure", "buy peace", "avoid litigation", "amicable settlement", etc. to explain away its conduct. The question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income. Explanation to Section 271(1) raises a presumption of concealment, when a difference is noticed by the AO, between reported and assessed income. The burden is then on the assessee to show otherwise, by cogent and reliable evidence. When the initial onus placed by the explanation, has been discharged by him, the onus shifts on the Revenue to show that the amount in question constituted the income and not otherwise on the facts as the transaction was held to be non genuine by the AO , which was not challenged by the assesse in quantum proceedings levy of penalty was held to be justified.(ITA No. 1681/M/2007, AY. 1993-94, Dt. 10.10.2014.)(AY.1993-94)
Times Guaranty Ltd. v. ACIT (Mum.)(Trib.);www.itatonline.org

S. 271(1)(c):Penalty-Concealment-Amounts not deductible –Deduction of tax at source-for s. 40(a)(ia) disallowance is permissible. [S.40(a)(ia)]
The law, in our humble view, would hold even where the disallowance leading to the variation between the assessed and returned incomes is u/s. 40(a)(ia), being independent of the provision whereunder the same (disallowance) is effected. That is, the question of levy or otherwise of penalty would have to be necessarily examined w.r.t. the assessee's case for the claim of expenditure in view of non-obstante clause of s.40(a)(ia), as indeed would be the case for any other provision.
Mulla Associates .v. ACIT (Mum.)(Trib.);www.itatonline.org

S. 271(1)(c) : Penalty-Concealment-Disallowance of claim- Unexplained jewellery and investment in property-Penalty could not be sustained.[S.69]
AO made certain addition to total income of assessee on account of Unexplained Jewellery and Unexplained investment in Property. Based on said addition, penalty under section 271(1)(c) was also imposed upon assessee. ITAT Held that, "Adverting to the facts of this case, when we apply the above law to the facts of this case we are of the considered opinion that no penalty under s. 271(1)(c) can survive. The assessee has made certain claims which could not be found to be plausible and additions have been made. But levy of penalty under s. 271(1)(c) is not automatic. In fact the assessee has not concealed any particulars of income as has been alleged. Therefore, we cannot sustain the impugned penalty and thus, hold that this penalty cannot survive and has to be deleted".(AY.2007-08)
Om Prakash Lohiya .v. Dy. CIT (2014) 61 SOT 15 (URO)/ (2013) 40 taxmann.com 135 (Jodh.)(Trib.)

S.271(1)(c):Penalty-Concealment-Search and seizure- As there was no addition over and above income declared by assessee in return of income filed in response to notice under section 153A, no penalty under section 271(1)(c) was to be imposed.[S.132,153A,271(1)(c),Explanation 5A]
The assessee was engaged in the business of jewellery and related activities. Assessee's Premises were subjected to search and seizure under section 132(1). In pursuance to notices under section

153A, the assessees filed their returns for relevant assessment years. The income declared by the assessees in the returns filed in response to the notices under section 153A were accepted in all these cases and no further addition was made. Thereafter, the Assessing Officer imposed penalty for concealment of the particulars of income or for furnishing the inaccurate particulars of income in respect of the additional income offered by assessees in the returns filed in response to notices under section 153A and also in those cases where for the first time in respective assessment years, the returns of income were filed only after issuance of the notices under section 153A. On appeal Tribunal held that, on the perusal of the assessment orders in all these appeals, it is admitted fact that there is no addition over and above the income declared by these assessees in the returns of income filed in response to notices under section 153A. It is also admitted fact that no declaration is based on any money, jewellery, bullion or any other valuable articles detected or seized in the course of the search operation. At the first instance, the counsel pleaded that these assessees are entitled for the immunity in view of Explanation 5 to section 271(1)(c) because the income admitted during the course of the search has been declared in the return of income as well as the tax on the admitted income has also been paid. In all the appeals *Explanation* 3 cannot be applied, as held in the case of Chandan K. Shewani v. *Dy. CIT* [IT Appeal Nos. 235 and 236 (PN.) of 2010, dated 29-8-2012]. So far as *Explanation* 5A is concerned, it is brought on the statute book with effect from 1-6-2007, *i.e.*, from the assessment year 2007-08. So far as the assessments in all these cases are concerned, no addition is made by the Assessing Officer over and above the income declared in the returns of income filed in response to notice under section 153A as the expression 'tax sought to be evaded' appearing in clause (*c*) to section 271(1) is to be understood as a difference between the income declared by the assessee in the return of income and the income finally assessed. After introduction of section 153A with effect from 1-6-2003, there in no specific penalty provision to deal with the assessments farmed in consequence of search and seizure action under section 132. In the present case, as the returned income and income assessed are the same, otherwise also, no penalty can be levied. Therefore, in all the appeals the Assessing Officer was not justified in levying the penalty under section 271(1)(*c*). Accordingly, the penalties levied by the Assessing Officer in all the appeals are to be deleted for the abovementioned reasons.(CIT v.Kirti Dahyabhai Patel(2009) 121 ITD 159(TM)(Ahd)(Trib.) is referred)(AY. 2000-01 to 2004-05)

Pramila D. Astekar v. ITO (2014) 61 SOT 113/(2013) 39 taxmann.com 103(Pune)(Trib.)

S.271(1)(c):Penalty-Concealment-Explanation 5-No material was found in the course of search, deeming provision cannot be applied –Penalty was not leviable.[S. 69A,69B,142(1),153A]

A search action was conducted in the case of the father of assessee in august, 2005.In response to notice the assessee filed the return. During the assessment proceedings the assessee filed the statement of assets and liabilities of him and wife and offered short fall as undisclosed investment under section 69B of the Act. The AO levied the penalty by invoking Explanation 5 to section 271(1)(c) of the Act. Tribunal held during the course of search proceedings no material was found with regard to ownership of any asset by assessee, hence the deeming provision of explanation 5 to section 271(1)(c) cannot be applied. Deletion of penalty by CIT(A) was held to be justified.(AY. 2005-06, 2006-07)

ITO v. V.R.Rathish(2014)65 SOT 79(URO)(Cochin)(Trib.)

S.271(1)(c):Penalty-Concealment-Show cause notice-Defective notice-Order imposing penalty was held to be invalid.[S.153A, 271AAA, 292BB]

The assessee is an individual .Consequent to search and seizure action return was filed u/s.153A. Income returned pursuant to search and seizure action was exceed the return of income shown in the return under section 139(1).AO initiated penalty proceedings under section 271 AAA , however levied the penalty under section 271(1)(c) of the Act. CIT (A) confirmed the levy of penalty. On appeal Tribunal held that the show cause notice refers section 271AAA , however the penalty was levied under section 271(1)(c) of the Act. Tribunal held that the aforesaid defect cannot be curable under section 292BB of the Act. Tribunal following the ratio in CIT v. Manjunatha Cotton and Ginning Factory 359 ITR 565 (Karn)(HC) held that the orders imposing penalty in all assessment years to be invalid and consequently cancelled the penalty imposed.(ITA Nos 265 to 267/Bang/2014 Bench “B” dt. 5-06-2014)(AY. 2006-07, 2008-09, 2009-10]

K.Prakash Shetty .v. ACIT (2014) BCAJ-August-P. 24 (Bang.)(Trib.)

S.271(1)(c) : Penalty – Concealment-Surrender of income-Bogus shares-Capital gains-Levy of penalty was justified.[S.68, 148]

Assessee filed return of income declaring long term capital gain arising from sale of shares. Getting information of bogus transaction of shares, capital gain transactions in question were sham, AO issued notice u/s. 148, in response to said notice, assessee surrendered income earned on sale of shares as income from undisclosed sources. AO made addition u/s. 68 and levied penalty order u/s. 271(1)(c). Tribunal held that the assesse had conducted enquiries into matter of sale of said shares prior to surrender made by assessee and duly established on record that share transactions were sham and bogus. Tribunal held that the assesse intentionally and deliberately filed inaccurate particulars of his income in original return and, therefore, penalty was justified as per law. (AY. 2002 - 03)

Dy. CIT .v. Mukesh Kumar Agarwal, (HUF) (2014) 146 ITD 562 / (2014) 41 taxmann.com 269 (Agra)(Trib.)

S. 271(1)(c) : Penalty – Concealment –Debatable-Relief by CIT(A) on merits (though reversed by ITAT) means claim is debatable.

The assessee, a film actor, went to Jodhpur for shoot for a Hindi movie called "Ham Sath Sath Hain". During his stay at Jodhpur, he was implicated in criminal proceedings on the allegation that he shot a black buck, an endangered specie. He was arrested by the local police and in order to get himself released, he had to engage lawyers. The criminal proceedings as a result of this case have continued thereafter and the assessee has been regularly incurring legal expenses to defend himself and obtain exemptions from the personal hearings from this case. He contended that if he had not defended himself in the criminal proceedings and asked for personal exemptions, it would have resulted in his absence from all the movies/projects undertaken by him causing loss of revenue to him as well as to the producers of his films. He contended that it was thus necessary for him to incur the legal expenses during the years under consideration to preserve and protect his profession and the said expenses therefore were claimed by the assessee as deduction. The CIT(A) accepted the stand of the assessee and allowed deduction for the legal expenses. However, the Tribunal reversed the decision of the CIT(A) and disallowed the claim. The AO levied penalty u/s 271(1)(c) for furnishing inaccurate particulars of income. This was upheld by the CIT(A). On appeal by the assessee to the Tribunal HELD allowing the appeal:

The fact that the claim of the assessee was accepted by the CIT(A) on merit clearly shows that the claim made by the assessee was based on a possible view of the matter. It also shows that the claim for deduction on account of legal expenses was a bonafide claim. In subsequent years, the assessee has capitalized similar legal expenses after having come to know about the disallowance made in the years under consideration. This show the bonafides of the assessee. All material particulars relevant to the claim were fully and truly furnished by the assessee and there is no allegation made by the AO in the penalty order that any inaccurate particulars were furnished by the assessee while making the claim on account of deduction of legal expenses. It is also not in dispute that the legal expenses claimed by the assessee were actually incurred by him and it is not the case of the Revenue at any stage that the expenses so claimed by the assessee were bogus. When no information given in the return is found to be in-correct or in-accurate, the assessee cannot be held guilty of furnishing in-accurate particulars of its income and unless the case is strictly covered by the provision, penalty cannot be imposed. Where there is no finding that the particulars furnished by the assessee in the return are in-accurate or erroneous or false, there is no question of imposing penalty u/s 271(1)(c) of the act merely because the claim of the assessee for deduction is disallowed in the quantum proceedings. (ITA No. 2559/Mum/2013,dt. 30.07.2014.) (AY. 2003-04)

Salman Khan .v. ACIT (Mum.)(Trib.), www.itatonline.org

S. 271(1)(c) : Penalty – Concealment –Stamp valuation-Levy of penalty for failure to compute capital gains as per section 50C is not justified.[S.50C]

The assessee sold property for a sale consideration of Rs.4.50 lakhs. The said plot of land was valued for Stamp Duty purposes at Rs.15,89,000. The AO applied s. 50C and considered the difference between the sale price and Stamp Duty value for purposes of computation of capital gain. He also

levied concealment penalty u/s 271(1)(c) on such difference. The levy of penalty was confirmed by the CIT(A). Before the ITAT, the assessee claimed that the issue was covered in his favour by Renu Hingorani (ITAT Mum), Chimanlal Manilal Patel (ITAT Ahd) & CIT .v.Madan TheatresLtd. (2013) 260 CTR (Cal) 75 where it was held that as the AO had not questioned the actual consideration received by the assessee and as s. 50C was a deeming provision, it could not be said that the assessee had filed inaccurate particulars of income so as to attract levy of penalty u/s 271(1)(c) of the Act. The department claimed that as the assessee was aware of s. 50C, it ought to have applied it and failure to do so was a deliberate attempt to furnish inaccurate particulars of his income which entailed concealment penalty. Reliance was placed on CIT .v. Zoom Communications P. Ltd. (2010) 327 ITR 510 (Del) & CIT .v. Escort Finance Ltd. (2010) 328 ITR 44 (Del). HELD by the Tribunal:
There are direct judgements which hold that where addition is made on account of application of s. 50C and there is no material on record to show that the assessee had received more amount than that shown by it on sale of property then penalty u/s 271(1)(c) cannot be levied. The decisions relied upon by the Dept are not directly on the issue and distinguishable on facts. The context in which the decisions have been rendered is entirely different from the context of the present case. The law in this regard is well settled as held in CIT .v. Sun Engineering Works P. Ltd. (1992) 198 ITR 297 (SC). When there is a direct decision available on the issue, then it will be appropriate to follow the same particularly when no contrary decision on the same very issue is cited by the opposite side. (ITA No. 6383/Mum/2012, A. Y. 2007-08, dt. 03/07/2014.)
Harish Vooyaya Shetty .v. ITO (Mum.)(Trib.) www.itatonline.org.

S. 271(1)(c) : Penalty–Concealment-Explanation 5-Gift disclosed in the balance sheet-Amount disclosed in the return filed pursuance of notice u/s.153C-levy of penalty was held to be not justified.[S.139,153C]
The assessee received gifts of certain amounts from two persons; gifts were credited to the capital account of the assessee. In the original return filed u/s. 139, the assessee did not include amount of said gifts. Thereafter, search conducted on third party, proceedings u/s. 153C were initiated in case of assesse, return filed in response to notice issued u/s. 153C, the assessee included the amount of gifts.AOlevied penalty u/s. 271(1(c) on the ground that assessee having not disclosed the impugned income in return of income filed u/s. 139(1), but had declared impugned income in return filed in response to notice issued u/s. 153C, was guilty of concealing income. Commissioner (Appeals) upheld levy of penalty.
Tribunal held that,Explanation 5 cannot be said that assessee was found to be owner of any money, bullion, jewellery or other valuable article or thing. What has been made basis is entry in the capital account of the assessee which was already part of the accounts maintained by the assessee. Therefore, even according to the provisions of Explanation 5, concealment penalty cannot be linked to the return filed by the assessee under section 139. (AY.2002-03)
Vrajlal T. Gala (HUF) .v. ACIT (2014) 146 ITD 742/(2013) 33 taxmann.com 620 (Mum.)(Trib.)

S. 271(1)(c) : Penalty–Concealment-Surrender of income-Revised return-Bogus transaction-Capital gains-Levy of penalty was held to be justified.[S.68,148]
Assessee filed return of income declaring long term capital gain arising from sale of shares. On getting information of bogus transaction of shares, AO issued notice u/s.148.Assessee surrendered income earned on sale of shares as income from undisclosed sources. AO taking a view that capital gain transactions in question were sham, made addition u/s. 68 and also levied penalty order u/s. 271(1)(c).Tribunal held that the assesse had intentionally and deliberately filed inaccurate particulars of his income in original return hence levy of penalty was confirmed. (AY. 2002 – 03)
Dy. CIT .v. Mukesh Kumar Agarwal(HUF), (2014) 146 ITD 562 / (2014) 41 taxmann.com 269 (Agra)(Trib.)

S. 271(1)(c) : Penalty–Concealment-Surrender of income-Revised return- Return accepted–Levy of penalty was not justified.[S.132]
In the course of search various documents were found and seized which indicated unaccounted sales.The assesse declared the unaccounted receipts in the revised return. Revised return was accepted by the AO and certain other additions were made on estimate basis. The AO levied the

penalty.Tribunal held that levy of penalty on the basis of revised return was held to be not valid and other additions were on estimate basis hence penalty cannot be levied.(AYs. 2001-02 , 2002-03 to 2004-05)

PoonamMarble (P) Ltd. .v. Dy.CIT (2014)62 SOT 137 (URO) (Jaipur)(Trib.)

S.271(1)(c):Penalty-Concealment-Fact that assessee has huge carry forward losses and depreciation and filed a nil return suggests that there is no motive or incentive to make a bogus claim in the return-Levy of penalty was not justified.

The expenses payable to APR Limited were shown separately by the assessee in the profit and loss account and the same has been also discussed by the auditor in the audit report. Thus, assessee has made a claim which was transparent and bona fide. Assessee has not concealed anything in this regard. Therefore, it cannot be a case of concealment of facts. As far as the filing of inaccurate particulars of income is concerned, the assessee was having huge carry forward losses and depreciation and the return was filed at nil income. In our considered view, there cannot be a motive or incentive for the assessee to make any bogus claim in the return of income. These facts show that whatever claim made by the assessee was under good faith and with the advice of the auditors and the employees. The assessee has furnished an explanation which has not been found false.(AY. 2000-01)

Toscana Lasts Limited .v. ITO (2014) 164 TTJ 145(Delhi)(Trib.)

S.271(1)(c): Penalty-Concealment-Wrong claim of deduction under section 80P even after cancellation of licence which was up held by the Supreme Court-Levy of penalty was held to be justified.[S. 80P, 176(3)]

Assessee is notified as state co-operative Bank by Maharashtra Government and was granted license from RBI . Said notification of State Government was quashed .On appeal, Supreme Court upheld such action. Assessee'slicence was cancelled by RBI and it was directed to sell all investments and to refund deposits. It was found that assessee continued to operate banking activities, even after striking down of notification preventing assessee to continue to operate as State Co-operative Bank and, thus, had not discontinued business as required under section 176(3). Assessee proceeded to claim deduction under s. 80P without considering advise of auditors that income was ineligible to be classified as banking income in conformity of Supreme Court judgment. Assessee was fully aware of all facts, but claim for deduction was made, it was to be held to be a false claim made continuously and deliberately and, thus, amount claimed as deduction would be deemed to represent income in respect of which particulars had been concealed. Penalty u/s. 271(1)(c) was held to be justified.(AY. 2005 – 2006)

Apex Urban Co-op. Bank of Maharashtra & Goa Ltd. v. ITO (2014) 146 ITD 791 / (2013) 38 taxmann.com 301/163 TTJ 438/102 DTR 410(Mum.)(Trib.)

S.271(1)(c): Penalty–Concealment–When assessee has declared undisclosed income after search and paid tax and interest- entitled to immunity under the Explanation 5 to section 271(1)(c).

Pursuant to search and seizure and the statement recorded by the director of the assessee company, undisclosed income of Rs. 151 lakh was disclosed in the return of income and tax was paid on it. The AO levied penalty u/s. 271(1)(c) which was confirmed by the CIT(A).

On appeal by the assessee, the Tribunal allowing the appeal held that since the three conditions mentioned in Explanation 5 to section 271(1)(c) were satisfied and assessee had paid the tax alongwith interest, the assessee was entitled to the benefit available and penalty levied was to be deleted. (AYs. 2004-05 to 2006-07)

Kalpana Nursing Home Pvt. Ltd. .v. ACIT(OSD) (2014) 29 ITR 633 (Jodh)(Trib.)

S.271(1)(c):Penalty-Concealment-Explanation 7-Addition on account of transfer pricing adjustment–TPO rejected methodology adopted by assessee-Levy of penalty was not justified.

TPO determined ALP of international transaction after rejecting the transfer pricing study report submitted by the assessee primarily on account of difference of opinion with regard to use of multiple year data and selection of certain comparables. It could not be said that the difference in ALP arose on account of concealment of income or furnishing of inaccurate particulars or income by the assessee. Therefore, penalty was not leviable. (AY. 2004-05)

ACIT .v. ADP (P) Ltd. (2014) 98 DTR 413 (Hyd.)(Trib.)

S.271(1)(d):Penalty-Concealment-Surrender of amount of fringe benefit in the course of assessment-Calculation of mistake-Bonafide mistake-Levy of penalty was not justified. [S.271(1) Expl.1].

During scrutiny assessment, AO found that amount of Rs 11,55,634 on account of conveyance was not considered in the value of fringe benefit & he made addition thereof to the income of the assessee & also imposed penalty u/s 271(1)(d). CIT (A) confirmed penalty as well as Tribunal. High Court held in favour of the assessee & held that when the assessee is offering the huge amount of fringe benefit amounting to Rs 2.55 crores for Taxation, the said calculation mistake cannot be said to be an act of furnishing of inaccurate particulars of income. Assessee had shown its bonafides on two counts, firstly when the mistake was pointed out by the AO, the assessee came forward & voluntarily surrendered during the assessment does give immunity to the assessee from penalty, as per Expl 1 to S. 271(1). The explanation offered by the assesse that it was simply a mistake of omission was not found to be false by the lower authorities. There was no finding from the authorities below that it was not a mistake of omission. Once the omission was identified by the AO, the assesee accepted the same without any dispute. Therefore explanation offered by the assessee was acceptable & penalty was not imposable.(AY. 2006-07)

Hindustan Coca-Cola Marketing Co (P) Ltd .v. DCIT(2014) 99 DTR 225 (Delhi)(Trib.)

S. 271B : Penalty – Failure to get accounts audited -Speculative business of shares –No bonafide reasons –Levy of penalty was held to be justified.[S.44AB]

The assessee an individual entered into speculative business of the shares, The transactions entered in to by her were more than the prescribed monetary limit as envisaged by the provisions of s. 44AB for tax audit. No bonafide reasons were furnished by the assessee, for not getting the books of accounts audited, its was observed by the ITAT that total turnover indicate the aggregate price of the commodities received by an assessee during the course of his trading or business activities. Considering the principles governing the imposition of penalty u/s. 271B and the facts of the case AO was justified in levying penalty for not getting books of accounts audited.(AY. 2004 - 2005)

Anahaita Nalin Shah .v. Dy. CIT (2014) 149 ITD 171 / 43 taxmann.com 206 (Mum.)(Trib.)

S. 271B : Penalty - Failure to get accounts audited-Reasonable cause shares shown as capital gains-Assessed as business income—Levy of penalty was held to be not justified. [S.10(38), 44AB, 273B]

The assessee declared income from sale of shares as long term capital gain and claimed exemption u/s. 10(38). The AO held such income as business income instead of capital gain. And also imposed penalty u/s. 271B as the sale proceeds exceeded the monetary limit of Rs. 40 lakhs prescribed u/s. 44AB.

While deciding the issue before the Tribunal it is observed that the requirement to get the accounts audited and furnish audit report has arisen because of the change in the head under which income from sale of shares was offered by the assessee. The assessee declared income from sale of shares under the head 'Capital gains'. This view was canvassed on the basis of treatment of similar income offered and accepted by the Revenue in the immediately preceding year as capital gain. The acceptance by the Revenue of income from sale of shares as capital gain in the immediately preceding year constituted a *bona fide* ground for the assessee to entertain a belief that such income was liable to be taxed under the head capital gain and not as business income. Once this view is accepted, then failure of the assessee to get its account audited and furnish the audit report, constitutes reasonable cause for default. The acceptability of the reasonable cause for the failure to get the account audited and furnish the report in due time constitute a reasonable cause within the meaning of section 273B, in the failure to comply with the provisions of section 44AB. (AY. 2006-07)

Bunkim Finance & Investments (P.) Ltd. .v.ITO (2014) 146 ITD 796 / (2013) 33 taxmann.com 115 (Mum)(Trib.)

S. 271B : Penalty-Failure to get accounts audited-Reasonable cause-Business income or capital gains–Sale of shares-Levy of penalty was held to be not justified.[S.10(38),44AB]

The assessee declared income from sale of shares as long term capital gain and claimed exemption u/s. 10(38).AO held such income as business income instead of capital gain and imposed penalty u/s. 271B as the sale proceeds exceeded the monetary limit of Rs. 40 lakhs prescribed u/s. 44AB. Commissioner (Appeals) upheld penalty. On appeal Tribunal held that S. 273B provides that no penalty shall be imposable on the person for any failure referred to in the relevant penalty sections prescribed in section 273B, if the assessee proves that there was a reasonable cause for the said failure. S. 271B finds place u/s 273B. It transpires that the imposition of penalty u/s 271B on the failure to get the account audited or furnish the audit report before the prescribed period is not automatic. If a reasonable cause is shown for such a failure, then the penalty otherwise imposable u/s 271B, shall be waived in terms of s. 273B.Levy of penalty was deleted.(AY. 2006-07)

Bunkim Finance & Investments (P.) Ltd. .v.ITO(2014) 146 ITD 796 / (2013) 33 taxmann.com 115 (Mum.)(Trib.)

S.271BA :Penalty-Transfer pricing–Failure to furnish report from accountant –No reasonable cause was established- Levy of penalty was justified. [S.92E, 275].

In the present case, the A.O. found that the assessee had not furnished audit report regarding its international transactions as required to be furnished under section 92E. The A.O. initiated penalty proceedings. The assesse submitted that the audit report was obtained before due date of filing the return but the same could not be filed as the provisions of section 92E were new provisions about which the assessee's CA was not aware. According to the assessee this constituted a reasonable cause for not levying penalty u/s. 271 BA. The AO. imposed penalty in the assessee u/s. 271BA. The C.I.T. (A) &Tribunal upheld the order of the AO and held that as the assessee had failed to make out a reasonable cause no penalty u/s. 271BA was leviable. (AY. 2003-2004 to 2005-2006)

Ajit Singh Rana v. ACIT (2014) 61 SOT 251 (Asr.)(Trib.)

S. 271C : Penalty - Failure to deduct tax at source – Not deducted based on the order of Tribunal-Held to be reasonable cause.

At the relevant time, there was a Tribunal decision and in view whereof the assessee was under a bona fide belief that tax was not liable to be deducted on commission/trade discount. It was held that there being a reasonable cause, penalty was rightly deleted.

CIT .v. G.M. (Telecom) BSNL (2014) 101 DTR 401(All.)(HC)

S. 271D :Penalty–Accepts any loan or deposit- Reasonable cause – Assessee not able to demonstrate that he required cash urgently to meet his requirements – Tribunal wasjustified in confirming the penalty levied by the AO.[S.269SS]

The assessee received substantial amount in cash from his creditors. The assessee was not able to demonstrate with sufficient material that he required cash urgently to meet his requirements. Thus, in absence of proof to show that the transaction was genuine and there was a reasonable cause for receiving the amount in cash, penalty under section 271 D was leviable. (A.. 2007 – 08)

K.V.George v. CIT (2014) 102 DTR 167 / 42 taxmann.com 261 (Ker.)(HC)

S.271G: Penalty–International transaction–Transfer pricing-Discretionary-Notice should specify the information or documents to be furnished-Deletion of penalty was held to be valid.[S.92D,R.10D]

The penalty imposable is discretionary and not mandatory. S. 271G has to be interpreted reasonably and in a rational manner. Information or documentation, which is assessee-specific or specific to the associated enterprises, should be readily available, whereas other documentation or information relating to data bases or transactions entered into by third parties may require collation or collection from time to time. There cannot be any end or limit to the documentation or information relating to data bases or third parties. When there is general and substantive compliance with the provisions of rule 10D of the Income-tax Rules, 1962, it is sufficient.

CIT .v. Leroy Somer and Controls (I) P. Ltd. (2014) 360 ITR 532 (Delhi)(HC)

S. 272B : Penalty - Permanent account number - Penalty for failure to comply with section 139A is linked to the deductor and not to the number of defaults and hence, it cannot be imposed by

calculating the number of defective entries in each return and by multiplying them with Rs. 10,000[S. 139A]

The respondent assessee could not quote certain Permanent Accounts Numbers (PAN) in the Tax Deducted at Source (TDS) returns as they were not furnished to him by the truck owners. The AO imposed penalty by calculating the number of defective entries in each return and by multiplying them by Rs.10,000/- which amounted to Rs.30,70,60,000. The High Court dismissed the Revenue's appeal on two counts – firstly that the AO had not specifically referred to any default or failure by the respondent assessee even when the said details were available, and secondly that the stand taken by revenue was contrary to the Central Board of Direct Tax (CBDT) circular dated 5.8.2008 vide No.275/24/2007-IT(B) which clarified that penalty under section 272B is linked to the deductor and not to the number of defaults and thereby, the High Court held that maximum amount of Rs.10,000/- can be imposed on deductor

CIT (TDS) .v. DHTC Logistics Ltd. (2014) 221 Taxman 83 (Delhi)(HC)

S. 273A:Commissioner-Power to reduce or waive-Penalty-Concealment-Voluntary disclosure under search & seizure-Rejection was held to be justified. [S.148, 271(c)]

Search & Seizure operations were carried at the premises of the father of the partners of the assessee firm. After the operations, assessee voluntarily offered additional income. When the assesse got information from the Department for issuing notices u/s 148 for all the A.Ys & also notice for penalty was issued to the assessee. Thereafter assessee filed application u/s 273A for waiver of penalty. Rejecting the application penalty was levied by the AO and was confirmed by the CIT (A) as concealment and filing inaccurate particulars of income. Tribunal deleted the penalty on the basis of good faith and genuine hardship. On appeal in High Court, High Court reversed the decision of the assessee and held that the chain of events and concomitant conduct of the assessee was clear indicator that there was complete absence of good faith and when the assessee was placed in a very tight and rather vulnerable position consequent upon search & seizure proceedings, only then the additional income was confirmed and held that that CIT was justified in rejecting prayer for waiver or reduction of penalty. (AY.1982-83 to 1986-87)

CIT v. Bansal Abhushan Bhandar (2014) 264 CTR 102(P&H)(HC)

S. 273A : Penalty – Commissioner - Power to reduce or waive - CIT is confined within the powers of only 273A and not governed by powers of AO-Order of Commissioner was set aside.[S. 18B, Wealth –tax Act, 1957]

Writ Petition was filed by the assesse for adjudicating an application u/s 273A of the Ac by contending that CIT exercises powers specially conferred by various sub-sections, clauses and sub-clauses of s/273A of the Act and not by the powers of an AO and therefore while accepting or rejecting an application u/s 273A of the Act , CIT was required to confine his consideration to factors referred in sub-section, clauses &sub-clauses of S/273A of the Act .CIT however rejected the application by assigning reasons that fall within the domain of the AO, without taking into consideration factors set out in S.273A of the Act. Allowing the writ, the Hon'ble court held that discretion conferred under s.273A has to be exercised within the informed parameters set out in sub-clauses(a),(b),(c) read along with Expl. 1, as prevalent on the date of the application, order of CIT referring to the very same factors that led the AO to impose penalty was liable to be set aside . An adjudication based on grounds, other than grounds referred to in S.273A would necessarily invite a valid charge that the order is null and void for an illegal exercise of jurisdiction, or a failure to exercise jurisdiction in accordance with statutory parameters set out in S.273A of the act. (AY.1985-86 to 1987-88)

Kahan Chand v. CIT(2014) 264 CTR 322 (P&H)(HC)

S. 273A: Penalty–Concealment-Waiver–Application for several years-View of commissioner holding that waiver can be done for one year at one instance was held to be not valid-Matter was set a side where the assesse has shown that the taxes and interest were paid.[S. 220,271(1)(c)]

The assessee, for the assessment years 1980-81 to 1988-89, filed returns belatedly in respect of income under the head "Income from house property". She preferred an application seeking waiver of

penalty and interest for those years. The Commissioner opined that having regard to s.273A(3), the assessee was a persistent defaulter and, therefore, could not be granted the benefit of waiver sought for. He also proceeded on the footing that the assessee had neither paid tax nor made satisfactory arrangement for payment of tax. On a writ petition:

Held, allowing the petition, (i) that the question of the assessee having to pay the amounts of penalty and interest in the first instance in order to qualify for relief u/s.273A did not arise. If such a construction were to be given, the object of conferring discretion itself would be defeated. (ii) The language of s.273A(3) does not talk of one year but of one instance. The Commissioner proceeded on the assumption that the relief could be given once for one year was erroneous. (AYs. 1980-81 to 1988-89)

Asha Pal Gulati.v. CBDT (2014) 361 ITR 73/98 DTR 361 /265 CTR 332/ 226 Taxman 97 (Delhi)(HC)

S. 275 : Penalty - Bar of limitation –Refund-Assessee's claim for refund of penalty with interest cannot be defeated by inaction of revenue.[S.275(IA),Art. 226]

(i) What is provided by Section 275(1A) is that the order imposing or enhancing or reducing or cancelling the penalty may be passed on the basis of the assessment as revised by giving effect to the order in appeal. The concerned authority was thus required to make specific order for cancelling the penalty by giving effect to the order in appeal made in favour of the petitioner. However, failure of assessing officer or concerned authority to pass such order would not mean that the assessee has no right of refund on his becoming successful in appeal against the order of assessment. Further, if there is failure to exercise power under Section 275(1A) within outer limit of six months, the assessee would be justified in approaching before this Court under Article 226 of the Constitution. In our view, word 'MAY' should be construed to create an obligation upon the authority to pass consequential order upon conclusion of the litigation.

(ii) Though time limit of six month is provided for the order contemplated to be passed of imposing, enhancing, reducing, cancelling penalty or dropping the proceedings for imposition of penalty for giving effect to any order passed in appeal, but when such order is to be passed in favour of the assessee, time limit for passing such order by the concerned officer should not come in the way of the assessee for cancelling the penalty on his getting success before the higher forum in appeal merely because the concerned officials failed to discharge his duty of giving effect to the order made in the appeal in favour of the assessee.

(iii) A "tax refund" is a refund of taxes when the tax liability is less than the tax paid. As held by the Courts while awarding interest, it is a kind of compensation of use and retention of the money collected unauthorizedly by the Department. When the collection is illegal, there is corresponding obligation on the revenue to refund such amount with interest in as much as they have retained and enjoyed the money deposited.(SPA No. 5717 of 2014, dt. 17/10/2014.)

Shanti Enterprises .v. ACIT (Guj.)(HC); www.itatonline.org

S.275(1)(c): Penalty-Limitation-Loan or deposit-section 275(1)(c) which is applicable not section 275(1)(a)-LLevy of penalty wasbarred by limitation.[S. 269 SS, 269T,271,271E & 275(1)(a)]

Search action was on June 1999, Block assessment was completed on June 2001.JCIT issued show cause notice dated 15thJan, 2002 for levy of penalty under section 271D and 271E in the course of block assessment proceedings and levied penalty on 30th March , 2006. Before CIT (A) it was contended that penalties having been initiated in the month of January 2002 , the same could not have been levied after 31st July 2002, which was clearly the last date for levying these penalties under section 275(1)(c) of the IT ACT. Since the penalties have been levied as late as on 30thMarch 2006, i.e.; after three full years and eight months of the period of limitation, the same are clearly barred by limitation and hence bad in law. CIT(A) deleted the penalty levied on the ground that the order was time barred as per section 275(1)(c) of the Act. Before the Tribunal the department challenged the order passed by the CIT(A) deleting the penalty under section 271D & 271E imposed for violation of section 269SS & 269T on the basis that it was barred by the limitation under section 275(1)(c). Both the Tribunal Members did not agree on the issue, then on the difference of opinion between AM & JM, the issue was referred to third member. The third member followed the view taken by Hon'ble Rajasthan High Court in the case of Jitendra Singh Rathore (2013) 352 ITR 327 the Hon'ble High

Court after considering the relevant provisions of the Act has concluded that the order imposing penalty was hit by the limitation prescribed under the Act under section 275(1)(c). The Tribunal confirmed the order of CIT(A) and deleted the penalty as it was section 275(1)(c) which is applicable not section 275(1)(a).

ACIT .v. Dipak Kantilal Takvani (2014) 159 TTJ 304(TM) (Rajkot)(Trib.)

S.276B : Offences and prosecutions-Dismissal of complaint – Documents in judicial custody.

Revenue had filed a complaint before the Trial Court against the assessee-company and its director for failure to remit tax deducted at source. The Trial Court dismissed the complaint as the department had failed to produce the documents. On appeal, the High Court, restored the case to the Trial Court holding that, where documents listed against assessee could not be produced before Trial Court owing to fact that said documents were in judicial custody in some other cases, Trial Court was not justified in dismissing complaint for want of production of documents. (AY. 1988-89)

P. Jayanandan, ITO .v. Sri Ramakrishna Steel Industries Ltd. (2013) 355 ITR 528/38 taxmann.com 175 / (2014) 220 Taxman 92(Mag.) (Mad.)(HC)

S. 276CC: Offences and prosecutions-Firm –Partner-Failure to furnish return of income– Prosecution for failure to file ROI can be initiated during the pendency of assessment proceedings. The statement in the individual returns of the partners that the firm has not filed a ROI as its' accounts are not finalized does not absolve the firm of prosecution for non-filing of ROI-Onus to prove circumstances-Prosecution proceedings were allowed to be continued and directed the Criminal Court to complete the Trial with in four months of receipt of the judgment.[S. 139(1), 142,144, 148, 278E]

The assesse firm had two partners i.e. Ms. J. Jayalaitha and Mrs. N.Sashikala. Firm did not file its returns for the A.Y. 1991-92 and 1992-93. Following the survey conducted in respect of the firm on August 25, 1992 a notice under section 148 was served on the firm, thereafter notice under section 142(1)(ii) was l also served. AO made best judgment assessment on the firm and demanded tax and interest.For the assessment year 1993-94 also no return was filed and best judgment assessment was made. Department issued show cause notice for prosecution against the firm and two partners and filed compliant before the Chief Metropolitan Magistrate against the firm and two partners for the willful and deliberate failure to file returns of income for the A.Ys.1991-92 and 1992-93 offences punishable under section 276CC and also for the A.Y. 1993-94. The firm and two partners filed discharge application before Chief Metropolitan Magistrate which was dismissed. The revision petition before the High Court was also dismissed.On appeal to Supreme Court the court held that the assessee failed to file ROI within due date prescribed u/s.139(1) or within time allowed in notices u/s.142 and 148. Further opportunity to file return in prescribed time was also not availed of. Thus, the onus was on assessee to prove circumstances which prevented it from filing returns. Held, a case for willful failure and offence was made out. Also, held that prosecution need not await culmination of assessment proceedings and that best judgment assessments made would not nullify liability of assessee to file return. Order of High Court was confirmed and appeal of assesse was dismissed. Court directed the Chief Metropolitan Court to complete the trail within four months from the date of receipt of judgment.(AYs. 1991-92, 1992-93, 1993-94)

Sasi Enterprises .v. ACIT (2014) 361 ITR 163/98 DTR 329/ 222 Taxman 78/265 CTR 225 (SC)

S.279:Offences and prosecutions-Sanction-Criminal proceedings are independent of recovery proceedings-Proceedings are allowed to be continued by trail court. [S.2(35)(b), 201(1), 201(1A), 276B, 278B].

Criminal proceedings are not dependent on the recovery proceedings. Therefore, the pendency of proceedings initiated u/s. 201(1) and s. 201(1A) is not a legal impediment to continue the criminal prosecution against the petitioner. Proviso to s. 279(1) is not a condition precedent for issue of an order of sanction by the CIT or the CIT(A) u/s. 279(1). Subsequent treatment of an individual as the principal officer of the petitioner company will not result in quashing of the proceedings against the individual who was treated as principal officer while initiating the proceedings. Proceedings are allowed to be continued by trail court.(AY. 2009-10 to 2011-12)

Kingfisher Airlines Ltd. .v. ACIT (2014) 98 DTR 245/265 CTR 240(Karn.)(HC)

S. 281: Certain transfers to be void–Recovery of tax-No power to declare transfer void–Only civil suit to lie-Revenue could not proceed with the auction sale of the properties under attachment to recover the dues of the defaulter.

Notices were issued to the tax defaulter during the years 1989 to 1994 for recovery of unpaid taxes. Such taxes were however, not paid. In the meantime, the defaulter sold certain properties to various persons including the petitioners. Such sale deeds were executed in May1995. It was only thereafter that the Department attached the property in question by issuing an order dated May 22, 1995. On November 8, 1995, the Tax Recovery Officer passed an order declaring the sale transactions as void. This order was passed without any notice to the petitioners. On a writ petition:

Held, allowing the petition that the Revenue could not proceed with the auction sale of the properties under attachment to recover the dues of the defaulter.

KarsanbhaiGandabhai Patel .v. TRO (2014) 362 ITR 374 (Guj.)(HC)

S. 282 : Service of notice-A strict procedure has to be followed for service by affixture. If done improperly, the notice and the resultant assessment order are null and void.[Code of Civil Procedure, 1908 (V of 1908)]

As per sub-section (1) of section 282, the notice is to be served on the person named therein either by post or as if it was a summons issued by Court under the Code of Civil Procedure, 1908 (V of 1908). The relevant provision for effecting of service by different modes are contained in rules 17, 19 and 20 of Order V of CPC. Rules 17, 19 and 20 of Order V of CPC lay down the procedure for service of summons/notice and, therefore, the procedure laid down therein cannot be surpassed because the intention of the legislature behind these provisions is that strict compliance of the procedure laid down therein has to be made. The expression after using all due and reasonable diligence' appearing in rule 17 has been considered in many cases and it has been held that unless a real and substantial effort has been made to find the defendant after proper enquiries, the Serving Officer cannot be deemed to have exercised 'due and reasonable diligence'. Before taking advantage of rule 17, he must make diligent search for the person to be served. He therefore, must take pain to find him and also to make mention of his efforts in the report. Another requirement of rule 17 is that the Serving Officer should state that he has affixed the copy of summons as per this rule. The circumstances under which he did so and the name and address of the person by whom the house or premises were identified and in whose premises the copy of the summon was affixed. These facts should also be verified by an affidavit of the Serving Officer.

The reason for taking all these precautions is that service by affixture is substituted service and since it is not direct or personal service upon the defendant, to bind him by such mode of service the mere formality of affixture is not sufficient. Since the service has to be done after making the necessary efforts, in order to establish the genuineness of such service, the Serving Officer is required to state his full action in the report and reliance can be placed on such report only when it sets out all the circumstances which are also duly verified by the witnesses in whose presence the affixture was done and thus the affidavit of the Serving Officer deposing such procedure adopted by him would also be essential. In the instant case, the whole thing had been done in one stroke. It was not known as to why and under which circumstances another entry for service of notice by affixture was made on 27-7-2012 when sufficient time was available through normal service till 30-9-2012. Nor there is any entry in the note-sheet by the AO directing the Inspector for service by affixture and had only recorded the fact that the notice was served by the affixture. It appears that the report of the Inspector was obtained without issuing any prior direction for such process or mode. In view of the above, it is clear that there was no valid service of notice u/s.143(2) by way of affixation and the assessment made on the basis of such invalid notice could not be treated to be valid assessment and, hence, such assessment order deserves to be treated as null and void and liable to be quashed and annulled.(SA No. 216/Mum/2014. dt. 09/09/2014.) (AY. 2008-09),

Sanjay Badani .v. DCIT (Mum.)(Trib.);www.itatonline.org

S.288:Authorised representative-Appellate Tribunal-Power-(Majority view) Special Bench has no jurisdiction to consider whether an ex-Member of the ITAT can practice before it.

(Dissenting view) Special Bench is duty bound to answer the question. On merits, Ex-Member cannot be debarred from practice before it.[S.253,254,Income –tax Appellate Tribunal Members [S.254,Recruitment and conditions of service)Rules, 1963, R.13E]

In view of judgment in Denesh Agarwal v.UOI (2012)206 Taxman 29 (All)(HC) . Tribunal cannot decide vires of rule 13 of Income-tax (Appellate Tribunal Members 0Recruitment and Conditions of Service)Rules, 1963, consequently the Tribunal has no inherent jurisdiction to decide question as to whether an Ex-member can appear before Income tax Tribunal Benches. Consequently, the answer to the question referred to the Special Bench is that Shri Deepak R. Shah cannot be debarred by the Tribunal from practising before the Tribunal Benches.(AY.2002-03)

Nanubhai D. Desai .v. ACIT(2014) 104 DTR 1/162 TTJ 673/149 ITD 16(SB) (Ahd.)(Trib.)

Wealth-Tax Act, 1957

S. 7: Valuation of assets-Immoveable property-Guest house-Residential flat at Mumbai.[S.16A, Schedule III, Rules, 3, 8, 20]

Assessee owned a residential flat at Mumbai which was used as a guest house. Assessee disclosed the value at Rs 1.55 lakhs.AO referred the valuation to the Departmental valuer who valued at under rule 20 of schedule III who valued flat at Rs 2.61 crores. Appeal of assessee was dismissed by CIT(A) and Tribunal. High Court also affirmed the view of Tribunal. On appeal the Supreme Court held that AO was justified in holding that it was not practicable to apply rule 3 and rightly referred matter to valuation Officer under section 16A for determination of value of asset. Court held that the AO has discretionary power to determine rule 3 or rule 8 is applicable to a particular case. If AO is of opinion that it is not practicable to apply rule 3, AO can apply rule 8 and value of asset could be determined in manner laid down in rule 20 or section 16A.Appeal of assessee was dismissed.(AY. 1993-94)

Amrit Banaspati Co Ltd v.CWT (2014) 126 Taxman 147 (SC)

S. 7 : Valuation of assets- Immovable Property – Properties covered under ULC Act have to be valued at some discount.

Valuation of properties covered under the Urban Land Ceiling Act is not to be valued at market rate as large properties have to be valued at discounted rate.

CWT v. H. H. Maharaja Jyotindrasinhji (2014) 102 DTR 393 (Guj.)(HC)

S.7: Valuation of assets-No change in circumstances–Valuation was accepted in earlier years–Same may be accepted.

The Tribunal was correct in accepting valuation in relevant assessment year as valuation accepted by Revenue in earlier years and there was no change in circumstances. (AY. 1982-83)

CWT .v. Trustees of H.E.H. the Nizam'sJewellery Trust (2014) 361 ITR 668 (AP)(HC).

S.7: Valuation of assets-Motor cars- 80 per cent of insurance value of motor cars to be accepted for wealth tax purpose instead of written down value of motor cars.

The assessee declared the value of motor cars on the basis of the written down value as per the balance sheet, however, the AO adopted the insurance value as the value of the motor cars for the purpose of computing the net wealth of the assessee, the Commissioner of Wealth-tax (Appeals) confirmed the action of the AO. On appeal, the Tribunal directed the AO to adopt 80 per cent of the insurance value.(AYs.2005-06, 2006-07)

Zee Entertainment Enterprises Ltd. v. ACWT (2014) 61 SOT 34 (URO)/ (2013) 40 taxmann.com 533 (Mum.)(Trib.)

S.7(4): Valuation of assets–Residential property-Exclusive possession–Valuation date-Benefit of exemption was not available.[S.7]

Residential property must have been in exclusive possession of assessee for twelve months preceding the valuation date. Since the Assessee admitted that possession of property was given to purchaser of

property, Assessee was not entitled to benefit of s. 7(4).Assessee entered in to agreement with promoter for development of property .Promoter was given possession of property .There was no transfer of right in the property. Assessee was liable to pay wealth tax on value of share in the property as co –owner.(AY. 1987-88 to 1992-93)

SiddharthPratap Chand .v. CWT (2014) 360 ITR 30/102 DTR 140 (Delhi)(HC)

S.16(5) : Assessment – Best Judgment – Assessment – Opportunity of being heard. [S. 14(4)]

In this case the department has raised 3 grounds and the Tribunal upheld the order of the CIT(A) confirming all the three grounds in favour of assessee the first ground relating to best judgment of assessment. The Tribunal held that the AO is bound to give opportunity to the assessee before passing the assessment order. On second ground the Tribunal held that both the plots of land are agricultural land and hence not covered by the definition of asset and as regards the last ground the assessee has produced evidence in the form of actual sale consideration to support his claim and the department has not placed anything on record to controvert the findings of the CIT(A), therefore no interference is warranted. (AY. 2003-04 to 2006-07)

ACWT .v. Vasantrao Sudam Pingle (2014) 159 TTJ 805 (Pune)(Trib.)

S.18B:Commissioner-Waiver of penalties and interest-Section under wealth tax is pari-materia with Income tax and ratio of case laws under Income tax Act would also apply to wealth tax.[S.273A]

Writ Petition was filed to challenge the order passed under 18B of the WT Act, 1957. The court held in this case that sec.18B of the WT Act, 1957 is pari-materia to S.273A of the IT Act,1961 and requires the CWT , while considering a prayer for reduction/waiver of penalty etc , court needs to consider parameters set out in S.18B of the Act. The ratio recorded that ratio relating to S.273A of the IT would necessarily apply u/s 18B of the WT Act. Further the court held that CWT had committed an error as has been noticed in cases relating to S.273A of the IT Act, 1961. Therefore in view of the same the matter was asset aside to CWT.

Inderjeet Mehta v. CWT (2014) 264 CTR 322(P&H)(HC)

S.18B:Commissioner-Waiver of penalties and interest-Section under wealth tax is pari-materia with Income tax- CIT is confined within the powers of only s.273A and not governed by powers of AO-Oder of Commissioner was set aside. [S.273A]

Assessee filed Writ Petition praying for reduction/ waiver of penalty etc to consider parameters set out in 18B of the Act. The court held that CWT has committed the same error as has been indicated in cases, relating to s/273A of the IT Act. Therefore the impugned order was set aside and the matter was remitted to CWT to decide the matter afresh, in accordance with law. The court held that CWT has assumed the role of an AO and while dismissing the Petition and rejecting the plea for reduction / waiver of the amount of penalty imposed has referred to the very same factors that let the AO to impose penalty. Order of Commissioner was set aside. (AY. 1985-86 to 1987 -88)

Kahan Chand v. CIT (2014) 264 CTR 322 (P&H)(HC)

S.18(1)(c):Penalty-Concealment-Succession to business otherwise than on death-Wealth-tax Act did not have any equivalent section as section 170 for recovery of dues of predecessor-Recovery proceedings was held to be bad in law.[IT ACT,S.170(3)]

Petitioner had taken over all assets and liabilities of brokerage business of one S.C. Mangal & Co.Assessing Officer directed petitioner to pay liabilities and dues of S.C. Mangal & Co. under Income-tax Act and Wealth-tax Act as successor of S.C. Mangal & Co.Petitioner contended that Assessing Officer should record a finding under section 170(3) that sum payable in respect of income of such business or profession could not be recovered from predecessor. The revenue contended that the assessee had taken over the liabilities payable by S.C.Mangal & Co and therefore under common law recoveries can be made from the assessee The assesse filed the Writ petition challenging the recovery proceedings. Allowing the petition the Court held that recovery proceedings cannot be initiated against the assesse successor for recovery of the dues under the Income–tax Act without the AO first passing an order under section 170(3). If and when any advese order is passed by the AO the assesse would be entitled to file an appeal as provided under section 246.As regard the penalty under

the Wealth –tax Act, 1957, since the Wealth-tax Act did not have any equivalent section as section 170 for recovery of dues of predecessor from successor and recoveries sought to be made in instant case under Wealth tax Act were on account of penalty imposed under section 18(1)(c) of Wealth-tax Act, which were passed after date of transfer, same was not recoverable from petitioner. Court held that successor cannot be made liable for penalty imposed on predecessor, more so when penalty orders were passed after the date of transfer.(A.Ys. 1991-92, 1992-93 and 1995-96)
Moongipa Securities Ltd. .v. ACIT (2014) 97 DTR 241 (Delhi) (HC)

S. 27:Reference-Observation of High Court directing the reference was not conclusive-Tribunal is final fact finding authority.[S. 256]
While dealing with an application seeking to call for the reference of a question of law said to be arising from an order of the Tribunal, the opinion expressed in a prima facie view and the examination of the order of the Tribunal is only for the purpose of coming to a conclusion as to whether or not a question of law arises. As a matter of fact, consideration by the court at that stage is perfunctory. Merely because a reference was called for u/s 256(2) at a later stage, observations made at that stage are not conclusive and not binding on the court while answering the reference.
The Tribunal is the last fact finding authority and the High Court in exercise of its jurisdiction u/s.27 of the Wealth-tax Act, 1957, and s. 256 of the 1961 Act has to accept the finding as recorded by the Tribunal as correct unless a specific question as to the perversity of such finding of fact has been raised in the given case. (AY. 1982-83)
CWT .v. Trustees of H.E.H. the Nizam'sJewellery Trust (2014) 361 ITR 668 (AP)(HC)

Interest –Tax Act, 1974

S. 2(5A):Chargeable interest-Finance charges-Financing and leasing of vehicles business. [S.2(7),4]
Assesse Company was engaged in the business of "Financing & leasing". On hire purchase transaction, the assesse charged "Finance Charges" as well as interest on repayment of Principal amount, which were shown in the Balance Sheet as capital receipt. AO charged interest u/s 2(5) r.w.s. 2(7) of Interest Tax Act, 1974 and consequently charged u/s 4 of the IT Act as the interest charges on the money was financed to the hirer and it was chargeable to tax. CIT (A) upheld the AO. On appeal in Tribunal, Tribunal set aside the case by taking a view that the transactions involved were in the nature of contract of hire-purchases having an element of bailment as well as that of sale and therefore hire purchases transactions were not considered as lending or advancing of loans. On appeal in HC, HC reversed the decision of Tribunal and held that excess amount so paid by the hirer to the assesse was nothing but interest on loan. The amount so invested by the assessee in the purchase of vehicles was the amount of loan advanced by it to the hirer & also promising note was also executed by the hirer in the favour of the assesse company for total hire charges payable for the motor vehicle as collateral security and the assesse company was given the right to the said demand promissory note in favour of their bankers or any other party for valuable consideration and also sue upon the same. (AY. 1992-93 to 1997-98)
CIT v. Commercial Motors Finance Ltd. (2014) 264 CTR 217 / 221 Taxman 90 (Mag.) / 221 Taxman 90 / 97 DTR 137(All.)(HC)

S.2(7):Interest-Hire purchase –Not loan-Do not fall with in definition of interest.
Transaction entered in to by assessee with third party is hire purchase and not loan transaction hence interest tax is not applicable.(Followed Sundaram Finance Ltd v. State of Kerala (1966) 17 STC 489 (SC), AIR 1966 SC 1178)
CIT .v.M.G.Brothers (2014) 360 ITR 603 (AP)(HC)

S.4: Charging of interest-Stick loans-Interest not credited in profit and loss account as recovery extremely doubtful –Not chargeable to interest.[S. 5, 6,Income –tax Act, 1961 , S. 43D]

If the interest , recovery of which is doubtful , was not credited in the profit and loss account of the previous year, the interest would not fall within the scope and ambit of chargeable interest.(AYs. 1975-76 to 1979-80 and 1981-82 to 1986-87)

UCO Bank .v. CIT (2014) 360 ITR 567 (Cal.)(HC)

The Central Excise Act, 1944

Stay-Officer should not take recovery action before expiry of statutory period-Action to recover tax before expiry of statutory period for filing appeal is high-handed & in defiance of law.

Though the assessee had a statutory period of three months to file an appeal along with stay application before the CESTAT, the Asst CST directed the assessee to pay the demand within two days and threatened to take coercive action to recover the dues. The assessee filed a Writ Petition contending that the AO's action was in breach ofCircular dated 01.01.2013 issued by CBEC, and the demand was premature because the assessee had the right to file an appeal within 3 months. HELD by the High Court allowing the Petition:

(i) The AO's insistence that the assessee should pay the amount is contrary to the provisions of the Finance Act which provides for a period of 3 months to file an appeal to the Tribunal. It is also contrary to the circular dated 01.01.2013 issued by the CBEC. The impugned communications, to say the least, is high handed. The statute has advisedly provided a period of three months to an assessee to file an appeal before the appellate authority and also obtain a stay. This is with a view to enable the assessee to seek proper advice and considered opinion on the adjudication order before taking a decision and then challenging the adjudication order in appeal proceedings;

(ii) In case, the Revenue is allowed to adopt coercive measures and/or if the assessee is required to pay tax determined immediately, it would lead to injustice to an assessee, as his opportunity to obtain a stay from the appellate authority would stand foreclosed. Moreover, the inherent right of an appellate authority to stay the order being appealed against would be rendered futile. In fact, this Court in Mahindra & Mahindra Limited (1959-ELT-505) had directed the Revenue to return the amounts recovered by encashing the bank guarantee of the assessee as it was done before the expiry of three months to file an appeal;

(iii) The officers of the Revenue would do well to realize that their job is much more than merely collecting the tax. They are officers of the State, administering the Finance Act, 1994 and fairness in approach to the tax payers and acting in accordance with the Rule of Law is a sine-qua-non in discharge of all their functions;

(iv) The impugned communications are not only in defiance of the CBEC circular dated 01.01.2013 but also in breach of the statutory provisions which gives a period of 3 months to enable the aggrieved party to file an appeal before the appellate authority.(WP No. 1014 of 2014. dt.29/01/2014.)

Tata Teleservice(Maharashtra) Ltd. v. Ministry of Finance (Bom) (HC),www.itatonline.org

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National tax Tribunal Act ,2005

The National tax Tribunal Act is clearly breach of law declared by Supreme Court, it "crosses the boundary" &and "encroaches the exclusive domain" of the High Courtsis unconstitutional. Chartered Accountants and Company Secretaries are specialists on accounts & facts and are not capable of arguing/ deciding 'Substantial questions of Law'- Not eligible to represent party to appeal in Tribunal. Composition of National tax Tribunal would have to be on the same parameters as Judges of the High Courts. Appointment of process of members of the NTT was also held to be constitutional. Most of the provisions were held to be unconstitutional the remaining provisions have been rendered otiose and worthless , and as such the provisions of the NTT as a whole set aside. Parliament must ensure new Tribunal conforms to salient characteristics and standards of court sought to be substituted , failure to do so will be violative of "Basic structure" of Constitution.[S. 5, 6, 7,8 &13,Arts, 225, 226 , 227 247, 323B]

The Full Bench of the Supreme Court had to consider whether the National Tax Tribunals Act, 2005, which sought to take away the jurisdiction of the High Courts in tax matters was constitutional. The

Full Bench has struck down the entire Act as being unconstitutional on the ground that though "Tribunalization" has been allowed subject to safeguards, the NTT Act "crosses the boundary" and "encroaches the exclusive domain" of the High Courts. In the course of the judgement, the Supreme Court had to consider whether Chartered Accountants could be appointed Members of the NTT and whether s. 13(1) of the Act which permitted Chartered Accountants to represent a party to an appeal before the NTT was valid in law. It also had to consider the application by the Company Secretaries that they are equal in all respects to the CAs and should also be permitted to appear and plead before the NTT. HELD by the Full Bench:

A perusal of the reported judgements shows that while deciding tax related disputes, provisions of different laws on diverse subjects had to be taken into consideration. The Members of the NTT would most definitely be confronted with the legal issues emerging out of Family Law, Hindu Law, Mohammedan Law, Company Law, Law of Partnership, Law related to Territoriality, Law related to Trusts and Societies, Contract Law, Law relating to Transfer of Property, Law relating to Intellectual Property, Interpretation of Statutes, and other Miscellaneous Provisions of Law, from time to time. The NTT besides the aforesaid statutes, will not only have to interpret the provisions of the three statutes, out of which appeals will be heard by it, but will also have to examine a challenge to the vires of statutory amendments made in the said provisions, from time to time. They will also have to determine in some cases, whether the provisions relied upon had a prospective or retrospective applicability. Keeping in mind the fact, that in terms of s. 15 of the NTT Act, the NTT would hear appeals from the Income Tax Appellate Tribunal and the CESTAT only on "substantial questions of law", it is difficult for us to appreciate the propriety of representation, on behalf of a party to an appeal, through either Chartered Accountants or Company Secretaries, before the NTT. The determination at the hands of the NTT is shorn of factual disputes. It has to decide only "substantial questions of law". In our understanding, Chartered Accountants and Company Secretaries would at best be specialists in understanding and explaining issues pertaining to accounts. These issues would, fall purely within the realm of facts. We find it difficult to accept the prayer made by the Company Secretaries to allow them, to represent a party to an appeal before the NTT. Even insofar as the Chartered Accountants are concerned, we are constrained to hold that allowing them to appear on behalf of a party before the NTT, would be unacceptable in law. We accordingly reject the claim of Company Secretaries, to represent a party before the NTT. We simultaneously hold s. 13(1), insofar as it allows Chartered Accountants to represent a party to an appeal before the NTT, as unconstitutional and unsustainable in law. (TC (C) No. 150 of 2006, dt. 25/09/2014.)
Madras Bar Association .v. UOI(2014) 109 DTR 273/(2014) (308)E.L.T. 209(FB)(SC)

Income –tax Appellate Tribunal- Appointment of members-Union of India has continued the process of appointment of Tribunal members without amending the Rules, the petitioner, who was wait-listed in 2007, deserves to be considered for appointment within 30 days.

The Selection Committee finalized a list of 18 persons, 13 for the post of Accountant Member and 5 for the post of Judicial Member. The Petitioner, Inturi Rama Rao, was placed in a 'Waiting List' appointment as Accountant Member. The Select List was approved by the Appointment Committee of the Cabinet (ACC) and 11 vacancies of Accountant Members were filled up whereas 5 vacancies of Judicial Members were also filled up. Two vacancies of Accountant Members remained vacant as the two candidates who were selected were not cleared by the Vigilance. The Petitioner, who was in the Waiting List, perceived a right to be appointed against one of the vacant posts of Accountant Member. As appointment was not forthcoming, the Petitioner moved the Central Administrative Tribunal. Appropriate relief was granted by the CAT. The order of the CAT was affirmed by the Delhi High Court. However, the appeals filed by the UOI against the said order of the CAT and High Court were allowed by the Supreme Court on the ground that there was a difference between the main list of selected candidates and the wait-listed candidates. As appointments of the candidates in the main list (16 in number) had already been made, the Supreme Court thought it proper not to affirm the directions for appointment of the wait-listed candidates as made by the CAT and the High Court. It accepted the contentions made by the UOI that further appointments would be made only after amendment of the Rules pertained to the eligibility of the candidates. However, as the amendment to

the Rules has not been effected till date and instead, the UOI initiated fresh selection process in the year 2013 on the basis of the unamended Rules and the selection process was completed and the appointments are awaited, the Petitioner filed a fresh Writ Petition. HELD by the Court allowing the Petition:

What we find is that notwithstanding the statement made on behalf of the Union of India before this Court that vacancies in the future will be made only after the amendments in the Rules are carried out, the Union of India has initiated a process to make further appointments without amending the Rules. If persons eligible under the then existing Rules which are in force even today are to be considered for appointment, surely, the petitioner, who is a wait-listed candidate, will also have to be considered for appointment by consideration of his entitlement for appointment as in the year 2007 when the appointments on the main-list were made and the two vacancies arose giving rise to the issue of operation of the waiting list. What follows from the above is that even accepting the order dated 17.11.2011 passed by this Court, in view of the subsequent facts and events that have occurred, namely, action of the Union of India in resorting to a fresh process of selection and appointment without amendment of the Rules, the right of the petitioner to be considered for appointment on the basis of his position in the Waiting List has once again come to fore which needs to be resolved by an appropriate order. We, therefore, allow this writ petition and direct consideration of the case of the petitioner for appointment on the basis of his position in the Waiting List against one of the two vacancies that had arisen on account of two of the candidates in the merit list not having been granted the vigilance clearance. This will be done by the concerned Authority within 30 days from the date of receipt of a copy of this order.(W.P. No. 202 of 2013, dt. 23/09/2014)

Inturi Rama Rao .v. UOI (SC);www.itatonline.org

Evidence Act

New technology-Recording of evidence-An Attitudal change in Judges is required. It is high time for us to change our mind set and see whether this new technology can help us to increase the speed and also we have to take into account the convenience of the parties.[S.65A, 65B ,Evidence Act]

In the said judgment, the Supreme Court has reproduced valuable observations of Justice Bhagwati in the case of National Textile Workers' Union vs. P.R. Ramakrishnan at page 256 as follows:

"*We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree, it will shed that bark and grow a new living bark for itself.*"

It is to be noted that our legislature has wisely taken note of this fact and accordingly has made the changes in the Evidence Act by amending Section 65 and thereby section 65A, 65B are inserted on the point of recording of evidence relating to electronic record and admissibility of electronic record. When the legislature has expanded the scope of term 'Evidence' acknowledging advance technology and scientific methods used by people in their daytoday activities, it is the duty of the Judicial officers to put life to those letters of law by interpreting them effectively.

An Attitudal change in Judges is required. We need to train ourselves to understand the pulse of the new generation who is avidly technosavvy. Though it is difficult for the Judges, especially who are in their middle age, to accept and digest the entry of new language and methods of evidence in the established judicial system, it is high time for us to change our mind set and see whether this new technology can help us to increase the speed and also we have to take into account the convenience of the parties as our judicial system is necessarily litigant centric.

The presence of the person can be obtained physically so also virtually. What is important is that a person should be seen and be heard and vice versa. These are the methods of distant communication, which is possible by virtual measures and microspeakers. Therefore, it is not necessary for the Judge to insist for the physical presence of the witness when it is not possible especially in the circumstances of this case, a virtual presence can be secured which is very much legal and for this purpose, it is not necessary for the Judge himself to give time but such evidence can be recorded by appointing Commissioner. (WP No. 6514 of 2014, dt. 09/09/2014)

Suvarna Rahul Musale .v. Rahul Prabhakar Musale (Bom.)(HC);www.itatonline.org

Interpretation of taxing statutes-Exemption-Res-judicata.
Provision conferring exemption should be construed strict interpretation. Principle of res judicata and estoppel is not applicable to income-tax proceedings.
CIT .v. Maharao Bhim Singh of Kota (2014) 365 ITR 485 (FB) (Raj.)(HC)

Interpretation of taxing statues-Rules against retrospectiity-Onerous provision-Not to be given retrospctivve effect.
Though provision for surcharge under the Finance Acts has been in existence since 1995 , the charge of surcharge with respect to block assessments having been created for the first time by the insertion of the proviso to section 113 of the Income –tax Act , 1961 , by the Finance Act, 2002, it is clearly a substantive provision and is to be construed as prospective in operation .The amendment neither purports to be merely clarificatory nor is there any material to suggest that it was intended by Parilament .

CIT v. Vatika Township (2014) 367 ITR466/271 CTR 1/109 DTR 33(FB)(SC)

Interpretation of taxing statues-Purposive construction of provisions granting relief.

A purposive interpretation should be given to the provisions of the Act while considering a claim for exemption from tax.[S.2(47),54]

Sanjeev Lal .v. CIT(2014) 105 DTR 305/365 ITR 389/225 Taxman 239(SC)
Shail Motilal (Smt) .v. CIT(2014) 105 DTR 305/365 ITR 389(SC)

Interpretation of taxing statues-Clear and unambiguous words.
A taxing statute should be strictly construed even if the literal interpretation results in hardship or inconvenience; common sense approach , equity , logic and morality have no role to play.
CIT .v. Calcutta Knitwears (2014) 362 ITR 673/ 101 DTR 217 (SC)

Interpretation of taxing statues-Plain and unambiguous words-Grammatical meaning.
It is well settled principle that Courts must interpret the provisions of the statute upon ascertaining the object of the legislation through the medium or authoritative forms in which it is expressed. It is well settled that court should not while interpreting the provisions of the statute, assign its ordinary meaning. Words of a statute must be understood in their natural , ordinary or popular sense and construed according to their grammatical meaning unless such construction leads to some absurdity or unless there is something in the context or in the object of the statute to the contrary ; efforts should be made to give meaning to each and every word used by the legislature.
UOI .v. Tata Chemicals Ltd (2014) 267 CTR 89/ 101 DTR 193(SC)
UOI .v. Reliance Infocom Ltd (2014)267 CTR 89/101 DTR 193(SC)
UOI .v. Set Satellite (Singapore) Pte Ltd (2014)267 CTR 89/ 101 DTR 193(SC)

Interpretation of taxing statues-Meaning of words-Meaning given by body of accounts having stutory recognisation can be adopted.

When a recognised body of accountants, such as the Institute of Chrtered Accountants of India, after due deliberation and consideration publishes ceratin material for its members, one can rely upon it.The meaning given by the Insitutute clearly denotes that in normal accounting paralance the word" turn over" would mean "total sales" .The sales would definitely not include scarp which is either to be deducted from the cost of raw material or is to be shown seperatlely under a different head.There is no reason not to accept the mening of the term "turnover" given by a body of accontatnts , having statutory reognisation. If all accountants , auditors businessmen , manufacturers normally interpret the

term"turnover" as a sale proceeds of the commodity in which the business unit is dealing, there is no reason to take a different view.
CIT .v. Punjab Stainless Steel Industries (2014) 364 ITR 144/ 103 DTR 49 (SC)
CIT .v.Punjab Stainless and steel Industries (2014) 364 ITR 144/ 103 DTR 49 (SC)
CIT .v. Dhram Industries (2014)364 ITR 144/ 103 DTR 49 (SC)

Interpretation of taxing statutes-Precedent-Decision of Supreme Court interpreting Excise Act –Not binding in interpreting provisions of Income –tax Act-Ambiguity-Object of legislation.

While it is true that any law declared by the Supreme Court is one to be followed and applied by all courts in the country in view of the mandate under article 141 of the Constitution of India, it is only such law that is declared in a particular context and in respect of the particular statutory provisions and not in general. An interpretation placed on a particular enactment cannot be just engrafted to the provisions of another enactment.
CIT .v.Ecom Gill Coffee Trading P.Ltd. (2014) 362 ITR 204 (Karn.)(HC)
CIT .v. B. Fouress P. Ltd. (2014) 362 ITR 204 (Karn.)(HC)

Interpretation of taxing statues-Documents-Agreements-General principles-Name of document is not conclusive.

Nomencclature of a document or deed is not conclusive of what it seeks to achieve ;the court has to consider all parts of it , and arrive at a finding in regard to its true effect.(Referred Fuzhakkal Kutappu v.C.Bharavi (1977) AIR 1977 SC 105 and Faqir Chand Gulati v. Uppal Agencies Pvt Ltd (2008) 10 SCC 345(SC).In the income-tax law ,the position is no different, as can be seen from the judgment of the Supreme Court in CIT v. Motors and General Stores P.Ltd (1967) 66 ITR 692(SC), following Duke of Webminster v.IRC (1935) 19 TC 490 (HL) and IRC v. Welsleyan General Assurance Society (1948) 16 ITR (E.C.)101 (HL)

Radials International .v. ACIT (2014) 367 ITR 1/103 DTR 316(Delhi)(HC)
Interpretation of taxing statues-Binding precedent-Jurisdictional High Court is binding.
A High Court must not brush aside the binding precedent or the judgment of a co-ordinate Bench simply beacause some of the arguments were either not canvased or if canvased were not considered. The binding precedent can be ignored only if it is perincurium.

CIT .v. Impact Containers Pvt. Ltd(2014)367 ITR 346/48 taxmann.com/107 DTR 145/270 CTR 337/225 Taxman 322(Bom.) (HC)

Interpretation of taxing statues-Legal fiction.

Scope of a deeming provision has to be restricted to what is expressly stated in such a provision. There can be no inference or intendment as regards such a provision. Such a deeming provision cannot be extended beyond what is expressly stated therein.(AY.2009-10)
Jai Surgicals Ltd..v. ACIT (2014) 106 DTR 333/163 TTJ 724(Delhi)(Trib.)

Interpretation-Precedent- If there is a conflict of judicial opinion, the view in favour of the assessee must be taken.

Tribunal held that there is a judgment of Hon'ble jurisdictional High Court in favour of the revenue, namely, CIT v. Madhya Bharat Energy Corporation Ltd reported in (2011) 337 ITR 389 (Del) which states that the non issuance of notice u/s 143(2) does not vitiate the assessment. However, there are also two subsequent judgments of Hon'ble jurisdictional High Court directly in favour of the assessee, as regards the service of notice u/s 143(2). The Hon'ble H.C. held that service of notice u/s 143(2) is mandatory. If there is a conflict of judicial opinion, the view in favour of the assessee must be taken.
DCIT .v. Silver Line(Delhi)(Trib.);www.itatonline.org

Allied laws.
Advocates Act, 1961.
Advocates- Representation-Interim order passed that non-advocates cannot appear before VAT authorities or advertise services relating to filing of returns/ arguing before VAT authorities[Advocates Act, 1961, S.33,U.P. Value added Tax Rules 2008, R. 73,79(3)

The Tax Lawyers Association filed a Writ Petition claiming that Rule 73 read with Rule 79(2)(f) of the U.P. Value Added Tax Rules 2008 which permits outsiders to practice in the field of Law before the VAT Authorities under the VAT Act is ultra vires section 33 of the Advocates Act 1961 which provides that only Advocates are entitled to practice before any Court or authority. It was claimed that under the garb of the impugned Rule, outsiders have been permitted to appear before the authorities under the VAT Act to practice in the field of Law. Attention was drawn to certain leaflets which seem to be advertisement by certain persons who are not registered Advocates inviting assesses with regard to filing of return on payment of Rs.400 and odd. It was submitted that under the garb of said Rule, persons who are not skilled lawyer or have no knowledge in the field of Law, are appearing before the authority under the VAT Act, are spoiling the academic atmosphere of the profession. HELD by the Court admitting the Petition:
As an interim measure, we direct the respondents that no person whosoever, may be permitted to advertise in the Newspaper or any leaflet, inviting assesses for the purpose of filing of return or arguing before the authority under the VAT Act. Any person, who is not a registered advocate, shall not be permitted to appear before the Authority under the VAT Act.(MISC Bench No. 7116 of 2014, dt. 6.8.2014.)
Tax Lawyers Association .v. State of U.P. (All.)(HC) www.itatonline.org.
Criminal Procedure code,

Judgment or oder-High Court-Signature-Pronouncement- Despite pronouncement of verdict in open court & signing of draft judgement, Judge entitled to alter verdict until judgement is signed & sealed-Unless the judgment is signed and sealed , it is not ajudgment in strict legal sense and therefore , in exceptional cirmunstances, the order can be recalled and altered to a ceratin extent.[Criminal Procedure code ,197, 362]

In a case relating to the prosecution of police personnel for alleged dereliction of duty, the High Court dictated an order in open Court in which it held that in the absence of sanction of the State Government u/s 197 of the CrPC, the prosecution was not permissible and the Petitioner had to be acquitted. However, later, the said order was recalled by the court suo moto on the ground that the issue required to be examined further. The Petitioner challenged the order of recall on the ground that once the order had been dictated in open court, a review or recall is not permissible in view of s. 362 CrP.C which provides that a judgment or order passed in a criminal case cannot be reviewed or recalled once it has been pronounced and signed. HELD by the Supreme Court dismissing the appeal:
Up to the moment the judgment is delivered Judges have the right to change their mind. There is a sort of 'locus paenitentiae' and indeed last minute alterations often do occur. Therefore, however much a draft judgment may have been signed beforehand, it is nothing but a draft till formally delivered as the judgment of the Court. Only then does it crystallise into a full fledged judgment and become operative. It follows that the Judge who "delivers" the judgment, or causes it to be delivered by a brother Judge, must be in existence as a member of the Court at the moment of delivery so that he can, if necessary, stop delivery and say that he has changed his mind. There is no need for him to be physically present in court but he must be in existence as a member of the Court and be in a position to stop delivery and effect an alteration should there be any last minute change of mind on his part. If he hands in a draft and signs it and indicates that he intends that to be the final expository of his views it can be assumed that those are still his views at the moment of delivery if he is alive and in a position to change his mind but takes no steps to arrest delivery. But one cannot assume that he would not have changed his mind if he is no longer in a position to do so. A Judge's responsibility is heavy and when a man's life and liberty hang upon his decision nothing can be left to chance or doubt

or conjecture; also, a question of public policy is involved. As we have indicated, it is frequently the practice to send a draft, sometimes a signed draft, to a brother Judge who also heard the case. This may be merely for his information, or for consideration and criticism. The mere signing of the draft does not necessarily indicate a closed mind. We feel it would be against public policy to leave the door open for an investigation whether a draft sent by a Judge was intended to embody his final and unalterable opinion or was only intended to be a tentative draft sent with an unwritten understanding that he is free to change his mind should fresh light drawn upon him before the delivery of judgment.
KushalbhaiRatanbhaiRohit.v. State of Gujarat(2014) 104 DTR 2/269 CTR 11(SC)
Editoril: Refer ITO .v. V.Meenakshi(Smt)(2010) 128 TTJ 619/(2011) 128 ITD 11 (TM) (Chennai) (Trib)

Works contract-Distinction between "contract for sale of goods" and "works contract" explained.

A Constitutional Bench of 5 Judges of the Supreme Court had to consider whether the law laid down by a three-Judge Bench in State of A.P. v. KoneElevators (India) Ltd (2005) 3 SCC 389 that a contract for manufacture, supply and installation of lifts in a building is a "contract for sale of goods" and not a "works contract" is correct or not. HELD by the Constitution Bench over-ruling the three-Judge Bench judgement:

(i) In the case of a "contract for sale of goods", the entire sale consideration is taxable under the sales tax or value added tax enactments of the State legislatures. In the case of a "works contract", the consideration paid for the labour and service element has to be excluded from the total consideration received and only the balance is chargeable to sales tax or value added tax;

(ii) Four concepts have clearly emerged from the numerous judgements of the Supreme Court on the point. They are (a) the works contract is an indivisible contract but, by legal fiction, is divided into two parts, one for sale of goods, and the other for supply of labour and services; (b) the concept of "dominant nature test" or, for that matter, the "degree of intention test" or "overwhelming component test" for treating a contract as a works contract is not applicable; (c) the term "works contract" as used in Clause (29A) of Article 366 of the Constitution takes in its sweep all genre of works contract and is not to be narrowly construed to cover one species of contract to provide for labour and service alone; and (d) once the characteristics of works contract are met with in a contract entered into between the parties, any additional obligation incorporated in the contract would not change the nature of the contract;

(iii) The "dominant nature test" or "overwhelming component test" or "the degree of labour and service test" are really not applicable. If the contract is a composite one which falls under the definition of works contracts as engrafted under clause (29A)(b) of Article 366 of the Constitution, the incidental part as regards labour and service pales into total insignificance for the purpose of determining the nature of the contract;

(iv) On facts, the three-Bench judgement erred in taking the view that the major component was the equipment and that the skill and labour employed for converting the main components into the end product were only incidental. The principal logic applied, i.e., the incidental facet of labour and service is not correct because in all the cases, there is a composite contract for the purchase and installation of the lift. The price quoted is a composite one for both. Various technical aspects go into the installation of the lift. There has to be a safety device. In certain States, it is controlled by the legislative enactment and the rules. In certain States, it is not, but the fact remains that a lift is installed on certain norms and parameters keeping in view numerous factors. The installation requires considerable skill and experience. The labour and service element is obvious. The preparatory work has to be done taking into consideration as to how the lift is going to be attached to the building. The nature of the contracts clearly exposit that they are contracts for supply and installation of the lift where labour and service element is involved. Individually manufactured goods such as lift car, motors, ropes, rails, etc. are the components of the lift which are eventually installed at the site for the

lift to operate in the building. In constitutional terms, it is transfer either in goods or some other form. In fact, after the goods are assembled and installed with skill and labour at the site, it becomes a permanent fixture of the building. However, if there are two contracts, namely, purchase of the components of the lift from a dealer, it would be a contract for sale and similarly, if separate contract is entered into for installation, that would be a contract for labour and service. But, a pregnant one, which is a composite contract for supply and installation, has to be treated as a works contract, for it is not a sale of goods/chattel simpliciter. It is not chattel sold as chattel or, for that matter, a chattel being attached to another chattel.(WP. No. 232 of 2005, dt. 06/05/2014.)

Kone Elevator India Pvt. Ltd. v. State of T.N.(FB 5 Judges)(SC) ,www.itatonline.org

Income tax Appellate Tribunal-Guidelines for promotion.
Income tax Appellate Tribunal-Guidelines laid down regarding procedure for promotion of ITAT Members to avoid arbitrariness. Suggestion made that there should be a mechanism to oversee the quality of orders passed by ITAT Members.

Shri. R. P. Tolani& Shri. S.K. Yadav, Judicial Members of the ITAT, filed a claim before the Central Administrative Tribunal ("CAT") challenging their non-appointment as Vice-Presidents at the time that four other Members (S/Shri. K.L. Karwa, O.K. Narayanan, Bhartvaja Shankar & G.C. Gupta) were appointed Vice Presidents. While several contentions were raised before the CAT (including that the appointment of Vice-President was by way of direct recruitment, rather than promotion, and, therefore, the obligation to reserve posts in favour of the OBC group was violated) the principal contention was that the petitioners were senior to some of the members appointed as Vice-Presidents and have equally good, if not better, Annual Confidential Reports ("ACRs") in their favour. The CAT rejected the contentions. On a Writ Petition by M/s Tolani& Sunil Yadav to challenge the said decision of the CAT HELD by the High Court dismissing the Petitions:

(i) The Selection Committee did not conduct interviews or meet the candidates at any point in the selection process, nor were orders written by the candidates in their capacity as members of the ITAT placed before the Selection Committee. The only material before the Selection Committee was the Annual Confidential Reports ("ACRs") of the candidates. It is on this basis that the selection of five candidates was made, as the minutes of the Selection Committee records, on the basis of "available character rolls, knowledge and suitability";

(ii) The Selection Committee, as an administrative body, does not have to give reasons for accepting the five candidates in question, and rejecting the two writ petitioners. Nevertheless, the decision-making process should be fair and reasonable, and ensure that promotions are made on the basis of the statutory criteria, and through a fair consideration of the relative merit of the candidates to the posts in question. The Selection Committee was not bound by the ACRs; however, it adopted some other consideration in the absence of any material. The Selection Committee could have adopted the view that the petitioners were not merited, if it formed this opinion on the basis of other material present before it, as for example, sample judgments of the members, their disposal rates, cases turned on appeal etc. If such a course had been followed, the assessment of the Selection Committee would lie outside the Court's limited power of judicial review. Yet, since no material was before the Selection Committee which could testify as to those factors, and since none of the candidates were interviewed by the Selection Committee (which did not have any occasion to interact with them), the comparative merit as judged by the ACRs leads to a conclusion contrary to that returned by the Selection Committee;

(iii) However, the Court has to be cautious in ensuring that its inquiry does not translate into a 'merit review' of the decision of the Selection Committee. The fact that no mala fides were urged or proved against anyone in this case, or in respect of the process, is an important circumstance. Once that aspect is accepted, the further circumstance that the Chairman (Justice Kapadia, who later became the Chief Justice of India) had vast experience in income tax matters, would have had occasion to consider some of the orders of the candidates was relevant. He was aided by the President of ITAT,

who in turn would have provided inputs in respect of the functioning of each contender to the post. If these aspects are kept in mind, it cannot be said that there was any unfairness in the selection process or that the committee's decision is vitiated by non-application of mind, or that relevant material was withheld from consideration;

(iv) To allay any future apprehensions, it would be necessary for the Central Government, in consultation with all concerned, including the President of ITAT, to evolve some guidelines applicable for future cases. This could be in the form of some minimum information about each candidate who applies for the post of Vice President, Senior Vice President and President, in regard to the last three years or five years' performance, such as the number of orders written or delivered, each year; the units/appeals disposed of; a certain number of orders, i.e. about five or ten (may be chosen in advance by the Chairman of the Committee) to assess their quality, and personal interaction. The committee might, for its own assistance, in accordance with such guidelines, evolve an appropriate marking mechanism. This would lend objectivity and a greater degree of scrutiny of the quality of candidates and avoid the odium of arbitrary or unfair procedure;

(v) Members of tribunals such as the ITAT perform crucial judicial functions, which can have an adverse bearing on individuals, and at times, vast commercial and fiscal ramifications. In these circumstances, the Central Government should seriously consider continuous oversight through the concerned High Courts, given that High Courts exercise appellate (and supervisory writ) jurisdiction over the orders and proceedings of ITAT and its benches. Some reporting mechanism, preferably centralized, to oversee the quality of the orders of ITAT is essential because the President of ITAT's powers over members of ITAT and Vice President are not appellate, they are administrative. Creation of this mechanism would result in adding a new and possibly crucial dimension to ensure greater scrutiny of ITAT and its orders and also provide a link in the decision making process of selection to senior judicial positions within ITAT.(WP (C) 8639 of 2010, dt. 23.05.2014.)

R. P. Tolani.v. UOI (Delhi) (HC),www.itatonline.org
Sunil Kumar Yadav.v. UOI(Delhi)(HC) ,www.itatonline.org

Chartered Accountants Act, 1949.
S. 21 : Misconduct of Members of Institute.

Petitioner No. 1 was a partner of PWC, a firm of Chartered Accountants. PWC were statutory auditors of 'G' Bank. Institute, respondent No. 1, received information from Reserve Bank of India (RBI) about certain irregularities alleged to have been committed by petitioners in relation to statutory audit done by them on behalf of PWC of 'G' Bank. Respondent No. 1 formed a prima facie opinion that petitioners were guilty of misconduct and in accordance with section 21 referred matter to its Disciplinary Committee. During pendency of proceedings before Disciplinary Committee, provisions of Chartered Accountants Act, 1949 relating to misconduct and procedure and penalties, underwent substantial modification and amendments by Chartered Accountants (Amendment) Act, 2006. By amended Act, section 21 of unamended Act was replaced with sections 21, 21-A, 21-B, 21-C and 21-D - In another case wherein similar issue was involved, question as to whether amended or unamended provisions of sections 21, 22 and 22-A would apply was pending adjudication before Supreme Court. Petitioners thus filed instant petition contending that unless and until Supreme Court decide said matter, proceedings adopted by respondent No. 1 against them should also be stayed. The Court held that if petitioner's contention was accepted, it would result in a standstill of numerable proceedings before various Courts and Tribunals all over country merely due to pendency of appeal before Supreme Court. Even otherwise, if Supreme Court comes to a conclusion that procedure to be adopted by respondent No. 1 was different from what it adopted, still entire evidence collected may be of some use though it might necessitate holding a fresh inquiry adopting new procedure. Therefore, there was no reason for adjourning proceedings before respondent No. 1 sine die and, consequently, instant petition was dismissed.
Partha Ghosh .v. ICAI (2014) 220 Taxman 50 (Bom.)(HC)

Contempt of Courts Act, 1971.

S.15(2):Contempt-Income tax Appellate Tribunal- Proceedings under the Contempt of Courts Act are quasi-criminal in nature and hence, no action under the Act can be taken unless a clear case of criminal contempt is made out- The lawyers and other representatives of the litigants in the subordinate courts and Tribunals are expected to conduct themselves in a manner which protects the dignity and decorum of the judicial proceedings.

The Lucknow Income Tax Tribunal Bar Association passed a resolution, and addressed a letter to the President of the ITAT, stating that they had resolved not to appear before the Bench in which Sri B.R. Jain, Accountant Member, is one of the members. It was requested that the appeals be adjourned till such time a decision is taken by the President of the ITAT. The senior Member of the Bench, Hon'ble Sunil Kumar Yadav adjourned the matters. However, the other Member of the Bench, Shri. B. R. Jain, passed a separate order stating that certain practitioners had joined hands in "forum shopping" and that the allegations against him were "motivated, false, frivolous" and unacceptable. He also stated that being a junior member of the Bench, he was not objecting to the adjournment granted by the Sr. Member. Thereafter, one Mr. S. K. Garg, Advocate, filed a representation to the President in which he denounced the resolution passed by the Bar against Hon'ble B. R. Jain and claimed that B. R. Jain was "judicious". At the same time, S. K. Garg made a complaint against Hon'ble S.K. Yadav and cited instances which according to him showed impropriety and judicial indiscipline by Hon'ble S.K. Yadav. Hon'ble S.K. Yadav took the view that the representation of S. K. Garg contained "scandalous and scurrilous allegations" with the object of "scandalizing" the Lucknow Bench and "intention to create fear/terror in the mind of members of the ITAT". Though Hon'ble Sunil Kumar Yadav proposed an order for making reference for initiation of criminal contempt proceedings against the opposite parties u/s 15(2) of the Contempt of Court Act, Hon'ble B.R. Jain did not concur with the proposed order though he also did not pass any dissent thereon. Accordingly, Hon'ble Sunil Kumar Yadav filed a contempt petition in the High Court against S. K. Garg in his individual capacity. Hon'ble S. K. Yadav also passed an order stating that "in order to maintain the dignity of the institution" no appeal would be heard "unless and until Bar Association passes a resolution condemning this act of a particular advocate and reposing confidence in the bench …." However, Hon'bleB.R.Jain passed a separate order disassociate and disagreeing with the view of Sunil Kumar Yadav. HELD by the Court on the said contempt petition:

(i) The reference made by Hon'ble Sunil Kumar Yadav singly is not a reference by a subordinate court within the meaning of s. 15(2) of the Contempt of Courts Act for the reason that the other member of the division bench has not concurred with it. While this does preclude the Court from taking suomotu cognizance of alleged criminal contempt, the facts and circumstances do not make out a case for criminal contempt against the opposite parties. Certain startling facts are noted. One Bar Association passes a resolution against the conduct of one member of the ITAT whereas members of another Bar Association condemn the same and lodge the complaint against the other member of the ITAT. Both the members of the Tribunal did not concur in their views on various occasions. The complainant who is the Judicial Member of the ITAT has gone even to the extent of saying in his order that the Tribunal will not hear any appeal unless and until Bar Association passes the resolution condemning the particular act of an Advocate of moving the representation against him. The complainant has even observed in the said order that Bar Association should pass the resolution in a particular manner giving assurance that in case of decision in the any case, no such type of representation or complaint will be made to the President of ITAT and further that the protection be given from President of the ITAT with the assurance that such type of complaint/representation would not be entertained and erring Advocate will be dealt with severely. The said view expressed by the complainant-S.K. Yadav, who is Judicial Member of the ITAT, though was not agreed to by the other member, namely, B.R. Jain, Accountant Member, however, such observations, as the one made by the complainant in a judicial order are unacceptable. Further, the instructions issued by the complainant, in his capacity as senior member of the Tribunal to the Assistant Registrar, ITAT, Lucknow to obtain consent of the individual assessees in respect of the application moved by the opposite party No.1

regarding transfer of cases from Lucknow Bench to some other Bench, also does not appear to be a sound act on his part, if measured or judged on acceptable judicial standards;

(ii) The language used in the representation dated 28.08.2012 also cannot be said to be in good taste, which we also do not appreciate, as the words like "deeper evil", "conspiracy" and "ill motivated" have been used but the same in itself may not amount to criminal contempt. The emphasis of the representation made by the opposite party No.1, prima facie, appears to be on "judicial precedences" not allegedly being followed by the complainant and on the alleged "judicial indiscipline" and "impropriety". It is well settled that proceedings under the Contempt of Courts Act are quasi-criminal in nature and hence, no action under the Act can be taken unless a clear case of criminal contempt is made out;

(iii) The lawyers and other representatives of the litigants in the subordinate courts and Tribunals are expected to conduct themselves in a manner which protects the dignity and decorum of the judicial proceedings. Use of words, as narrated above, by the opposite party No.1 in his representation is not worthy of approval. We express our hope that lawyers will always be guided by the following observations of Supreme Court in HargovindDayal Srivastava vs. G.N. Verma AIR 1977 SC 1334 "It is the duty of lawyers to protect the dignity and decorum of the judiciary. If lawyers fail in their duty, the faith of the people in the judiciary will be undermined to a large extent. It is said that lawyers are the custodians of civilization. Lawyers have to discharge their duty with dignity, decorum and discipline".(Case No. 310 of 2013, dt. 28/05/2014.)
State of U.P. v. S. K. Garg (All.)(HC),www.itatonline.org

Kerala Agricultural Income-tax Act 1991.

S.35(2): Recovery of tax-Limitation for passing the order-Amended order was passed beyond limitation period –Recovery proceedings was held to be not valid. [S. 57]

As per the provision of the Agricultural income-tax Act (Kerala), assessment shall be completed with five years from end of year for which agricultural income was first assessable. Amended assessment was passed beyond five year period . The court held that recovery proceedings were not valid.(AY.1988-89)
SavyL.Purayidam.v.Agrl IT and CTO (2014) 360 ITR 551 (Ker.)(HC)

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