MONTHLY DIGEST OF IMPORTANT CASE LAWS (FEBRUARY 2014)


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]
Asseesee 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 Harivillabhdas 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)

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)

S.2(22)(e): Deemed dividend-Asseesee 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 & assesse 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)

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): Dividend–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–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(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.
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 A. G. v. DDIT (Delhi)(HC)**

**S.4: Income-Accrues or arise -Retention money received, after TDS, but subject to bank guarantee, is not chargeable to tax as income till all conditions are satisfied.**

(i) Mere receipt of income is not the sole test of chargeability.

(ii) On facts, the right to receive the sum was uncertain and contingent upon satisfactory completion of several factors. Same uncertainly and unpredictability prevailed. The assessee had no absolute right to receive the amount. SSNNL had no obligation to release the same before completion of warranty period and even thereafter would release the amount only after making permissible adjustments. Mere fact that in the present case no recoveries were made from the bank guarantee or security deposit is of no consequence. The fact that tax was deducted at source on said amount also would be of no consequence. The assessee had no control over such deduction. Merely whether tax was deductible or not would not decide the taxability of certain receipts. The manner in which the assessee accounted for such receipt in its books of account can also not determine its tax liability.

**Amarshiv Construction Pvt. Ltd. v. DCIT; (Guj) (HC) [www.itatonline.org]**

**S.4: Income-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.


**S.4: Income-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: Income-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 (Delhi)(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.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.


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 assessee, 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. (AYs. 2003-04 to 2005-06)

Brown & Sharpe Inc .v. ACIT (2014) 98 DTR 405 (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(Bang.)(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)(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 tax 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 input service 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) 61 SOT 19 (Cochin)(Trib.)
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 (Karn.)(HC)
S.10(23C): Hospitals-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)

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 (All.)(HC)
S.11: Property held for charitable or religious 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)


S.11: Property held for charitable or religious 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)


S.11: Property held for charitable purposes–Charitable or religious trust – 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)


S.11: Property held for charitable purposes–Voluntary contributions-Trust or institutions – 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-Trusts or institutions-Cancellation of registration was held to be not justified-Directio 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)


S.12AA: Procedure for registration-Trusts or institutions-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-Trusts or institutions- Genuineness of activities was not doubted-Cancellation of registration was not valid. [S.2(15, 11)]

For the cancellation of registration u/s. 12AA(3), it has to be satisfied that the activities of the trust are not genuine and the activities are not carried on in accordance with the object of the trust. If a particular activity appears to be commercial in character and it is not dominant, then AO has to consider the effect of s. 11 in the matter of granting exemption on particular head of receipt and the mere fact that the said income does not fit in with s. 11 would not, by itself, lead to the conclusion that the registration granted u/s. 12AA is bad and hence has to be cancelled. The Court observed that for invoking section 12AA read with section 2(15) revenue has to show that the activities are not falling within the objects of the Association and that the dominant activities are in the nature of trade, commerce and business. By the volume of receipt one cannot draw the inference that the activity is commercial .Cancellation of registration was not valid.

Tamil Nadu Cricket Association .v. DIT(E) (2014) 98 DTR 299 (Mad.)(HC)

S.12AA: Procedure for registration-Trusts or institutions-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 DTR 183 (All.)(HC)

CIT .v. U.P. Housing & Development Board (2014) 98 DTR183 (All.)(HC)

CIT .v. Ayodhya Faizabad Development Authority (2014) 98 DTR 183 (All.)(HC)

S.12AA: Procedure for registration-Trusts or institutions-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 Agrawal Community 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 assessee 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.13: Denial of exemption - Trusts or institutions - 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). (Civil Appeal No. 2492 of 2014. order dt. 20th February, 2014.)

CIT v. Dawoodi Bohara Jamat. (SC), 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/2012 dt. 26.03.2014, (AY. 2009-2010)

JM Financial 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 (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.28(i): Business income-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. 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.


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.


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 -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 (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 (Mum.)(Trib)

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)(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.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)
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)(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–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 assessee. 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–Irrecoverable amount due from clients-Allowable as deduction after reducing the sum recoverable from sale 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 (Mum.)(Trib.)

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)

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)


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 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 facility could 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 (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 expenditure gives 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 - Business 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.)

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 Movers v. 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.)

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 (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 (Bang.)(Trib.)

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.40(a)(ia): Amounts not deductible-Deduction at source-Tax deducted at source paid before due date of 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)


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 (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–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-Tax was deposited before due date of filing of return-
Payments-Excess 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 C.I.T. 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)


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.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)


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.
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) (Anupam Tele Services vs. ITO distinguished) Rajmoti Industries v. ACIT (Guj.)(HC) www.itatonline.org

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 (Cochin)(Trib.)

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), 39(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) 98 DTR107 (P&H)(HC)
CIT v. UT Star Com. Inc. (2104) 98 DTR 107 (P&H)(HC)

S.45:Capital gains-Capital loss-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. (ITA No. 1110 of 2012. dt. 25/03/2014.)
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.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.54F: Capital gains–Construction of new residential house– Construction need not begin after sale of the original asset-Eligible cannot be denied.
S.54F does not stipulate that to claim exemption the construction of house should commence before the date of sale of shares. Exemption could not be denied on the ground that the construction of house had commenced before the date of sale of shares. (AY. 2009-10)

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”. So, 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 Provviso 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. (ITA No. 1973/Ahd./2012, dt. 25/03/2014.)
Alkaben B. Patel .v. ITO(SB) (Ahd.)(Trib.); www.itatonline.org
S.55: 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.55A(a)]

Asseessee 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. Order of Tribunal was affirmed. (AY. 2006-07)

CIT .v. Puja Prints (2014) 98 DTR 177 (Bom.)(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.

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 (ITA No. 4887/mum/2013, A.Y. 2010-11 and SA No. 192/Mum/2013. A. Y. 2010-11.order dt. 12.03.2014.)

Sudhir Menon HUF .v. ACIT (Mum.) (Trib.), www.itatonline.org

S.68: Cash credits–Credit in capital account of partner-Gift from NRI-Addition was confirmed.

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 gift. 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) 98 DTR 273 (P&H)(HC)

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 manager 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.80HHE: Export business-Free trade zone-total turnover—Total 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 DTR 194 (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 DTR 18 (Karn.)(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. (Tax Appeal No. 508 of 2007 dt. 25.03.2014.)
CIT v. Atul Intermediates (Guj.)(HC); www.itatonline.org

S.80IB: Industrial undertaking—Manufacture-explained. Non-claiming of s. 80-IB deduction in return is no bar for claiming it before CIT(A)
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 assesses 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.
CIT v. Mitesh Impex (Guj)(HC).www.itatonline.org

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 assessee 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) 61 SOT 143 (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 Clinipharm (P.) Ltd. v. Dy.CIT (2014) 98 DTR 1 (Mum.)(Trib.)

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.
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 assessee have made any special ground for non-utilization of the FSI. (Tax Appeal No. 549/2008, dt. 08/04/2014.)

CIT . v. Moon Star Developers (Guj.)(HC); www.itatonline.org

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 (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.
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 on profits, 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 (Delhi)(Trib.) www.itatonline.org

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.
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 a practical 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)(Mum.)(Trib.), www.itatonline.org

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 (Delhi)(Trib.) www.itatonline.org

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 and if the facts and circumstances 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 Tribunal in 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 any 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 benchmarking 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 (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 (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.

Honeywell Electrical Devices and Systems India Ltd. v. ACIT (2014) 29 ITR 347 (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 (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 (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-Computation of 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-Computation of 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–Computation of 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–Computation of 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–Computation of 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)

S.92C: Transfer pricing – Computation of 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)

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)

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.
SHV Energy (P) Ltd . v. Dy. CIT (2014) 98 DTR 177 (Hyd.)(Trib.)

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.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.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 (P&H)(HC)**

**S.142(2A): Special audit–Enquiry before assessment–AO need not examine books of account before directing special audit. Q whether accounts are “complex” has to decided by AO & Court can interfere sparingly.**

(i) The contention that the books of account were not called for and examined by the A.O. and therefore the direction for 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;

AT & T Communication Service India (P) Ltd. v. CIT (Delhi)(HC), 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 Tribunal noted 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.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, HELED 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 big question 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 conduct. (ITA No. 5816/Del/2012. order dt. 11/03/2014. A. Y. 2008-09)

Bharti Airtel Limited v. ACIT (Delhi)(Trib.) www.itatonline.org

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 accounts- Rejection – 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 (Mum.)(Trib.)

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.2002-03,2006-07)

Rohilkhand Educational Charitable Trust v. Chief CIT (2014) 99 DTR 115 (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 assessee, without mandating the disclosure of any specific document. While the 2G Spectrum Report 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. (W.P. (C) 1954/2013, C. M. Appl. 3721/2013, order dt. 28.02.2014.)

Acorus Unitech wireless Pvt. Ltd . v. ACIT (Delhi)(HC), www.itatonline.org

S.147: Reassessment–Full and true disclosure –Quantum of receipt was disclosed–Change of opinion–Reassessment was not valid.

Asesseee 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 (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) 98 DTR 161 (Bom.)(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 brought 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 DTR 1 (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-adversarial 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.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. 142(1),147]
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 assessee that the IT authorities was at Delhi and that they had no jurisdiction to reopen the case of the assessee 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 (P&H)(HC)

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.153A: Assessment-Search or requisition-Computation of 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 assessee 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 assessee 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-Computation of 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 (Hyd.)(Trib.)

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

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 assessee’s appeal . Before CIT(A) assessee 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 (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 rebut 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 & cross 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 (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)

S.158BC: Block assessment-Search and seizure–Computation of 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 (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. (Civil Appeal No. 3958 of 2014, dt. 12th March 2014 )

CIT . v. Calcutta Knitwears (SC),www.itatonline.org

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 freight 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.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.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 immovable 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 (Ker.)(HC)

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-DTAA- India-Portugal. [S.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(1A) was quashed.(AY. 2011-12)

Cedrick Jordan Da Silva v. ITO (IT) (2014) 98 DTR 314 (Panji)(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 (AAR)

S.199: Deduction at source-Credit for TDS given to person in whose hands income is assessable.
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 assessee 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. Ame Hosang Mistry (2014) 29 ITR 397 (Mum.)(Trib.)

Monthly Digest of Case Laws (February 2014)  http://www.itatonline.org
S.201: 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. [S.148,195, 40(a)(ia)]

(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.

Samsung India Electronics Pvt. Ltd. v. DDIT (Delhi)(HC). www.itatonline.org

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 assessee 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 (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)


**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), www.itatonline.org**

**S.226: Collection and recovery-Modes of recovery-AO warned of contempt action for seeking to overreach ITAT’s stay order.**

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.)

**A.T. Kearney India Pvt. Ltd. .v. ITO (Delhi)(HC); www.itatonline.org**

**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 (Bang)(Trib.)

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 asseessees 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.

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)

S.244: Refund–Interest–Interest on interest is not payable. [S.244A]
Interest on interest is not payable u/s. 244. (AY. 1991-92)

S.244A: Refunds–Interest–Deduction at source-Deductor entitled to 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 accrued interest 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 aequo 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.

UOI v. Tata Chemicals Ltd (2014) 267 CTR 89 (SC)
DIT v. Reliance Infocom Ltd (2014) 267 CTR 89 (SC)

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. 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.

CIT v. Mitesh Impex (Guj.) (HC), www.itatonline.org

S.249(4): Appeal—CIT(A)—Condition precedent—Adjustment against amount seized—Appeal was held to be maintainable. [S.249(4)(a)]

Assessee sought adjustment of the amount lying with the Revenue towards tax payable on the returned income. He could not be denied a hearing on the ground of non-payment of tax due on the returned income. Tribunal correctly held that the requirements of s. 249(4)(a) were duly complied with. (AY. 1996-97)


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.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 (Mum.)(Trib.)**

**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 assesse 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. (ITA No 2646 of 2011, dt. 17.04.2014.)

CIT v. Kirloskar Oil Engines Ltd. (Bom.)(HC); www.itatonline.org

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 proper. [S.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 (P&H)(HC)

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.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 (All)(HC)

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 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-Bona fide 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 bona fides 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 assessee 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.273A: Penalty-interest – Waiver or reduction – Not a condition precedent to pay the tax and interest-Refers one instance and not one year-Petition was allowed.[S.220]

S. 273A does not require the assessee to pay the amounts of penalty and interest first in order to qualify for the relief. S. 273A(3) does not talk of one year but of one instance. Matter was remitted to the Commissioner to consider whether the assessee has made satisfactory arrangements for payment of tax.(i.e. without including any penalty and amounts dues under s. 220). (AYs. 1980-81 to 1988-89)

Asha Pal Gulati v. CBDT (2014) 98 DTR 361 (Delhi)(HC)
S.275(1)(c): Penalty-Limitation-Loan or deposit-section 275(1)(c) which is applicable not section 275(1)(a)-Levy of penalty was barred by limitation. [S. 269 SS, 269T, 271D, 271E & 275(1)(a)]
Search action was on June 1999, Block assessment was completed on June 2001. JCIT issued show cause notice dated 15th Jan, 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 30th March 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.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 (Karn.)(HC)

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