CONSOLIDATED DIGEST OF CASE LAWS (JANUARY 2012 TO DECEMBER 2012)

(**Journals Referred**: ACAJ / AIR / AIFTPJ / BCAJ / BLR / IT Review / Comp Cas / CTR / CH / DTR / E.L.T. / GSTR / ITD / ITR / ITR(Trib.) / JT / SOT / SCC / TTJ / Tax LR / Taxman / Tax World / VST / www.itatonline.org)

S. 2(1A) : Agricultural income - Cultivation of palm - Product fit for marketing is agricultural income and extraction of oil from fruit / kernel is an industrial activity and assessable as business income [S. 28(i)]

The assessee is a plantation company which is engaged in cultivation of oil and processing and extraction of crude palm oil from fruit as well as from the kernel. The Assessing Officer held that part of income earned by assessee from sale of palm oil as business income by applying Rule 7 of the Income-tax Rules. In appeal the view of Assessing Officer was confirmed. On further appeal, the High Court held that the processing covered by item(ii) of section 2(IA)(b) is only so much of process which a cultivator ordinarily engages to make product for marketing, therefore income that is attributable to agricultural operations is the market value of palm fruit with pulp and kernel. Activity carried out by assessee in extraction of oil from fruit / from kernel is an industrial activity and therefore income from such activity is assessable as its 'profits and gains of business' under section 28(i). Appeal was decided in favour of revenue. (A.Y. 1997-98 to 2006-07)

Oil Palm India Ltd. v. ACIT (2012) 206 Taxman 1 (Ker.)(HC)

S. 2(1A) : Agricultural income - Seeds - Company - Company supplying seeds to farmers under agreement income derived by company is not agricultural income [S. 10(1)]

The assessee company is in the business of cultivation, production and marketing of open-hybrid seeds both for the domestic and international market and entered in to agreement with the farmers for production of open-hybrid seeds for its own benefit or on behalf of its overseas principals. Assessee Company supplied the seeds & supervised the cultivation of seeds. After harvesting, the company purchased from farmers at fixed price. Assessee company has done the process of cleaning, grading and converting into certified seeds. Assessee has claimed entire income as exempt under section 10(1). Assessing Officer denied the exemption. On appeal before the Tribunal the tribunal opined that 10 percent of the net profit should be treated as business income and balance 90 percent of the net profit as agricultural income exempt from tax. On appeal to High Court by revenue the court held that the income is not agricultural income. (A.Y. 1998-99 to 2004-05)

CIT v. Namdhari Seeds P. Ltd. (2012) 341 ITR 342 / (2011) 203 Taxman 565 (Karn.)(HC)

S. 2(1A) : Agricultural income - Seeds - Conversion of raw peas into pea seeds constitute agricultural income

Assessee is engaged in cultivating and growing raw peas and also in the process of converting them into pea seeds so as to render them fit for sale and also selling seeds in the market and to various godowns. Income derived from pea seeds constituted agricultural income. (A.Y. 1997-98)

CIT v. Rana Gurjit Singh (2012) 340 ITR 108 / 75 DTR 376 (P&H)(HC)

S. 2(1A) : Agricultural income - Compensation received on demolition of borewell is agricultural income [S. 2(1A),2(14)(iii),45]

Compensation received on account of demolition of borewell and godown on agricultural land is agricultural income. (A.Y. 2007-08)

Ghanshyam Mudgal v. ITO (2012) 143 TTJ 60 (UO)/ BCAJ Pg. 43, Vol. 44-A Part 1, April 2012 (Jaipur)(Trib.)

S. 2(7) : Assessee - No business income in the hands of assessee where assessee is agent of the State Government

Assessee was a town development authority for various towns of Maharashtra. Assessee's business activity was construction of residential and commercial structures as well as development of infrastructures and towns. On basis of report of Special Auditor, Assessing Officer brought to tax certain amount as business income of assessee. In resolution passed by State Government it was clearly mentioned that assessee would act as a subsidiary company under control and supervision of State Government. All dealings of assessee had to be routed through authorizations by Government and all funds receivable would be in compliance and with intimations to officials of various Government departments. It was also undisputed that as soon as assessee completed any development project same was immediately handed back to State Govt. It was held that assessee was an agent of State Govt. and, thus, revenue authorities were not justified in assessing business income in hands of assessee. (A.Y. 2006-07)

City and Industrial Development Corpn of Maharashtra Ltd. v. ACIT (2012) 138 ITD 381/(2013) 90 DTR 406 (Mum.)(Trib.)

S. 2(14) : Capital asset - Capital gains - Controlling interest - Controlling interest cannot be treated as capital asset [S. 45]

Controlling interest is not an identifiable or distant capital asset independent of holding of shares and therefore does not satisfy definition of a 'capital asset' within the meaning of section 2(14). On the facts extent of 'control' of parent is no more than a persuasive position, it not being a legally enforceable right cannot be treated as a 'capital asset' within the meaning of section 2(14).

Vodafone International Holdings B.V. v. UOI (2012) 341 ITR 1 / 247 CTR 1 / 66 DTR 265 / 204 Taxman 408 / 6 SCC 613 / Vol. 42 Tax L R 305 (SC)

S. 2(14) : Capital asset - Agricultural land - Land within 8 kms. of municipal limit

Section 2(14)(iii)(b) covers the situation where the subject land is not only located within the distance of 8 kms., from the local limits, which is covered by cl. (a) to section 2(14) (iii), but also requires the fulfillment of the condition that the Central Govt. has issued a notification under this clause for the purpose of including the area up to 8 kms., from the municipal limits, to render the land as a 'capital asset' . In the present case, though it is contended that land is located within 8 kms. within the municipal limits of Dasarahalli City Municipal Council, in the absence of any notification issued under cl. (b) to section 2(14)(iii), it cannot be looked in as a capital asset. Capital gains were not therefore chargeable on sale of agricultural land. (A.Y. 2005- 2006)

CIT v. Madhukumar N. (HUF) (2012) 78 DTR 391 / 254 CTR 564 (Karn.)(HC)

S. 2(14) : Capital asset - Agricultural land - Barren land - Barren land is not agricultural land hence liable to capital gains [S. 45]

Assessee sold the land and claimed the exemption on the said transaction treating the same as agricultural land. Tribunal held that land in question was a barren land surrounded by rocky mountains and not fit for agricultural operations. Sale of the said land was not for agricultural purpose but for purpose of construction of flats, therefore, the land in question is capital asset and liable to capital gains tax. (A.Y. 2002-03 to 2007-08).

Suresh Kumar D. Shah v. Dy. CIT (2012) 49 SOT 341 (Hyd.)(Trib.)

S. 2(14) : Capital asset - Personal effects - Household items - In the absence of nature and full description consideration received on sale of carpets, paintings cannot be considered as personal asset [S. 68]

The assessee sold certain carpets, paintings, collector items, household items which were claimed to have been inherited or received as gift from his grandfather, father and uncle. The assessee claimed that those articles were in personal use of the assessee or his dependent family members and therefore fell within the meaning of 'personal effects' under section 2(14). It was held that in absence of nature and full description of each household articles or furniture and collector items sold and there being no evidence of intimate connection between the effects and person of assessee, items sold could not be held to be personal effects within the meaning of section 2(14) and thus, they were not excluded from the definition of capital asset. (A.Y. 2002-03)

ACIT v. Faiz Murtuza Ali (2012) 52 SOT 358 (Delhi)(Trib.)

S. 2(14) : Capital asset - Capital gains - Agricultural land - Land situated beyond prescribed municipal limit and recorded as agricultural land in revenue record is to be considered as agricultural land until proved otherwise [S. 45]

It was held that there is no requirement in Act that only self cultivated land would be treated as agricultural land. For purposes of land being agricultural land, actual agricultural operation or cultivation or tilting of land is always not necessary. Thus, land situated beyond prescribed municipal limit and recorded as agricultural land in revenue record is to be considered as agricultural land until proved otherwise. Tehsildar is most competent revenue officer to certify proof of agricultural operation, distance of land from particular place, rate of land etc. (A.Y. 2008-09)

ITO v. Ashok Shukla (2012) 139 ITD 666/(2013) 155 TTJ 630 (Indore)(Trib.)

S. 2(15) : Charitable purpose - Leasing of business is not charitable purpose hence not entitled to exemption [S. 11, 12A]

An assessee / institution having never carried out any scientific research, and applied a very insignificant portion of its income towards research and development activities, is not entitled to exemption under section 11. The assessees claim for exemption under section 11 is also not sustainable in view of clause (b) of sub section (4A) thereof as the leasing business carried on by the assessee was not wholly for the charitable purposes. Compliance with the provisions of section 12A is not the only requirement for the applicability of section 11. Compliance with the provisions of section 12A only indicates that the assessee is a trust or institution entitled to benefit of sections 11 and 12. It is entitled to benefit only if it complies with the other requirements of sections 11. (A.Y. 1989-90, 1990-91)

M. Visvesvaraya Industrial Research and Development Centre v. CIT (2012) 79 DTR 387 / (2013) 255 CTR 6 / 213 Taxman 213 (Bom.)(HC)

S. 2(15) : Charitable purpose - Publication of books, booklets as reference material by the public as well as the professionals in respect of bank audit, tax audit etc. cannot be construed as commercial activities - hence approval under section 80G(5) cannot be denied [S. 80G(5)]

The assessee trust is a society. One of the objects of the trust is to publish books, booklets etc. on professional subjects. The assessee trust filed an application in Form 10G for grant of renewal under section 80G of the Act. The renewal was rejected on the ground that the assessee was publishing and selling books of professional interest and its activities are commercial in nature. On appeal the Tribunal held that the activities of selling books could be considered as a part of ongoing education of Chartered Accountants, which in turn would help the society to get better, well-equipped and skilled set of Chartered Accountants for maintaining audit quality. The Tribunal allowed the appeal and held that the assessee is entitled to approval under section 8OG. On appeal by revenue the Court up held the order of Tribunal and held that activities of the assessee trust in publishing and selling books of

professional interest which are meant to be used as reference material by general public as well as the professional in respect of bank audit, tax audit etc. cannot be construed as commercial activities and therefore, assessee trust formed with the object inter alia to conduct periodical meetings on professional subjects is entitled to approval under section 80G(5).

DIT v. The Chartered Accountants Study Circle (2012) 70 DTR 219 / 250 CTR 70 (Mad.)(HC)

S. 2(15) : Charitable purpose - Institute conducting coaching classes and charging fees, denial of exemption is held to be not valid [S. 10(23C)(vi)]

The Institute of Chartered Accountants of India was denied exemption under section 10(23C)(vi) for the A.Y. 2006-07 onwards on the grounds that (i) the Institute was holding coaching classes and, therefore, was not an educational institution as per the interpretation placed on the word "education" used in section 2(15); (ii) the Institute was covered under the last limb of charitable purpose, i.e. advancement of any other object of general public utility. In view of the amendment made in section 2(15) of the Act with effect from April 1, 2009, for the asst. year 2009-10 onwards, the Institute was not entitled to exemption as it was an institution which conducted an activity in the nature of business and also charged fee or consideration.

Held, that the fundamental or dominant function of the Institute was to exercise overall control and regulate the activities of the members/enrolled chartered accountants. A very narrow view had been taken that the Institute was holding coaching classes and that this amounted to business. The Institute had framed the Chartered Accountants Regulations, 1988, and the Regulations provided for training of students, their examination, award of degrees and membership of the Institute. There was a clear distinction between coaching classes conducted by private coaching institutions and the courses and examinations which were held by the Institute. The question whether the Institute carried on business had not been examined with proper perspective. The Institute maintained that it never granted any loan and/or advance to the Institute of Chartered Accountants of India Accounting Research Foundation. The facts regarding this question had not been considered. The order denying the exemption was not valid. (A.Y. 2006-07, 2007-08, 2008-09, 2009-10)

The Institute of Chartered Accountants of India (ICAI) v. Director General of IT(E) (2012) 347 ITR 99 / (2011) 245 CTR 541 / 202 Taxman 1 / 64 DTR 226 (Delhi)(HC)

S. 2(15) : Charitable purpose - Educational institution - Investment in Trust publishing magazines dealing with education ancillary to main object of running educational institution - Trust is entitled to exemption [S. 11]

The assessee was allowed the benefit under section 11 of the I.T Act 1961, till 1985-86. But, for the asst. years 1986-87 and 1987-88, the Assessing Officer denied the exemption for the reason that (i) the assessee was not a public charitable trust; its objects were limited for the benefit of a few people; (ii) the assessee was running educational institution only for the purpose of commerce; and (iii) there was violation of the provisions of section 11(5) of the Act, inasmuch as the assessee invested the monies in two organizations publishing magazines and thereby infringed section 13(1)(c). The Commissioner (Appeals) and the Tribunal held that the assessee was entitled to exemption. On appeal the High Court held that the Assessing Officer did not give any clear finding regarding violation of section 11(5) except making such a comment. Investing monies in the two organizations publishing magazines could not be said to be commercial ventures. They were incidental and ancillary to the main activities of the trust. The assessee was entitled to exemption under sec. 11.The Supreme Court in Yogiraj Charity Trust (1976) 103 ITR 777 (SC) held that if the primary or dominant purpose of a trust is charitable, another object which by itself may not be charitable but which is merely ancillary or incidental to the primary or dominant purpose would not prevent the trust from being a valid charity. (A.Ys. 1986-88, 1987-88, 1988-89)

CIT v. Vijaya Vani Educational Trust (2012) 349 ITR 280 (AP)(HC)

S. 2(15) : Charitable purpose - Expression "education" - Coaching class by open university or distance education cannot be construed as "education" for charitable purpose [S. 11, 12A]

A mere coaching class for preparing the students to attend the examination conducted by open university or by the other university or distance education cannot be considered to be regular and systematic schooling within the meaning of Section 2(15). For the purpose of section 2(15), the assessee has to necessarily conduct a regular school / college in which the students are imparted education, knowledge, training which result in of degree or diploma by government or government agency or university. Activity of coaching classes cannot be considered as Charitable activity within the meaning of section 2(15), therefore the assessee is not entitled to exemption under section 11. (A.Y. 2005-06)

Dy. DIT v. Kuttukaran Foundation (2012) 51 SOT 175 (Cochin)(Trib.)

S. 2(15) : Charitable purpose - Hinduism - "Hinduism" is not a religion and worship of Hindu Gods is not "religious purpose" assessee is eligible for certificate under section 80G(5) [S. 80G]

The assessee trust was set up with the object of "worship of Lord Shiva, Hanumanji, Goddess Durga and maintaining of temple" and "to celebrate festivals like Shivratri, Hanuman Jayanti, Ganesh Uttasav, Makar Sankranti". It applied for a certificate under section 80G. Section 80G(5) provides that the trust should be established for a "charitable purpose". Explanation 3 to section 80G provides that "charitable purpose" does not include a purpose which is of a "religious nature". Section 80G(5)(iii) also stipulates that the trust should not be expressed to be for the benefit of any particular religious community or caste. The CIT rejected the application on the ground that the assessee was set up for "religious" purposes. On appeal by the assessee to the Tribunal, Held reversing the order of Commissioner of Income tax. The objects of the assessee is not for advancement, support or propagation of a particular religion. Worshipping Lord Shiva, Hanumanji, Goddess Durga and maintaining the temple is not advancement, support or propagation of a particular religion. Lord Shiva, Hanumanji & Goddess Durga do not represent any particular religion. They are merely regarded to be the super power of the universe. Further, there is no religion like "Hinduism". The word "Hindu" is not defined in any of the texts nor in judge made law. The word was given by British administrators to inhabitants of India, who were not Christians, Muslims, Parsis or Jews. Hinduism is a way of life. It consists of a number of communities having different gods who are being worshipped in a different manner, different rituals, different ethical codes. The worship of god is not essential for a person who has adopted Hinduism way of life. Therefore, expenses incurred for worshipping of Lord Shiva, Hanuman, Goddess Durga and for maintenance of temple cannot be regarded to be for religious purpose.

Shiv Mandir Devsttan Panch Committee Sanstan v. CIT (2012) 79 DTR 276 / 150 TTJ 452 / (2013) 56 SOT 456 (Nagpur)(Trib.)

Editorial:- Refer CWT v. Late R. Shridharan (1976) 104 ITR 436 (SC), where entire concept of "Hinduism" has been explained.

S. 2(15) : Charitable purpose - Proviso to section 2(15), introduced by the Finance Act, 2008 with effect from 1-4-2008, applies to trust which has object of 'advancement of any other object of general public utility' and does not apply to other categories of charitable trust i.e., relief to poor and medical relief [S. 12AA(3)]

Proviso to section 2(15) of the Act introduced by the Finance Act, 2008 with effect from 1-4-2008 regarding excluding organizations where there is profit motive from definition of charitable purpose applies only to category of trusts which has as its object, object of 'advancement of any other object of general public utility'; It does not apply to other categories of charitable purpose viz., 'relief to poor, education and medical relief'. Registration cannot be withdrawn on the ground that objects of trust has been altered without the consent of the department. (A.Y. 2009-10)

Krupanidhi Educational Trust v. DIT(IT) (2012) 139 ITD 228 / (2013) 21 ITR 373 (Bang.)(Trib.)

S. 2(15) : Charitable purpose - Assessee - Society provided citizen's services to common people - Charged very huge fees, in addition to charges levied by State Government - Activities not treated as charitable purpose [S. 12AA]

Where assessee-society provided citizen's services to common people by charging very huge fees which was in addition to charges levied by State Government and was additional burden upon common man, activities of assessee could not be treated as charitable in nature making it eligible for registration under section 12AA, refusal of registration was held to be justified.

Sukhmani Society for Citizen Services v. CIT (2012) 139 ITD 307/(2013) 85 DTR 283/ 153 TTJ 235 (Amritsar)(Trib.)

S. 2(15) : Charitable purpose - Marathon conducted in commercial sense - Cannot be said to be existing only for charitable purpose [S. 12AA]

A trust conducts marathon in a commercial manner, then it cannot be said to be existing only for charitable purposes in view of amended definition of charitable purpose with effect from 1-4-2008, matter remanded. (A.Y. 2012-13)

Hyderabad Runners Society v. DIT (Ex) (2012) 139 ITD 464 / 20 ITR 675 (Hyd.)(Trib.)

S. 2(17) : Company - Free Zone Entity(FZE) - Income of Vega cannot be assessed as taxable income in India under section 5(1) of the Income-tax Act [S. 5(1), 90, Art. 3(1)(f), 4]

The assessee company has made outward investment in Emirates of Ajman in the form of a Free Zone Entity (FZE) 'Vega' in the Ajman Free Zone. The assessee is the sole shareholder having 100 percent shareholding. The income of the said entity was not an income of the assessee. The Assessing Officer has held that as the said entity did not have a separate legal identity vis-à-vis its sole shareholder and for any non compliance the owner is responsible legally where as under Indian Companies Act, 1956, shareholders are not legally liable for any act of the company or its board of directors. On this basis the Assessing Officer treated the income of the Vega as income taxable in India in the hands of the assessee under section 5(1). In appeal before the Tribunal, the Tribunal held that as per memorandum of incorporation, Vega UAE was established with corporate entity and independent and separate entity, merely because Amiri Decree [No. (3) of 1998] specifies a situation where the owner will be treated as personally responsible, it could not be said that Vega UAE was not a separate legal entity . On facts Vega UAE had to be accepted as a company within definition of section 2(17), and therefore addition made by the Assessing Officer by holding that Vega UAE was a sole proprietorship concern of assessee was not sustainable. Hence, the addition was deleted. (A.Y. 2006-07)

AIA Engineering Ltd. v. Addl. CIT (2012) 50 SOT 134 / 78 DTR 473 / 150 TTJ 170 (Ahd.)(Trib.*)*

S. 2(22) : Dividend - Buy back shares - Capital gains - DTAA - India-Mauritius - Scheme for buy back shares to avoid tax in India - Profits arising to be treated as deemed dividend and taxable in India - Hence liable to deduct tax at source [S. 46A, 115-O, 195, 245R(2), DTAA-article 10(2), (4), 13(4)]

The applicant is a company incorporated in India, 48.87 percent, of whose shares were held by a group holding company in the U.S.A, 25.06 percent by a group holding in Mauritius, 27.37 percent by a group holding company in Singapore and 1.76 percent by the general public. On June 15, 2010, the board of directors of the applicant passed a resolution proposing a scheme of buy back of its shares from its existing share holders in accordance with section 77A of the Companies Act 1956. Mauritius company which acquired the shares sought advance ruling on whether the capital gains that may arise, were chargeable to tax in India in the context of the Double Taxation Avoidance

Agreement between India and Mauritius and whether it would have the obligation to with hold the tax in terms of section 195 of the Income-tax Act, 1961. The authority for advance ruling while admitting the application under section 245R(2) of the Act for a ruling, held that the Authority can look into avoidance of tax and whether the transaction is colourable. On the facts of the case the Authority held that the applicant had not paid dividend to any of the share holders after April 1, 2003, on which date section 115-0 of the Act was introduced. Neither the holding company in the U.S.A. nor that in Singapore accepted the offer of buy- back for obvious reasons that it would have been taxable in India as capital gains. There was no proper application on the part of the applicant as to why no dividends were declared subsequent to 2003, when the company was regularly making profits and when dividends were being distributed before the introduction of section 115-O of the Act. Therefore, the proposal of buy-back was a scheme devised for avoidance of tax, a colourable devise for avoiding tax on distributed profits as contemplated in section 115-O of the Act. The arrangement could only be treated as a distribution of profits by a company to its share holders satisfying the definition of dividend which includes any distribution by a company of accumulated profits to its share holders. The payments in question would also satisfy the definition of dividend in the Article 10(4) of the DTAA between India and Mauritius. Under Article 10(2) of the DTAA, dividend paid by a company which is a resident of India, to a resident of Mauritius, may also be taxed in India, according to the laws of India but subject to the limitation contained therein. The proposed payment would be taxable in India in terms of article 10(2) of the DTAA between India and Mauritius hence, the applicant was required to withhold tax on the proposed remittance of the proceeds to the Mauritius company.

A. Mauritius (XYZ India), In re (2012) 343 ITR 455 / 206 Taxman 631 (AAR)

S. 2(22)(a) : Dividend - Deemed dividend - Occupancy rights - Occupancy rights to shareholder taxable as "deemed dividend" but not as "benefit or perquisite" [S. 2(24)(iv)]

The assessee was the substantial shareholder of a closely held company which owned a building. The Articles of the company provided that each shareholder would have occupancy rights to a flat on the condition that an interest-free refundable deposit be paid. The occupancy rights were transferable. The Assessing Officer held that the grant of occupancy rights by the company amounted to a "distribution of assets" and that the same was assessable as "deemed dividend" in the hands of the assessee under section 2(22)(a) to the extent of the accumulated profits. On appeal, the CIT(A) held that as the occupancy rights were given against payment of a refundable deposit, there was no "distribution of assets" and so no deemed dividend. Instead, he held that the occupancy rights conferred a "benefit/perquisite" on the assessee which was assessable under section 2(24)(iv). On cross appeals before the Tribunal, held:

(i) U/s 2(22)(a), any distribution by a company of accumulated profits, whether capitalized or not, constitutes "dividend" if such distribution entails the release by the company to its shareholders of all or any part of the assets. As the assessee received the occupancy rights to the flat in perpetuity and could transfer them, it effectively meant that he had full ownership over the flat. Accordingly, the value of the flats was assessable as deemed dividend under section 2(22)(a);

(ii) However, as the said occupancy rights were given in lieu of holding shares and an interest-free refundable deposit towards proportionate land cost and development cost and were transferable, there is no "benefit or perquisite" which is assessable under section 2(24)(iv). (A.Y. 2006-07 & 2007-08)

Shantikumar D Majithia v. Dy. CIT (2013) 140 ITD 251 / 22 ITR 246/ 90 DTR 335/155 TTJ 638 (Mum.)(Trib.)

Shobhana Majithia (Smt) v. Dy. CIT (2013) 140 ITD 251 / 22 ITR 246/90 DTR 335 /155 TTJ 638(Mum.)(Trib.)

S. 2(22)(e) : Dividend - Deemed dividend - Credit balance - Credit balances in the normal course of business cannot be assessed as deemed dividend.

Assessee has filed the confirmation and copies of accounts showing that the amounts representing in the accounts were receipts due to the appellant, in the normal course of business dealings with these companies. The Court held that receipts from these companies cannot be treated as deemed dividend. (A. Y. 2003-04).

CIT v. Francies Wacziarg (2012) 66 DTR 453 / (2011) 203 Taxman 391/(2013) 353 ITR 187 (Delhi)(HC)

S. 2(22)(e) : Dividend - Deemed dividend - Loan to partnership - Since the partnership firm which has purchased the shares through its partners though not registered share holder, being beneficial owner is to be treated as share holder and loan advanced by company to such partnership is liable to tax as deemed dividend

The Assessing Officer has held that loan received by partnership firm from Bharti Enterprises (P) Ltd. should be treated as deemed dividend as two partners hold more than 10 percentage shares in Bharti Enterprises (P) Ltd. v. CIT(A) and Tribunal decided the issue in favour of assessee. On appeal, the High Court following the Judgment in National Travel services (2012) 249 CTR 540 (Delhi) held the issue in favour of revenue holding that partnership firm is to be treated as the share holder and it is not necessary that it has to be "registered shareholder". The question was answered in favour of revenue. As regards the accumulated profits the matter is set aside to the Tribunal by giving a reasonable opportunity to both the parties. (A.Y. 2004-05)

CIT v. Bharati Overseas Trading Co. (2012) 349 ITR 52 / 249 CTR 554 / 70 DTR 336/207 Taxman 135(Mag.) (Delhi)(HC)

S. 2(22)(e) : Dividend - Deemed dividend - Unsecured loans from other Company - Provisions of section 2(22)(e) cannot be invoked if the assessee does not possess the prescribed voting rights in that company

Section 2(22)(e) cannot be invoked in respect of the unsecured loans taken by the assessee from the other company if the assessee does not possess the prescribed voting rights in that company; shareholding of the common shareholder or director cannot be taken into consideration for the purpose. Assessee company was holding less than 10 percent voting rights in another company which has advanced the money to assessee company. (A.Y. 1994-95, 1996-97 & 1997-98)

CIT v. Gopal Clothing Co. Ltd. (2012) 71 DTR 358 / (2013) 350 ITR 67/207 Taxman 134(Mag.) (Delhi)(HC)

Editorial:- The Supreme Court has granted special leave to the Department to appeal against this judgment (2013) 350 ITR 3(St).(2013) 216 Taxman 206 (Mag.)(SC).

S. 2(22)(e) : Dividend - Deemed dividend - Partnership firm - Shares held by partners on behalf of partnership firm is to be treated as shareholder

A partnership firm which purchases shares of a company through its partners, though not registered shareholder, being beneficial owner, is liable to be treated as shareholder for the purpose of section 2(22)(e) of the Act.

CIT v. National Travel Services (2012) 347 ITR 305 / 70 DTR 321 / 249 CTR 540 / (2011) 202 Taxman 327 (Delhi)(HC)

S. 2(22)(e) : Dividend - Deemed dividend - Journal entries - Credit entries made through journal entries would not be said that cersit enties so made in accounts, would not be assessed as deemed dividend

The accounts of directors were credited with various amounts by passing journal entries. The Assessing Officer treated the same as deemed dividend. In appeal Commissioner (Appeals) held that the amount credited by journal entries could not be held to be deemed dividends in the hands of assessee. On appeal to the Tribunal by revenue, the Tribunal held that, it is not proper on the part of

the Commissioner (Appeals) to hold that credit entries made in accounts of the assessee by the company would not fall under section 2(22)(e), only on the reasons that the credits were provided through journal entries, which may not be proper. An assessee may avail benefit either by direct transfer of funds or by conferring credit by passing journal entry or through any other lawful method and still such benefit would amount to deemed dividend. As the assessing authority, Commissioner (Appeals) have not undertaken any such enquiry or verification, the matter is remitted back to the Assessing Officer to re examine the nature and character of the journal entries passed by the company. (A.Y. 2008-09)

ACIT v. Gurbinder Singh (2012) 50 SOT 263/32 CCH 233 (Chennai)(Trib.)

S. 2(22)(e) : Dividend - Deemed dividend - Loan - Subsidiaries - Loan received from some subsidiaries, distributed amongst other subsidiaries in the course of ordinary business cannot be treated as deemed dividend

Assessee company was a holding company of 11 subsidiary companies. The assessee company managed the financial affairs of its subsidiary companies in the ordinary course of its business. The assessee as a part of its role arranged short term and long term funds for its subsidiaries. Thus, it was held that the activity of taking loan from the subsidiaries and advancing it to other subsidiaries in ordinary course of its business cannot be treated as deemed dividend. (A.Y. 2003-04, 2004-05)

Farida Holding P. Ltd. v. Dy. CIT (2012) 51 SOT 452 (Chennai)(Trib.)

S. 2(22)(e) : Dividend - Deemed dividend - Share application money - No material placed on record by the department to show that the entries recorded in the books of accounts are false, untrue and without any basis, section 2(22)(e) was not applicable

The assessee was engaged in the business of website hosting, domain name registration and allied services and showed share application money received from another company under the head current liabilities. The Assessing Officer observed that the amount was in the nature of loans and advances and had common directors. It was held that it is a settled law that the making of an entry or the absence of an entry could not determine the rights and liabilities of a party. In the absence of any material placed on record by the department to show that the entries recorded in the books of accounts are false, untrue and without any basis, the amount received by the assessee did not come under the scheme of loan and advances. Section 2(22)(e) was not applicable. (A.Y. 2006-07)

ITO v. Direct Information P. Ltd. (2012) 18 ITR 562 (Mum.)(Trib.)

S. 2(22)(e) : Dividend - Deemed dividend - The amount forwarded by the company to the assessee was not in the shape of advances or loans. The arrangement between the assessee and the company was merely for the sake of convenience arising out of business expediency hence, loan cannot be assessed as deemed dividend

The assessee, a substantial shareholder of a closely held company, availed of a loan from the company. She claimed that the said loan was not assessable as "deemed dividend" under section 2(22)(e) as she had given a personal guarantee and collateral security to a third party to enable the company to avail of credit facilities and in return she was entitled to withdraw funds from the company as and when required by her for personal purposes. The Assessing Officer rejected the claim though the CIT(A) accepted it. On appeal by the department, held dismissing the appeal:

Every payment by a company to its shareholders may not be a loan/ advance so as to come within the ambit of section 2(22)(e). In the present case, the amount was withdrawn by the assessee from the company only to meet her short term cash requirements. By virtue of offering personal guarantee and collateral security for the benefit of the company, the liquidity position of the assessee had gone down. In the strict sense, the amount forwarded by the company to the assessee was not in the shape of advances or loans. The arrangement between the assessee and the company was merely for the sake of convenience arising out of business expediency (Pradip Kumar Malhotra v. CIT (2011) 338

ITR 538 (Cal.) & CIT v. Creative Dyeing & Printing (2009) 318 ITR 476 (Delhi) followed). (A.Y. 2006-07)
ACIT v. G. Sreevidya (Smt.) (2012) 138 ITD 427 (Chennai)(Trib.)

S. 2(22)(e) : Dividend - Deemed dividend - Trade advances to sister concern - Provisions of section 2(22)(e) is not applicable [S. 194, 201(IA)]
Provisions of section 2(22)(e) is not applicable to trade advances given to sister concern in which shareholders of assessee have substantial interest, therefore provision of section 194 cannot be applicable and assessee cannot be treated as assessee in default and levy of interest under section 201(IA) was deleted. As the Commissioner (Appeals) has passed a reasoned order the matter was set aside. (A.Y. 2005-06 to 2006-07)
Jaypeem Granites (P.) Ltd. v. ITO (2012) 139 ITD 564 (Hyd.)(Trib.)

S. 2(22)(e) : Dividend - Deemed dividend - Transfer of profit by company - Not treated as loan
Mere transfer of profit by a company cannot be treated as loan within meaning of provisions of section 2(22)(e), matter remanded to pass a speaking order. (A.Y. 2004-05)
Mahendra Kumar Gupta (HUF) v. ACIT (2012) 139 ITD 377 (SMC)(Delhi)(Trib.)

S. 2(22)(e) : Dividend - Deemed dividend - Loans or advances - Director holding 10 percent voting power addition is held to be justified.
Assessee took an unsecured loan from a company in which he was a director and was holding 10 percent voting power. He submitted that substantial part of business of said company was of money lending. However, Assessing Officer made addition under section 2(22)(e). It was held that since said company had not obtained requisite permission to carry on money lending business and major part of loan was advanced to assessee, addition under section 2(22)(e) was justified. (A.Y. 2008-09)
Krishna Gopal Maheshwari v. ACIT (2012) 139 ITD 656 (Agra)(Trib.)

S. 2(24) : Income - Incentive prize - Not income
The Assessee subscribed to PPF which formed part of Small Savings Scheme encouraged by Government of Punjab. The government issued lucky coupon on every investment of Rs. 5,000/-. The Assessee also received lucky coupon which won the prize of 1kg gold. The Assessing Officer held that the price money won by assessee fell within the meaning of section 2(24)(ix) and made addition as income. On Appeal, the CIT(A) as well as the Tribunal deleted the addition. On appeal, the High Court, confirmed the view of the Tribunal and held that incentive price received by assessee on account of coupon given on the strength of small saving certificate would not fall within the definition of lottery and would not be included as income as per section 2(24)(ix). (A.Y. 1996-97)
CIT v. Tilak Raj Kalra (2012) 206 Taxman 126 / 249 CTR 205 / 69 DTR 363 (P&H)(HC)

S. 2(24) : Income - Capital receipt - TDR - TDR - Gains on housing society redevelopment is not-taxable as it is a capital receipt [S. 4, 45]
The assessee was the member of a housing society. The housing society and it's members entered into an agreement with a developer pursuant to which the developer demolished the building owned by the housing society and reconstructed a new multistoried building by using the FSI arising out of the property and the outside TDR available under Development Control Regulations. The assessee, as a member of the housing society, received a larger flat in the new building, displacement compensation of Rs. 6 lakhs (at Rs. 34,000/- p.m. for the period of construction of the new building) and additional compensation of Rs. 11.75 lakhs. The Assessing Officer & CIT(A) held that the said "additional compensation" was assessable as income in the assessee's hands. On appeal by the assessee, held allowing the appeal:

In principle, though the scope of "income" in section 2(24) is very wide, a capital receipt is not chargeable to tax as income unless there is a specific provision to that effect. As the residential flat owned by the assessee in the society's building was a capital asset in his hands, the compensation was a capital receipt. The department's argument that the cash compensation was a "share in profits earned by the developer" is not acceptable because it proceeds on the fallacy that the nature of payment in the hands of the payer determines the nature in the hands of the recipient. However, as the said receipt reduced the cost of acquisition of the new flat, it had to be taken into when computing the gains from a transfer thereof in the future. (A.Y. 2007-08)

Kushal K. Bangia v. ITO (2012) 50 SOT 1 / 145 TTJ 37 (UO)(Mum.)(Trib.)

S. 2(24)(iv) : Income - The value of benefit or perquisite - Deemed income - Interest on interest free deposit - Interest on interest free loans availed by assessee from two companies in which she was director could not be treated as deemed income

The assessee has availed interest free loans from two companies. Assessing Officer taxed the alleged interest as deemed benefit under section 2(24)(iv) of the Act, which was confirmed by the Commissioner (Appeals). Tribunal deleted the addition. On appeal by revenue the court held that the interest on interest free loans availed by assessee from two companies in which she was a director could not be treated as her deemed income in terms of section 2(24)(iv) of the Act. (A.Y. 1990-91 to 1995-96)

CIT v. Madhu Gupta (2012) 205 Taxman 303 / 71 DTR 385 (P&H)(HC)

S. 2(28A) : Interest - Allotment of flats - Delayed payment - Delay in allotment payment is not interest

Interest on amount deposited by allotttes on account of delayed allotment of flats does not fall under section 2(28A).

CIT v. H. P. Housing Board (2012) 340 ITR 388 / 67 DTR 113 / 247 CTR 464 / 205 Taxman 5 (HP)(HC)

S. 2(28A) : Interest - Official liquidator - Lump sum consideration received cannot be assessed as income from other sources, it is assessable as capital gains [S. 45, 56]

The amount received by the official liquidator in terms of orders of company court, though referred to as interest, for the purpose of assessment of income-tax it was part of the sale consideration and therefore, could not be treated as income from other sources under section 56, the amount is assessable as capital gains under section 45. (A.Y. 1995-96)

Cauvery Spinning and weaving Mills Ltd. (In liquidation) v. Dy. CIT (2012) 340 ITR 550/ (2011) 238 CTR 55 / 50 DTR 218 (Mad.)(HC)

S. 2(28A) : Interest - Debenture - Non-resident - DTAA - India-Mauritius - Sale of investment to holding company before conversion into equity, gains arising on sale of debentures is to be taxed as interest [Art .11(4), 13(4)]

The applicant sought an advance ruling on the questions whether gains arising to the applicant on sale of equity shares and compulsory convertible debentures held by the applicant in S. Ltd. were exempt from capital gains tax in India under Article 13(4) of the Double Taxation Avoidance Agreement between India and Mauritius. The Authority for Advance Ruling held that, the term "interest" has been defined in the Income-tax Act, 1961 and in the DTAA to mean any type of income payable on a debenture. Sale of investment to holding company of Indian company before conversion of debentures in to equity, debentures remain debt till discharged. Conversion rate determined on basis of period of holding, hence, gains arising on sale of debentures to be taxed as interest. The entire gains arising to the applicant on the sale of shares and compulsory convertible debentures were not exempt from capital gains tax in India under the DTAA with Mauritius. The gains arising on the sale

of compulsory convertible debentures being interest within the meaning of section 2(28A) of the Act and Article 11 of the DTAA was taxable as such.
Z, In re (2012) 345 ITR 11 / 69 DTR 329 / 249 CTR 225 / 206 Taxman 528 (AAR)

S. 2(31) : Person - Minor - Income clubbed in hands of parents - Exemption allowable [S. 54EC, 64]
Minor is an assessable entity even though his income is clubbed in his parents. When income is clubbed with parents all deductions are to be allowed including the exemption under section 54EC. (A.Y. 2007-08)
Dy. CIT v. Rajeev Goyal (2012) 52 SOT 335 (Kol.)(Trib.)

S. 2(42A) : Short term capital asset - Long term or short term - Period of holdings - The date of transfer or sale is treated as a cut-off point to apply the test of period of holdings [S. 10(38), 54EC, General Clauses Act, 1897 S. 3(35)]
The issue for consideration was whether the asset must be held for a period of more than 36 months or 12 months plus one day i.e. the date when transfer is made .The date on which the transfer is made has to be excluded. The contention of revenue was based on the language of section 2(42A) and the words "more than" used therein along with the expression "immediately preceding the date of transfer". The court held that the term "month" has not been defined in the Act, therefore one has to rely upon the words "calendar month" as defined in the General Clauses Act, 1897. Section 3(35) of the said Act defines a "month" to be month reckoned according to the British calendar. Thus if an assessee acquires an asset on 2nd January in a preceding year, the period of 12 months would be complete on 1st January, next year and not on 2nd January. If it is sold on 2nd January and if the proviso to section 2(42A) applies, it would be treated as a long term capital gains. Accordingly, the appeal of the assessee is allowed. (A.Y. 2006-07)
Bharti Gupta Ramola v. CIT (2012) 72 DTR 387 / 251 CTR 139 / 207 Taxman 178 (Delhi)(HC)

S. 2(42B) : Short term capital gain - Gold bond certificate - Treated as asset, sale consideration liable to be taxed as short term capital gain
Gold received by assessee on redemption of gold bond certificates issued under Gold Deposit Scheme, 1999, is a new asset. Therefore, when assessee sold said gold within a period of twelve months from date of its acquisition, income arising from sale transaction was to be taxed as short-term capital gain. (A.Y. 2008-09)
Shiv Kumar Agrawal v. Dy. CIT (2012) 139 ITD 572 (Agra)(Trib.)

S. 2(43) : Tax - Education cess - Foreign company - DTAA - India-Singapore - "Education cess" is "additional surcharge" & is included in "tax" under DTAA. If DTAA caps the rate of "tax" payable, cess is not payable by foreign assessee [S. 2(23A), 90, Art. 11, 12]
The assessee, a Singapore company, offered interest and royalty income to tax at the rate of 15% & 10% as specified in Articles 11 & 12 of the India-Singapore DTAA respectively. The Assessing Officer held that the assessee was also liable to pay surcharge and education cess in addition to the tax. The CIT(A) upheld the assessee's claim that surcharge was not leviable though he rejected the claim with regard to cess. On further appeal by the assessee. Held, allowing the appeal:
Articles 11 & 12 of the DTAA provide that the "tax" chargeable in India on interest and royalties cannot exceed 15% and 10% respectively. The expression 'tax' is defined in Article 2(1) to include 'income tax' and includes 'surcharge' thereon. Article 2(2) extends the scope of the 'tax' by laying down that it shall also cover "any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of the present Agreement in addition to, or in place of, the taxes referred to in paragraph 1". "Cess" was introduced by the Finance Act, 2004 and it is

described in section 2(11) of the Finance Act 2004 as "additional surcharge for purposes of the Union", to be called the "Education Cess on income-tax". Accordingly, the "education cess" is in the nature of an "additional surcharge" and is covered by Article 2. Accordingly, education cess cannot be levied in respect of the assessee's tax liability. (A.Y. 2009-10)

DIC Asia Pacific Pte. Ltd. v. ADIT (2012) 147 TTJ 503 / 74 DTR 140 / 52 SOT 447 / 18 ITR 358 (Kol.)(Trib.)

S. 2(47) : Transfer - Capital gains - Family arrangement - Since partition is not a transfer and what is recorded in family arrangement is nothing but a partition, there is no transfer liable to capital gains [S. 45]

The family members of the assessee were holding the family properties and shares in different business concerns. There was disputes and the arbitrator suggested a settlement, which the assessee and family members agreed. Consequence to family arrangement the assessee resigned from a partnership firm and transferred his share of profit / loss in the firm to a family member for a consideration of Rs. 35,000/- being the capital balance of the firm. The Assessing Officer held that there was a capital gain in the hands of the assessee and was liable to pay capital gain tax. On appeal Commissioner (Appeals) up held the order of the Assessing Officer. Tribunal held that there was no transfer and not liable to capital gain tax. On appeal by revenue the Court held that since partition is not a transfer, there was no liability of assessee to pay capital gain tax. (A.Y. 1993-94)

CIT v. R. Nagaraja Rao (2012) 207 Taxman 236/(2013) 352 ITR 565(Karn.)(HC)

S. 2(47)(v) : Transfer - Transaction involving the allowing the possession of any immoveable property - Development agreement - If developer has taken any steps in relation to construction of flats, on the basis of development agreement, then it has to be considered as transfer under section 2(47)(v) [S. 45, Transfer of Property Act, 1882, S. 53A]

When an owner enters into an agreement for development of the property and certain rights are assigned to the developer who in turn has made the substantial payment and taken steps to construction of flats, then the transaction is held to be a transfer under section 2(47)(v). Legal ownership continued with the owner does not have bearing on taxability of capital gains. Though total profits received in later year for the purpose of capital gains tax the year of transfer is relevant. On the facts of the case the provisions of section 53A of Transfer of Property Act is held to be applicable. (A.Y. 2002-03 & 2008-09)

ACIT v. A. Rama Reddy (2012) 52 SOT 521 (Hyd.)(Trib.)

S. 2(47)(v) : Transfer - Transaction involving the allowing the possession of any immoveable property - Possession of immoveable property by way of lease on facts held is not transfer [S. 45, Transfer of Property Act, 1982, S. 53A]

Possession of the mill was transferred to the purchaser by way of lease and not in terms of the Transfer of Property Act. Therefore, there was neither actual transfer nor artificial transfer of title on account of the transfer of possession. Such transfer of title took place only on payment of the entire amount by the purchaser and only after the sale certificate was issued by the competent court. (A.Y. 1995-96)

Cauvery Spinning and weaving Mills Ltd. (In liquidation) v. Dy. CIT (2012) 340 ITR 550/ (2011) 238 CTR 55 / 50 DTR 218 (Mad.)(HC)

S. 2(47)(v) : Transfer - Transaction involving the allowing possession of any immoveable property - Capital gains - Conditions of execution of a written agreement and handing over possession have to be cumulatively satisfied [Transfer of Property Act 1882, S. 53A]

The Twin conditions of execution of a written agreement and handing over possession have to be cumulatively satisfied in order to bring case within the ambit of section 2(47)(v), read with section

53A of the Transfer of Property Act, 1882. None of the conditions are satisfied in the said case i.e. neither the agreement to sell the land was signed nor the possession of the land had been delivered. Since the transaction of the transfer has not taken in that year, thus nothing could be brought to tax. (A.Y. 2006-07)

Addl. CIT v. Delhi Apartment P. Ltd. (2012) 135 ITD 441 / 147 TTJ 451 / (2013) 23 ITR 217 (Delhi)(Trib.)

S. 4 : Charge of income - tax - Subsidiary - Subsidiary and its parent are totally distinct tax payer, profits assessable on stand alone basis

Subsidiary and its parent are totally distinct taxpayers and therefore entities subject to income-tax are taxed on profits derived by them on stand alone basis, irrespective of their actual degree of economic independence and regardless of whether profits are reserved or distributed to share holders / participants. Principle of Lifting of corporate veil can be applied in cases of holding company-subsidiary relationship, where, in spite of being separate legal personalities, if facts reveal that they indulge in dubious method of tax evasion.

Vodafone International Holdings B.V. v. UOI (2012) 341 ITR 1 / 204 Taxman 408 / 247 CTR 1 / 66 DTR 265 / 6 SCC 613 / Vol. 42 Tax LR 305 (SC)

S. 4 : Charge of income-tax - Income from other sources - Compensation received under consent decree [S. 56]

Court found that the department having not called upon the assessee to produce the relevant documents viz. Letter of offer made by JN Ltd., resolution of the board of directors of the assessee company when they applied for fully convertible debentures of that company, terms and conditions of issue of debentures, pleadings in the suit, resolution of the board of directors whereby they agreed to give up their right to take over JN Ltd. for the agreed compensation, etc., the impugned order of the High Court is set aside and the matter relating to the taxability of the compensation received by the assessee for giving up its right under the SEBI Takeover Code is remitted to the Assessing Officer for de novo consideration.

CIT v. Vasudhara Holdings Ltd. (2012) 210 Taxman 568 / 254 CTR 341 / 79 DTR 351 (SC)

S. 4 : Charge of Income-tax - Addition - Business income - Appropriation of profit - Sale of sugar at concessional rate by Co-operative society - Matter remanded back to the Commissioner (Appeals) [S. 28(i), 37(1)]

The assessee is a co-operative society engaged in the business of production of sugar cane and sale thereof. Assessee buys sugarcane from its members. Every month and on Diwali assessee sells certain quantity of sugar (Final product) at concessional rate to farmers / cane growers / members. The difference between the average price of sugar sold in the market and the price of sugar sold by the assessee to its members at concessional rate is sought to be taxed by the department under the head 'appropriation of profit'. When the matter came before the Supreme Court by revenue the Supreme Court set aside the matter the Commissioner (Appeals) to consider on what basis the quantity of sugar is being fixed for sale to farmers / cane growers/members each year on month to-month, apart from Diwali. Whether the aforesaid practice of selling sugar industry and whether any resolution has been passed by the State Government supporting this practice.

CIT v. Krishna Sahakari Sahakar Karkhana Ltd. and Ors. (2012) 80 DTR 298 / 254 CTR 638 / 211 Taxman 109 (SC)

Editorial:- From the judgment and order dated 30th June, 2009 of the Bombay High Court ITA No. 225 of 2007

S. 4 : Charge of Income-tax - Mutuality - Members club - Interest - Interest earned by a mutual association from deposits placed with member banks is not exempt on the ground of "mutuality".[S.2(24), 11]

The assessee, a mutual association, claimed that the interest earned by it on fixed deposits kept with the bank (which was a corporate member) was not taxable on the basis of mutuality. The Assessing Officer rejected the claim though the CIT(A) and Tribunal upheld the claim. The High Court reversed the Tribunal and upheld the stand of the Assessing Officer. On appeal by the assessee to the Supreme Court, held dismissing the appeal:

For a receipt to be exempt on the principles of Mutuality, three conditions have to be satisfied. The first is that there must be a complete identity between the contributors and participators. The second is that the actions of the participators and contributors must be in furtherance of the mandate of the association. The third is that there must be no scope of profiteering by the contributors from a fund made by them which could only be expended or returned to themselves. On facts, though the interest was earned from banks which were corporate members of the club, it was not exempt on the ground of mutuality because (i) the arrangement lacks a complete identity between the contributors and participators. With the funds of the club, member banks engaged in commercial operations with third parties outside of the mutuality, rupturing the 'privity of mutuality', and consequently, violating the one to one identity between the contributors and participators, (ii) the surplus funds were not used in furtherance of the object of the club but were taken out of mutuality when the member banks placed the same at the disposal of third parties, thus, initiating an independent contract between the bank and the clients of the bank, a third party, not privy to the mutuality & (iii) The Banks generated revenue by paying a lower rate of interest to the assessee-club and loaning the funds to third parties. The interest accrued on the surplus deposited by the club like in the case of any other deposit made by an account holder with the bank. A facade of a club cannot be constructed over commercial transactions to avoid liability to tax. Such setups cannot be permitted to claim double benefit of mutuality. (A.Y. 1989-90 to 1999-2000)

Bangalore Club v. CIT (2013) 350 ITR 509 / 212 Taxman 566 / 255 CTR 465 / 82 DTR 66/5 SCC 509 (SC)

S. 4 : Charge of income-tax - Capital or revenue - Non-compete fee - Non-compete fee is capital receipt

Non-compete fee received by the assessee prior to 1st April 2003, has to be treated as capital receipt. Department has not doubted the genuineness of transaction before lower authorities, hence, the Tribunal cannot contend before the High Court that the transaction is sham. (A.Y. 1997-98)

Hari Shankar Bhartia v. CIT (2012) 65 DTR 380 / 247 CTR 611 (Cal.)(HC)

S. 4 : Charge of income-tax - Capital or revenue receipt - Award - Acquisition of land - Interest received till date of award is capital receipt

The assessee's land was taken by the agreement on October 31, 1998 and the award was passed on March 29, 1992. The Assessing Officer took the view that interest was a revenue receipt. The Commissioner (Appeals) and Tribunal held that the interest was a capital receipt. On appeal to the High Court, the Court held that the interest paid, for the period 1-11-1998, upto date of award (i.e. 20-3-1992) must be treated as a capital receipt.

CIT v. V. Subbaraju (2012) 341 ITR 584 (AP)(HC)

S. 4 : Charge of income-tax - Contingent deposit - Sales tax - Collection of contingency deposit against sales tax liability is revenue receipt

The High Court in CIT v. Southern Explosives Co. (2000) 242 ITR 107 (Mad.), has held that the receipt of the amount for payment of sales tax and keeping it in deposit would amount to a "revenue receipt" and it would form part of the assessee's income, hence, the collection of contingency deposit

against payment of sales tax would form revenue receipt, the matter decided in favour of revenue. (A.Y. 1996-97 & 1997-98)
CIT v. Sundaram Finance Ltd. (2012) 205 Taxman 37 / 67 DTR 117 (Mad.)(HC)

S. 4 : Charge of income-tax - Capital or revenue - Subsidy - Subsidy for power consumption is revenue receipt
Power subsidy received by the assessee for encourage setting up of new industries in backward areas Assessee treated the said subsidy as capital receipt. The Court held that subsidy was given for five years at a particular percentage on the total consumption is a revenue receipt. Decided in favour of revenue. (A.Y. 1995-96)
CIT v. Karaikal Chlorates Ltd. (2012) 341 ITR 624 (Mad.)(HC)

S. 4 : Charge of income-tax - Diversion by overriding title - Amount transferred to Transport Infrastructure Utilisation Fund did not stand diverted at source by way of overriding title and it is includible in the taxable income of the assessee
The assessee was given license to conduct and carry on liquor trade in Delhi. On the basis of the minutes of the meeting construction of flyovers, etc. was a precondition or an obligation imposed and had to be complied with to enable the assessee to conduct business of sale of country liquor in Delhi.
The assessee on the directions of the Delhi Administration had got flyovers and infrastructure facilities constructed. As per resolution, 95 paisa out of Re 1 the assessee was entitled to retain and keep. The balance 5 paise per bottle was to meet the administrative expenses including corporate expenses. The said 95 paise was not transferred or paid by the assessee to the Delhi Administration. Accordingly the Court held that the amount standing in TIUF was not diverted at source by way of overriding title and it was to be included in the taxable income of the assessee. The interest earned on amount transferred to TULF is also income and is taxable. (A.Y. 1990-91 to 1992-93, 1994-95 & 1996-97)
CIT v. D.T.T.D.C. Ltd. (2012) 71 DTR 115 / 206 Taxman 507 / (2013) 350 ITR 1 (Delhi)(HC)
D.T.T.D.C. Ltd. v. CIT (2012) 71 DTR 115 / 206 Taxman 507 / (2013) 350 ITR 1 (Delhi)(HC)

S. 4 : Charge of income-tax - Mutuality - Co-operative Housing Society - TDR Premium - TDR Premium received by Co-op. Hsg. Society from its members is exempt on ground of "mutuality" [S. 24]
The assessee, a Co-operative Housing Society formed of plot owners, passed a resolution to the effect that if any member desired to avail of the benefit of Transferable Development Rights (TDR) for carrying out construction or additional construction on his plot, he should apply for a No Objection Certificate which would be granted on payment of a premium calculated at the rate of Rs. 250/- per sq.ft. The Society received a premium of Rs. 18.75 lakhs from its members for this purpose and claimed that the receipt was not chargeable to tax on the grounds of mutuality. The Assessing Officer rejected this plea on the ground that the TDR premium was in reality a "profit sharing arrangement of commercial nature" and was chargeable to tax. The CIT (A) & Tribunal upheld the assessee's plea. On appeal by the department to the High Court, held dismissing the appeal:
In Mittal Court Premises Co-op. Society (2010) 320 ITR 414 (Bom.) it was held in the context of non-occupancy charges that the principle of mutuality would apply to a co-op. society. The same principle applies to the TDR premium paid by a member to the Society of which he is a member as consideration for being permitted to make an additional utilization of FSI on the plot allotted by the Society. There is a complete mutuality between the Society and its members and the TDR premium is not chargeable to tax. (A.Y. 2005-06)
CIT v. Jai Hind Co-opertaive Housing Society Ltd. (2012) 349 ITR 541 / 209 Taxman 163 / (2013) 259 CTR 501 (Bom.)(HC)

S. 4 : Charge of income-tax - Excess cash in possession of bank - Excess cash found of relevant year which was transferred to suspense account cannot be treated as income of relevant year. The excess arrears brought forward from earlier years is liable to be taxed as income [S. 28(1)]

The court held that when there is no possibility of any one claiming any amount against surplus in the suspense account maintained by the assessee, the assessee cannot treat it as liability or provision for liability, further as and when the claim is made the appellant has to make any payment the same is allowable as a deduction in the year in which the claim is made, therefore, the Tribunal is right in rejecting the claim of the assessee in respect of arrears carried over for several years. However, in respect of excess found during the previous year need not be treated as income. The High Court confirmed the order of Tribunal in respect of arrears brought forward except Rs. 95,000/- which is the excess found in the previous year.

Catholic Syrin Bank Ltd. v. Addl. CIT (2012) 349 ITR 569 / 251 CTR 430 / 74 DTR 19 (Ker.)(HC)

S. 4 : Charge of income-tax - Subvention assistance - Capital receipt - Subvention assistance received by assessee from its holding company to recoup losses likely to be suffered by it was a capital receipt and not liable to tax [S. 2(24)]

The assessee a 100 percent subsidiary of a German company which is engaged in the activity of housing finance. The holding company granted subvention assistance to the assessee. It was done on the evaluation of the holding company that the assessee was likely to on account of its business activity, incur losses which would be substantial if not entirely eroded. The Assessing Officer held that subvention receipt was by way of casual receipt and liable to tax. On appeal, Commissioner (Appeals) held that receipt was capital in nature. On appeal by revenue, the Tribunal also confirmed the order of Commissioner (Appeals). On appeal to the High Court, it was held that the subvention assistance received by assessee from its holding company to recoup losses likely to be suffered by it, was a capital receipt not liable to tax. Appeal of revenue was dismissed.

CIT v. Deutsche Post Bank Home Finance Ltd. (2012) 209 Taxman 313 (Delhi)(HC)

S. 4 : Charge of income-tax - Income - Capital or revenue receipt - Sale of assets, properties and rights of business

The consideration of Rs. 2,02,25,000/- is not the consideration paid for transfer of any goodwill. The said consideration is paid for sale, transfer and assigning the business, the network and benefits and obligations of pending contracts of the business and commercial rights associated with or embedded therein. These are the properties owned by the assessee company. It is that property which is transferred for consideration of Rs. 2,02,25,000/-. In the transfer deed, having set out the particulars of the properties, the rights which are transferred in the end as a residuary, it is stated that all the goodwill pertaining thereon. Now the finding by the Assessing Officer is there is no goodwill. Therefore, consideration paid is not for the goodwill but it is for the assets, properties and rights of the transferor. Consequently if that is so, for transfer of capital asset no tax is payable. This is what precisely the Tribunal has held. Tribunal was therefore right in holding that the sum of Rs. 2,02,25,000/- paid for transfer of the assessee's business should be treated as a capital receipt. (A.Y. 2000-01)

CIT v. Asiatic Inds. Cases Ltd. (2012) 77 DTR 44 (Karn.)(HC)

S. 4 : Charge of income-tax - Diversion by overriding title - Appropriation towards sinking fund created under lease agreement there was no diversion by overriding title [S. 2(15), 11, 12A]

The Court held that there was no diversion of income by overriding title as regards the amount appropriated by the assessee lessor towards the sinking fund which is to be used for discharging its obligations under the lease agreements as assessee had complete control over these funds and it has

claimed depreciation in respect of the plant and machinery and other equipments purchased by utilizing the sinking fund for extending the facilities to the lessees. (A.Y. 1989-90 & 1990-91)
M. Visvesvaraya Industrial Research and Development Centre v. CIT (2012) 79 DTR 387 / (2013) 255 CTR 6 / 213 Taxman 213 (Bom.)(HC)

S. 4 : Charge of Income-tax - Mutuality - Interest on fixed deposits with member banks is taxable
As per the club rules, a corporate member like a bank was entitled to nominate their whole time directors, or full time senior executives, as members. It was held that when a company itself becomes a member of a club to the extent of making contribution it is responsible, but when it comes to participation and availment of facilities and privileges it is not the juridical person but it is only the nominated officers of the company who do so. There is thus a discernible factor which takes away the nexus between contribution and participation. It further held that there is also a dichotomy between the juridical personality who contributes to the club and the nominees (who can be changed) who actually avail of facilities and receive benefits from the club activities. An important facet of the principle of mutuality is not only the identity of the contributors of and the recipients from, the fund, but also the right to be returned the contribution in the event of the aggregate of members getting dissolved. If the continuance of the original contributors till the end, or till the achievement of the objects for forming the association or society/club is uncertain, the principle of mutuality ceases to apply. Further, when a person deposits money in a bank, the relationship is that of a creditor and a debtor, and they would be bound by the contract that regulates the deposit and payment of interest thereon. Principle of mutuality ends the moment the club deposits the amount with the sole aim of earning interest on the deposits. Further, by depositing its funds with its corporate member banks, the club would certainly help increase the business of the bank. In that view of the matter, the corporate member bank is being shown a favour, and is not being provided a facility. Therefore, it was held that interest on fixed deposits with banks was taxable. (A.Y. 1996-97, 1998-99 to 2001-2002)
CIT v. Secunderabad Club (2012) 254 CTR 163 (AP)(HC)
CIT v. Armed Forces Officer's Co-Operative Housing Society Ltd. (2012) 254 CTR 163 (AP)(HC)

S. 4 : Charge of income-tax - Capital or revenue receipt - Consideration for relinquishment rights under distributorship agreement is revenue receipt
The question before the High Court was whether the amount received by the assessee from Brown Boweri Company Ltd. Switzerland under memorandum of settlement dated 12th March, 1979, was a revenue receipt. After considering various clauses in the agreement the court held that assessee is engaged in several line of business activities and distributorship contracts, the Court observed that the assessee has not established that its trading structure was not adversely affected by non-renewal of the distributorship agreement with one company or it was either prevented or otherwise unable to enter into similar agreements in respect of similar products manufactured by other enterprises, the consideration received by the assessee under a memorandum of settlement for insisting upon the renewal of the said distributorship agreement constitutes revenue receipt. (A.Y. 1980-81)
Larsen & Toubro v. CIT (2012) 79 DTR 225 / (2013) 256 CTR 252 (Bom.)(HC)

S. 4 : Charge of income-tax - Undisclosed income - Search and seizure - On money - Paper seized from third party addition is deleted [S. 132]
In the course of search and seizure action against third party, from the Director of the said company certain loose papers were seized which recorded the alleged payments to artists. One of the name was of the assessee. On the basis of said paper the assessment of the assessee was reopened. Assessing Officer treated the said amount of Rs. 20 lakhs as undisclosed income of assessee. In the course of cross examination the director of the company has stated that he did not recollect the year of payment

either 1996 or 1999 nor the person to whom he has given the money. The Tribunal held that under the circumstances the statements given by Director had no evidentiary value, hence, the addition could not be taxed in the assessment year 1999-2000. (A.Y. 1999-2000)
Saif Ali Khan Mansurali v. ACIT (2012) 13 ITR 204 (Mum.)(Trib.)

S. 4 : Charge of income-tax - Capital or revenue receipt - Subsidy - Sales tax subsidy is capital receipt
Subsidy given under dispersal of Industries scheme as incentive to set up industries in areas other than Mumbai, Pune and Thane is capital receipt. (A.Y. 2004-05, 2005-06, 2006-07)
Dy. CIT v. Cosmo Films Ltd. (2012) 13 ITR 340 / 139 ITD 628 (Delhi)(Trib.)

S. 4 : Charge of income-tax - Diversion by overriding title - Infrastructure fund -Infrastructure fund retained cannot be held as diversion by overriding title
Assessee is a development authority created under the provisions of UP Urban Planning & Development Act, 1973. 90 percent of the amounts collected by the assessee by way of development fees, conversion charges of land user, stamp duty and fees on regularization of colonies were retained in the infrastructure fund account. As per office memorandum assessee has power to collect the fees / charges for functioning. The amount collected by office memorandum not being a separate independent entity of the assessee and the said memorandum having not created any overriding title of the State Government at source of collection of the specified fees/charges, which have to be applied towards fulfillment of assessee's object, there is no diversion of income by overriding title as regards the amounts credited to the infrastructure fund. (A.Y. 2006-07 & 2007-08)
Mussore Dehradun Development Authority v. Addl. CIT (2012) 65 DTR 297 / 143 TTJ 395 / 16 ITR 358 (Delhi)(Trib.)

S. 4 : Charge of income-tax - Salary - Performance incentive - Appeal - Same income cannot be assessed twice, and claim of assessee has to be allowed as mistake apparent on record, though the income was offered by assessee in the return of income [S. 139, 154, 246A]
The assessee while filing the return for the assessment year 2007-08 in addition to regular income also admitted a sum of Rs. 4,28,750/- as performance incentive from his employer. The assessment was completed under section 143(3), which were accepted by the assessee. In the assessment year 2008-09 after going through the TDS certificates, the assessee realized that the correct assessment year should be assessment year 2008-09 and offered for taxation in the Assessment year 2008-09, which was accepted by the tax department. The assessee filed an appeal to Commissioner (Appeals) for the assessment year 2007-08, which was dismissed by Commissioner in-limine as appeal is not maintainable. The assessee preferred an appeal before the Tribunal. As there was difference of opinion the matter was referred to third member. The third member held that the Act does not authorize levy of tax on same amount more than once, therefore, when amount of performance incentive had been assessed for assessment year 2008-09, assessment of same amount for impugned assessment year 2007-08 was a mistake apparent on records. Accordingly the claim of assessee was allowed. (A.Y. 2007-08)
R. Natarajan v. CIT (2012) 135 ITD 55 / 70 DTR 249 / 146 TTJ 315 (TM)(Chennai) (Trib.)

S. 4 : Charge of income-tax - Accrual - Retention money - Retention money in the contract is assessable only in the year of receipt that too after clearance of the defect liability [S. 5]
The issue referred for the consideration of Third Member was whether the retention money is accrued in the year of retention or in the year of actual receipt of the retention amount from the contractee's departments after the clearance of effect liability claims .The third member held that assessee had no right to receive the money by virtue of the contract between parties and the assessee also had no right to enforce the payment and therefore the Assessing Officer could not include the retention money in

the assessment year when actually this amount had not been paid to the assessee. The Tribunal held that the retention money in the contract is assessable only in the year of receipt, that too after clearance of the defect liability. (A.Y. 2003-04 to 2005-06)

ACIT v. Chandragiri Construction Co. (2012) 147 TTJ 249 / 73 DTR 20 (TM)(Cochin)(Trib.)

S. 4 : Charge of income-tax - Diversion of income by overriding title - Amount paid to wife of late partner was allowed as deduction

The issue before the Tribunal was whether the amount paid by the assessee to Mrs. Mehru Minoo Shroff, wife of late Dr. M. S. Shroff is first charge on receipts of firm in terms clause 13 of the partnership deed executed on 1-4-2003. Held that, as there was an absolute contractual obligation imposed on the continuing firm / partners by the partnership deed to pay an amount of 2% of the gross receipts subject to maximum of 3 lakhs p.a. to the legal heir of the deceased partner, it was a first charge on the receipts of the continuing firm/partners and constituted a diversion of income by overriding title. The claim of assessee was allowed. (A.Y. 2007-08)(ITA no 1560/2012 Bench 'D' dated 3-8-2012)

Shroff Eye Centre v. ACIT (Delhi)(Trib.) www.itatonline.org

S. 4 : Charge of income-tax - Banking company - Net appreciation in value of securities - Not recognized as income

Assessee, banking company registered in Korea, was carrying on banking business in India through its branch at Mumbai. As a part of its banking business, assessee claimed to have invested in securities which were categorized as 'available for sale'. As per accounting policy consistently followed, net appreciation in value of said securities was not recognized as income by assessee on ground that it represented unrealized and notional profits. Assessing Officer treated such net appreciation in value of securities as income of assessee liable to tax. The said addition was deleted following order passed by Tribunal in case of Dy. CIT (International Taxation) v. Chohung Bank (2010) 126 ITD 448 (Mum.). (A.Y. 2004-05 to 2006-07)

Shinhan Bank v. Dy. DIT (2012) 54 SOT 140 (Mum.)(Trib.)

S. 4 : Charge of Income-tax - Mutuality - Investment of surplus in Bank - Interest/return on such investment not be covered by character of mutuality hence liable to tax

When a mutual concern invests its surplus funds or makes deposit in bank, return or interest on such investment/deposits will not be covered by character of mutuality and such an amount will be liable to tax. (A.Y. 1996-97)

Dy. DIT v. Societe International De Telecommunication (2012) 139 ITD 328/(2013) 23 ITR 714/153 TTJ 55 (Mum.)(Trib.)

S. 4 : Charge of Income-tax - Mutuality - Provision of goods / services to non-members - Profit from transaction is liable to tax

When a mutual concern provides goods and services to non-members also and, some profit flows from said transactions, it is chargeable to tax. (A.Y. 1996-97)

Dy. DIT v. Societe International De Telecommunication (2012) 139 ITD 328 /(2013) 23 ITR 714/153 TTJ 55(Mum.)(Trib.)

S. 4 : Charge of income-tax - Compensation received from landlord for delay in actual delivery of leased premises is not taxable as revenue receipt

On facts compensation of Rs. 1,69,71,000/- received from landlord, which was in effect refund of rent paid for the period for which property was not ready for start of STP unit. Rent received back by way of compensation is to be credited against the rent paid by the assessee. Thus, refund of the rent of pre operative period was credited to pre operative expenses account and the refund of the rent of post

operative period was credited to rent account which was transferred to P&L A/c. nature of entire compensation is the same. Merely because the assessee has bifurcated it into two portions, different treatment cannot be given to them. Therefore, no portion of the compensation amount is taxable as revenue receipt. (A.Y. 2003-04)

American Express (India) (P) Ltd. v. Jt. CIT (2012) 79 DTR 127 / 150 TTJ 316 (Delhi)(Trib.)

S. 4 : Charge of income-tax - Interest - Head office - DTAA - Indo-France [S. 5, 90, Art. 7]

Interest paid to the head office/branches of the assessee bank by the Indian branch, cannot be taxed in India being payment to self which does not give rise to income that is taxable in India as per the domestic law or even as per the relevant tax treaty. (A.Y. 2002-03 & 2003-04)

BNP Paribas SA v. Dy. DIT (IT) (2012) 137 ITD 322 / 79 DTR 310 / 150 TTJ 395 (Mum.)(Trib.)

S. 4 : Charge of Income-tax - Mutuality - Nostro and overseas accounts with head office, neither interest income taxable, nor interest expenditure allowable

Assessee-bank maintained Nostro and overseas accounts with head office and branches outside India. It was held that on principle of mutuality neither interest income was taxable nor interest expenditure was allowable. (A.Y. 1998-99 to 2000-01)

ADIT (IT) v. Credit Lyonnais (2012) 139 ITD 681 / (2013) 21 ITR 359 (Mum.)(Trib.)

S. 4 : Charge of Income-tax - Mutuality - Deduction at source - Mere deduction of tax at source by members making payment, not lead to conclusion that receipt was taxable and section 28(iii) held to be not applicable [S. 28(iii)]

Assessee-institution which was formed by tenants of a building, was working for common interest of its members. It claimed tax exempt status on ground of mutuality. The Assessing Officer declined its claim. It was held that as long as services were rendered to members, even for a remuneration, same could be covered by principle of mutuality. Mere deduction of tax at source by members making payment could not lead to conclusion that receipt was taxable in nature. Thus, section 28(iii) had no application as it comes into play only when there is an 'income' derived by assessee but no income can be arise in case of mutuality. (A.Y. 2006-07)

Belvedere Estates Tenants Association v. ITO (2012) 139 ITD 675/(2013) 86 DTR 129 (Kol.)(Trib.)

S. 4 : Charge of income-tax - Sales tax subsidy - Capital receipt

Sale tax subsidy from Government of Maharashtra under Sales Tax Subsidy Scheme of 1993 was held to be capital receipt not liable to tax. (A.Y. 2005-06, 2006-07)

Dy. CIT v. Indo Rama Textiles Ltd. (2012) 53 SOT 515 (Delhi)(Trib.)

S. 4 : Charge of Income-tax - Income or capital - Joint venture - Guarantee - Business income - Amount remitted to bank is capital and amount credited to assessees bank is business income [S. 28(i)]

Joint venture between Indian company and foreign company. Foreign company providing guarantee for loans from foreign banks. Termination of joint venture agreement. Amounts paid by foreign company directly to foreign banks in discharge of guarantee obligations. The amount of remittance of Rs. 118.09 crores consisted of (a) Rs. 108.49 crores remitted by G, and proportionately directed for the benefit of three banks and (b) Rs. 11.58 crores remitted by G and credited to the bank account of the assessee. The assessment of the assessee was framed making an addition representing the sums remitted by G as they were held to be in the nature of subsidy or grant, and thus revenue receipts. The Commissioner (Appeals) held that the sum remitted by G, to the extent of Rs. 108.49 crores was a capital receipt not chargeable to tax, but the sum of Rs. 11.58 crores which has been credited to the bank account of the assessee, was to be treated as business income. The Tribunal held that the sum

paid was also not in the nature of compensation because there was no obligation on G, under any contract to compensate the assessee. The appellate authority was right in treating the amount of Rs. 108.49 crores out of an aggregate addition of Rs. 118.49 crores made by the Assessing Officer as a capital receipt. Since the balance was credited to the bank account of the assessee, in the absence of any contrary and satisfactory explanation by the assessee, the Commissioner (Appeals) had rightly treated this amount as income of the assessee. (A.Y. 2002-2003)

Luxor Writing Instruments P. Ltd. v. Dy. CIT (2012) 20 ITR 518 / (2013) 56 SOT 92 (URO)(Delhi)(Trib.)

S. 4 : Charge of Income-tax - Accrual - Revaluation of unsellable stock-in-trade - Corresponding entry in the balance sheet as capital reserve - A person cannot make profit from himself by merely making some entries in the books of account, income cannot be assessed [S. 5]

Revaluation of assets in the books of the assessee does not lead to generation of income as no transaction has been taken up with an outside party. A person cannot make profit from himself by merely making some entries in the books of account. The case of the assessee is that the value of these items had been taken as nil till last year as there was no buyer for these items. However, with a view to show improved balance sheet for taking higher loan from the banks these assets have been shown in the balance sheet now. Nonetheless, no item could be sold in this year also. The assessee has not incurred any expenditure which has not been recorded in the books of account. Therefore, it cannot be said that these assets have come out of any unaccounted income. This value admittedly is an artificial value because this work in progress is unsellable even now though there is a possibility of getting some amount, may be even large amount, in some future date if some buyer finds interest in these items. The ostensible purpose is to window dress the balance sheet, not a laudable purpose but a purpose tainted with immorality of getting higher loan with no corresponding security. Therefore, even if revaluation may not per se lead to generation of income, one cannot approve the entries made in the books of account in this behalf, which also have tax implication in future, namely, that the business profit shall become taxable under the head 'Capital gains'. Accordingly, the re-classification of the assets and the value placed thereon in the books will have no consequence as far as income tax assessments are concerned. In other words, the assets for the purpose of income tax shall continue to be grouped as stock in trade at nil value. Since no value has been realized in respect of this stock in trade, nothing can be taxed in this behalf in this year. (A. Y. 2007-08)

Moving Picture company India Ltd. v. ACIT (2012) 80 DTR 450 (2013) 151 TTJ 200 (Delhi)(Trib.)

S. 5 : Scope of total income - Accrual - Non-resident - Transfer of shares of foreign company by non-resident to non-resident does not attract Indian tax even if object is to acquire Indian assets held by the foreign company - Representative assessee - Income cannot be assessed [S. 9(1)(i), 195, 163(1)]

Share holding in companies incorporated outside India is property located outside India. Where such shares became subject matter of off shore transfer between two non-residents, there is no liability for capital gains tax. On the facts of case the transaction of outright sale between two non-residents of a capital asset (share) outside India. Further, the transaction was entered in to on principal to principal basis. Therefore, no liability to deduct tax at source. In the absence of permanent establishment, profits were not attributable to Indian operations. Moresoever, tax presence has to be viewed in the context of the transaction that is subjected to tax and not with reference to an entirely unrelated matter. Tax presence must be construed in the context and in a matter that brings the non-resident assessee under the jurisdiction of the Indian tax authorities. On the facts the revenue failed to establish any connection with section 9(1)(i). Under the circumstances, section 195 is not applicable. Sections 163(1)(c) and 9(1)(i) have to be read together. Section 163(1)(c) is not attracted as there was

no transfer of capital asset situated in India, consequently Vodafone International Holdings cannot be proceeded against even under section 163 of the Act as representative assessee.
Vodafone International Holdings B. V. v. UOI (2012) 341 ITR 1 / 204 Taxman 408 / 247 CTR 1 / 66 DTR 265 / 6 SCC 613 / Vol. 42 Tax L R 305 (SC)
Editorial:- Decision of Bombay High Court in Vodafone International Holdings B. V. v. UOI (2010) 329 ITR 126 (Bom.)(HC) is set aside.

S. 5 : Scope of total income - Accrual - Interest income - Debenture - Interest income calculated on amortization basis is accepted on the basis of matching principle
The assessee has computed his interest income arising on the difference between purchase price of the debenture and redemption price after six years and calculated the income on amortization basis. The issue before the Apex court was whether such interest should be taxed on accrual basis in the year of allotment of debenture itself or whether it should be taxed on spread over basis. The Apex court referring the Judgment of Bombay High Court in Taparia Tools Ltd. v. Jt. CIT (2003) 260 ITR 102 (Bom.)(HC), which refers to matching principle, order of Tribunal up held and order of High Court was set aside. (A.Y. 1995-96)
Rakesh Shantilal Mardia v. Dy. CIT (2012) 210 Taxman 565 / 254 CTR 338 / 79 DTR 302 (SC)
Editorial:- Taparia Tools Ltd. v. Jt. CIT (2003) 260 ITR 102 (Bom.)(HC) is approved.

S. 5 : Scope of total income - Accrual - Real income - Even under mercantile system of accounting mere raising of proforma invoice income does not accrue
On advice of the Controller and Auditor General of India, the assessee had been raising proforma invoices/bills, even when no money was received in respect of those bills as income of assessee on the ground that assessee was following the mercantile system of accounting, therefore, income had accrued. Very fact that spaces were given to those agencies and against those spaces proforma invoices / bills were raised. There was some dispute and some of departments had never made any payments, hence no income accrued merely because pro forma advices were raised that too at the instance of the Controller and Auditor General of India. The matter was remitted to the Assessing Officer to examine the matter on the merits. (A.Y. 1998-99)
Airports Authority of India v. CIT (2012) 340 ITR 407 / 247 CTR 149 / 66 DTR 440 / 205 Taxman 84 (Mag.) / 2012 Tax LR 497 (FB)(Delhi)(HC)
Editorial:- SLP of revenue is dismissed. (2013) 214 Taxman 23(Mag.) (SC)(A.Y. 1996-97)

S. 5 : Scope of total income - Accrual - Lease rentals - It is only financing charges which represent real income which has to be offered for tax [S. 145]
The assessee is a non-banking finance company. For the relevant assessment year, it had received a sum of Rs. 11.84 crores as the lease rentals. The assessee deducted a sum of Rs. 4.35 crores representing the lease equalization account from lease rentals. According to assessee lease equalization charges should not be added as income. The tax authorities and Appellate Tribunal held that the assessee is not entitled to deduction. On appeal to High Court, the court held that, lease rental may consist of financing charges as well as capital recovery. Amount received towards capital recovery constitute capital expenditure, where as financing charges which represent real income which has to be offered for tax. In the absence of any provision in Act for calculating lease equalization charges, Accounting Standards prescribed by ICAI can be adopted for that purpose and assessee would be entitle to claim said amount as deduction from total lease rentals. Accordingly the claim of assessee was allowed. (A.Y. 1998-99 to 2000-01)
Prakash Leasing Ltd. v. Dy. CIT (2012) 208 Taxman 464 (Karn.)(HC)

S. 5 : Scope of total income - Accrual - Securities - Government debt - DTAA - India- Cyprus - Interest on Government Securities accrues only on the date specified in such instrument and not on the last date of financial year [Art. 11(4), 14(4)]

The Assessing Officer taxed the interest accrued though not due on securities held as on 31st March, 2007, being last date of the financial year. Addition was deleted by the Commissioner (Appeals) and Tribunal. On appeal, the High Court held that, the right to receive interest on the Government securities vested in the respondent only on the due date mentioned in the securities. Consequently, interest accrued on the securities only on the due dates and cannot be said to have accrued to the respondent on any date other than the date stipulated therein. The contention that interest accrues for broken periods between two consecutive dates stipulated in the agreement / instrument for payment of interest is without any basis in law. Consideration received by assessee in respect of sale of securities is capital gains and exempt in terms of DTAA. The court up held the order of Tribunal. (A.Y. 2001-02)

DIT v. Credit Suisse First Boston (Cyprus) Ltd. (2012) 209 Taxman 234 / 76 DTR 215 / 253 CTR 190 / (2012) Vol. 114(5) Bom.L.R. 2783 / (2013) 351 ITR 323 (Bom.)(HC)

S. 5 : Scope of total income - Accrual - Advance rent - Premium for agreement to lease [S. 2(15), 11, 12A]

On facts "advance rent" received by the assessee from the lessee being the consideration for being let into possession of the leased premises as evident from the report of the assessee's council of Management and the terms of the lease, it was in fact a premium rather than advance rent and constituted the assessee's income; leasing out of commercial spaces by the assessee cannot be regarded as sale of properties as the assessee was only a lessee of the land which belonged to the Govt. and it was not even entitled to sell the construction put up on the land. Constituted the assessee's income. (A.Y. 1989-90 & 1990-91)

M. Visvesvaraya Industrial Research and Development Centre v. CIT (2012) 79 DTR 387 / (2013) 255 CTR 6 / 213 Taxman 213 (Bom.)(HC)

S. 5 : Scope of total income - Amount received for transfer of indefeasible right of connectivity for 20 years is assessable over the period of 20 years as business income [S. 28(i)]

RI Ltd. in terms of the agreement, had only the right to use the network during the tenure of the 20 years agreement. Further, the agreement was liable to be terminated at the sole discretion of RI Ltd. and consequently, the amount received as advance for 20 years lease period would have to be returned on such termination for the balance unutilized period. Tribunal also held that the agreement dated 30th April 2003 was only in the nature/form of a lease agreement. Therefore, the assessee had in terms of AS-19 correctly spread the entire fee of Rs. 3,037 crores over the period of 20 years and to pay tax thereon over the entire period. Entire amount was not assessable during the relevant year. (A.Y. 2004-05)

CIT v. Reliance Communication Infrastructure Ltd. (2012) 79 DTR 198 / 254 CTR 251 / (2013) 212 Taxman 177 (Bom.)(HC)

S. 5 : Scope of total income - Interest - Hire charges - Finance business - Nature of transaction not hire charges hence liable for interest tax [S. 2(7), 2(5B)]

Assessee-company filed its return declaring certain income from hire charges. Revenue authorities took a view that assessee-company was engaged in financing business and only by advancing loan on interest it could not be considered a hire purchase company. Accordingly, hire charges declared by assessee were brought to tax as interest under section 5. Tribunal upheld order of revenue authorities In view of fact that hire purchase agreement was silent on period of its tenure and, moreover, vehicle was registered in name of hirer itself, it could be concluded that real nature of transaction was not hire

purchase but a sale on financing basis. therefore, income received by assessee was rightly brought to tax as interest. Appeal of assessee was dismissed. (A.Y. 2000-01)
S. E. Investments Ltd. v. CIT (2012) 211 Taxman 82 (Mag.)(Delhi)(HC)

S. 5 : Scope of total income - Accrual - Commission - Foreign agents - Commission which is reduced from invoice value cannot be assessed as income it is in the nature of discount
Assessee was engaged in business of export of fabrics. Assessee allegedly claimed the deduction as commission expenses paid to foreign agents. On enquiry by the Assessing Officer the assessee contended that the said amount was reduced from the invoice itself therefore it is discount given to buyer. The Assessing Officer disallowed the commission. On appeal the Tribunal held that when the alleged commission was deducted from invoice value and only net amount was received by assessee from buyer, amount of commission recorded in invoice could not be treated as income arising to assessee. (A.Y. 2005-06)
Rajesh Manikchand Jain v. ITO (2012) 49 SOT 167 (Ahd.)(Trib.)

S. 5 : Scope of total income - Accrual - Surcharge - Method of accounting - Cash - Mercantile - Levy of surcharge being contingent tax can be levied only when realized and not on the basis of accrual [S. 145]
Assessee a PSU, engaged in distribution of electricity which maintained the accounts on mercantile system. On the basis of prudence norms the method of accounting was changed and the surcharge was accounted on the basis of actual receipt. The levy of is not mandotority enforceable by assessee at the time of payment of bill. The court held that the receipt of surcharge is purely contingent hence tax can be levied only on the realized income and not on hypothetical income. (A.Y. 2006-07)
Dy. CIT v. Dakshin Haryana BijliVitran Nigam Ltd. (2012) 65 DTR 388 / 144 TTJ 307 (Delhi)(Trib.)

S. 5 : Scope of total income - Accrual - Bill discounting charges - Pertaining to period after 31st March, 2000, could not be assessed in assessment year 2000-01 on accrual basis
The Tribunal applied the 'matching concept' in the mercantile system of accounting and held that if due date of bill crosses the date of closure of the financial year, the bank discounting the bill will incur matching interest cost on its year end also be deductible in the current year. The interest cost of subsequent year cannot be deductible hence the income pertaining to next year shall also not accrue as income in the current year. Therefore, amounts representing discounting charges pertaining to period after 31st March, 2000 could not be assessed in the assessment year 2000-01 on accrual basis. (A. Y. 2000-01)
The Siam Commercial Bank PCL v. Dy. DIT (2012) 134 ITD 463 / 66 DTR 369 / 144 TTJ 235 (Mum.)(Trib.)

S. 5 : Scope of total income - Accrues or deemed to be accrued - Award - Interest and compensation awarded by Motor Accident Claim Tribunal to be taxed in the year in which award is final
The assessee received compensation and interest under the award passed by Motor Accident Claim Tribunal (MACT) and appeal filed by Insurance company was pending before the High Court. The Tribunal observed that such interest received would be chargeable to tax in the year when compensation and interest awarded by the MACT reaches finality. (A.Y. 2006-07)
Sharda Pareek (Smt.) v. ACIT (2012) 50 SOT 439 / 145 TTJ 41 (UO)(Jaipur)(Trib.)

S. 5 : Scope of total income - Accrual - Guarantee commission - Income should be spread over period to which it is related and should be assessed proportionately

Assessee received certain guarantee commission and offered the same to tax on accrual basis which was consistently followed by it. It was held that such income should be spread over period to which it is related and should be assessed proportionately. (A.Y. 2002-03 & 2003-04)
BNP Paribas SA v. Dy. DIT (IT) (2012) 137 ITD 322 / 79 DTR 310 / 150 TTJ 395 (Mum.)(Trib.)

S. 5 : Scope of total income - Accrual - Rent of premises - Assessee not tenant in premises, compensation received for surrender of tenancy rights would be liable to tax in hands of individuals and not in hands of assessee firm
In the instant case, premises in question was given on rent to one Y who ran business in name and style of 'Bombay Electrical Laundry'. In 1947, Y migrated to Pakistan and Custodian of Evacuee property sold rights, titles and interest of Y to A and V. Their legal heirs continued to hold tenancy rights and continued business in the name and style of 'Bombay Electrical Laundry'. None of the partners at any point of time had ever introduced his/her share in tenancy as capital in accounts of firm. Thus, it was held that since assessee firm was never a tenant in aforesaid premises, compensation received for surrender of tenancy rights would be liable to tax in hands of individuals and not in hands of assessee firm. (A.Y. 2006-07)
ITO v. Bombay Electrical Laundry (2012) 138 ITD 17 (Mum.)(Trib.)

S. 5 : Scope of total income - Accrual - Disputed claim - Allowed in the year of payment
Amount receivable by the assessee from another company has not been recognized in any earlier year or during the year under consideration on the ground that the same is disputed. Admittedly, the payment in question has actually been received in F. Y. 2006-07 i.e. A. Y. 2007-08 and duly recognized in the books of account in that year. No useful purpose would be served by disturbing the accounts. Assessing Officer is directed not to assessee the amount in the current A. Y. 2006-07 after verifying the correctness of the said claim. (A.Y. 2006-07)
Addl. DIT (International Taxation) v. Dalma Energy LLC (2012) 78 DTR 219 / 150 TTJ 70 (Ahd.)(Trib.)

S. 5 : Scope of total income - Accrual - Banking business - Guarantee commission recognized by assessee over life of guarantee on accrual basis - Addition sustained
Assessee, as a part of its banking business provided bank guarantees and charged guarantee commission on the same. Guarantee commission was being recognized by assessee over life of guarantee on accrual basis. Guarantee commission received for year under consideration to some extent was not recognized by assessee as its income on ground that guarantee period relating to said commission was subsequent to 31-3-2004. It was held that addition made by Assessing Officer on the basis that period of guarantee had nothing to do with assessee's right to receive commission and accordingly, said amount was brought to tax for assessment year in question holding that said income accrued to assessee at time when corresponding guarantees were issued. **(**A.Y. 2004-05 to 2006-07)
Shinhan Bank v. Dy. DIT (2012) 54 SOT 140 (Mum.)(Trib.)

S. 5 : Scope of total income - Accrual - DTAA - India-USA - Compensation for settlement of class action dispute in USA-Tax is deductible at source. [S.56, 195,Art. 23]
An Indian company, having made some misstatements by manipulating its financial statements with the alleged connivance of its auditors, the cause of action for the class action suit filed against them claiming damages in USA arose in India and, therefore, the amount deposited by Indian Company and its auditors in the escrow account as part of the settlement of the class action dispute is income from other sources arising in India. It is also chargeable to tax in terms of para. 3 of article 23 of the Indo-US DTAA. Tax deduction should be at the rate of 30 percent.
IC & Ors., In Re (2012) 76 DTR 177 / 252 CTR 265 / 211 Taxman 265/(2013) 353 ITR 664 (AAR)

S. 5 : Scope of total income - Compensation - Fraud - Taxability of Compensation for misrepresentation, fraud compensation on settlement of suits for misstatements, cause of action in India is taxable in India as IFOS and liable to withholding tax [S. 56, 195]

Shares of an Indian company were listed on BSE and NSE while its American Depository Receipt (ADS) were listed on New York Stock Exchange. Price of its shares fell suddenly as a result of admission by its former Chairman from India that its accounts as on 30.09.2008 contained misstatements. A number of suits were filed against the company and its auditors in US claiming damages. The suits were based on tort, misrepresentation, deceit, fraud. The suits were consolidated and Lead plaintiffs through the lead counsel filed consolidated Class Action Complaint. The parties arrived at a negotiated settlement of disputes subject to approval of court. Company agreed to pay $125 million and auditors agreed to pay $25 million to Qualified Settlement Fund (QSF) to be administered by Lead Counsel for distribution amongst those qualified to participate in class action. The amounts were transferred by company and auditors to QSF after taking RBI approval. US Court passed final judgment confirming the settlement as fair, reasonable and adequate.

Issue that came up before AAR was whether the compensation was taxable in India and liable to withholding tax under section 195 of the Act.

The Authority observed that right of action is different from cause of action. Even though the plaintiffs had a right of action in US, their cause of action arose or accrued in India by reason of the alleged misrepresentation, tort, etc. practiced by the company and its auditors in India. Therefore, it ruled that compensation accrued or arose in India within the meaning of section 5(2). It further ruled that the compensation was neither capital receipt nor capital gains but a revenue receipt and that the compensation or damages are taxable as income from other sources under section 56(1)(A.A.R. No. 1045, 1060, 1078, 1087 & 1088 dt. 27/08/2012) .

Satyam / PWC (AAR)

S. 6(1) : Residence in India - Non-resident - Subsidiaries - Subsidiaries cannot be treated as deemed resident

Mere fact that a parent company exercise shareholder's influence on its subsidiaries does not generally imply that subsidiaries are to be deemed residents of State in which parent company resides.

Vodafone International Holdings B.V. v. UOI (2012) 341 ITR 1 / 204 Taxman 408 / 247 CTR 1 / 66 DTR 265 / 6 SCC 613 / Vol. 42 Tax L R 305 (SC)

S. 6(1) : Residence in India - Non-resident - Numbers of days stay in India - If the period of a person in India is less than 182 days then status to be applied would be of non-resident and his global income cannot be taxed in India

Residential status of a person for purpose of section 6 is to be determined only on basis of number of days of his stay in India and there is no restriction for number of days spend abroad. Hence, if the period of a person in India is less than 182 days then status to be applied would be of non-resident and his global income cannot be taxed in India. (A.Y. 2002-03 & 2004-05)

Suresh Nanda v. ACIT (2012) 53 SOT 322/(2013) 90 DTR 225 (Delhi)(Trib.)

Editorial: Affirmed in CIT v. Suresh Nanda (2013) 90 DTR 283 (Delhi)(HC)

S. 6(1) : Residence in India - Non-resident - Less than 180 days - Date of arrival was to be excluded as it was not complete day

Assessee had received salary in India as employee of T and also he worked on rig outside India. Assessee filed loss return as non-resident. Assessee's passport revealed that assessee had arrived seven times in India and stayed for 187 days during relevant financial year. Assessing Officer considered assessee as resident and brought his salary to tax. Commissioner (Appeals) found that assessee generally arrived late in night after completing his work abroad and attended to work next day and generally left early in morning so as to attend work again after arriving at destination. He

held that such days of arrival was to be excluded and by doing so assessee's staying was less than 180 days in India. Date of arrival was to be excluded as it was not complete day, thus, assessee would be a non-resident and, hence, his salary could not be brought to tax in India. (A. Y. 2007-08)
ITO v. Fausta C. Cordeiro (2012) 53 SOT 522 (Mum.)(Trib.)

S. 6(6) : Residence in India - Not ordinary resident - Income deemed to accrue or arise in India - DTAA - India-Japan - When provisions of Income-tax Act were more beneficial to assessee, same should have been preferred over DTAA, since assessee was a person 'not ordinarily resident' in India, salary earned in Japan for employment under S could not be assessed in India, hence the income earned by assessee outside India could not be taxed in India [S. 5(1)(c), 9(1)(i), 90(2), Art. 15]
Assessee was a permanent resident of Japan. He was employed with a Japanese Company S. By virtue of a collaboration agreement entered into between S and an Indian company M, assessee was deputed to India to offer guidance and technical assistance to M. During relevant previous year, assessee worked in India for 273 days and was not a 'resident' in India in any of nine out of ten previous years .Assessee received salary from S in Japan. Assessing Officer held that assessee was liable to tax in respect of salary received by him in Japan. Tribunal found that provisions of Income-tax Act were more beneficial to assessee, same should have been preferred over DTAA, and, thus income earned by assessee outside India could not be taxed in India. Whether since assessee was a person 'not ordinarily resident' in India, salary earned in Japan for employment under S could not be assessed in India. Since in the provisions of sections 6(6) read with section 5(1)(c) and section 9(1)(i) were more beneficial to the assessee the same should be preferred over DTAA, accordingly the order of Tribunal was up held and appeal of revenue was dismissed.
CIT v. Sakakibara Yutaka (2012) 210 Taxman 286 (Delhi)(HC)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Transfer of shares - Foreign company - Jurisdiction - Off shore transaction tax authorities in India has no jurisdiction to spilt the payment
Appellant company, namely Vodafone International Holdings BV(VIH), was resident for tax purposes in Netherlands. A sale purchase agreement (SPA) was entered between appellant and HTIL under which HTIL agreed to transfer to appellant its entire issued share capital in CGP and thereby entire interest of HTIL in HEL was transferred to appellant. High Court held that VIH on purchase of CGP got indirect interest in HEL, acquired controlling right in certain indirect holding companies in HEL, controlling rights through shareholder agreements which included right to appoint directors in certain indirect holding companies in HEL, rights to use 'Hutch' brand in India, etc., which constituted capital asset as per section 2(14). High Court further held that VIH by virtue of its diverse agreements had nexus with Indian Jurisdiction and hence proceedings initiated under section 201 for failure to withhold tax by VIH on payments made to HTIL could not be held as lack of jurisdiction. On facts it was noted that investment in to India by a holding company (Parent company), HTIL through a maze of subsidiaries. It was also apparent that transaction involved 'outright sale' between two non-resident companies of a capital asset (Shares) outside India. Since the parties to transaction had not agreed upon a separate price for CGP share and for High Court called as 'other rights and entitlements' (Including options, right to non-compete, control premium, customer base, etc.) it was not open to Revenue to split payment and consider a part of such payments for each of above items. Even otherwise, since, there was an off shore transaction between two non-resident companies namely, HTIL and VIH and subject-matter of transaction was transfer of CGP (another non-resident company), Indian tax authorities had no territorial jurisdiction under section 9(1)(i) to tax said off shore transaction. Accordingly the Supreme Court set aside the order of High Court.
Vodafone International Holdings B.V. v. UOI (2012) 341 ITR 1 / 204 Taxman 408 / 247 CTR 1 / 66 DTR 265 / 6 SCC 613 / Vol. 42 Tax L R 305 (SC)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Transfer of shares - Foreign company - Off shore transaction tax authorities in India has no jurisdiction to split payment

Pursuant to the judgement in Vodafone International Holdings B.V. v. UOI (2012) 341 ITR 1 (SC), holding that Vodafone was not liable to pay capital gains on the transfer of shares, the Union of India filed a review petition in the Supreme Court seeking a review of the aforesaid judgement. Held by the Supreme Court dismissing the review petition.

"We have carefully gone through the review petition filed by the Union of India on 17th February, 2012. We find no merit in the review petition. The review petition is, accordingly, dismissed. Review Petition dismissed".

UOI v. Vodafone International Holding (Review Petition) (SC) www.itatonline.org

S. 9(1)(vi) : Income deemed to accrue or arise in India - Royalty - Transfer of know how - Amount paid for right to use know how for a specified period - Amount is taxable in India - DTAA - India-Sweden [Art. 7]

The assessee a non-resident Swedish company had entered into an agreement with Atlas Copco (India) Ltd. for supply of the technical know how for the manufacture of screw type air compressors and to render technical assistance that may be required in the said manufacture during the existence of the agreement against the lump sum consideration payable in three installments. It was contended by the assessee that the amount received during the year pursuant to the aforesaid agreement was not taxable as per the provisions of the Double taxation Avoidance Agreement. The Assessing Officer held that the amount received by the assessee was royalty which is covered under DTAA. The said order was confirmed in appeal by the Tribunal. In a reference at the instance of the assessee the Court held that since amount was paid to assessee on account of transfer of know-how by assessee-company to Indian Company it was in the nature of 'royalty' covered under Article VII of DTAA , hence, the Tribunal was justified in holding that the amount in question was taxable in India. (A. Y. 1986-87).

Atlas Copco AB Sweden v. CIT (2012) 205 Taxman 5 / 69 DTR 325 / 249 CTR 450 (Bom.)(HC)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Deduction at source - Foreign agent - Commission - Permanent establishment [S. 4(1), 40(a)(ia), 195]

Where a foreign agent of an Indian exporter operates in his own country and his commission is directly remitted to him, such commission is not received by him or in his behalf in India. Such agent is not liable to income tax in India on commission received by him. As there was no right to receive income in India nor there was any business connection between assessee and Evon Technologies UK, (ETUK) therefore, when income was not chargeable to tax in India under section 4(1), there was no question of invoking provisions of section 195 hence, no disallowance be made under section 40(a)(ia). (A.Y. 2007-08).

CIT v. Eon Technology (P) Ltd. (2011) 203 Taxman 266 / 64 DTR 257 / (2012) 343 ITR 366 / 246 CTR 40 (Delhi)(HC)

Editorial:- Affirmed view of Tribunal in Dy. Eon Technology (P) Ltd. (2011) 46 SOT 323 (Delhi)(Trib.*)*

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Permanent establishment - DTAA - India-Mauritius [S. 44BB, Art.5, 7]

Assessee, a Mauritius based company, entered into three contracts in India. It filed its return declaring nil income. Assessing Officer finding that duration of contracts taken together exceeded 9 months, held that assessee had its PE in India and, thus, income accrued to it was taxable in India. Tribunal held duration in respect of each contract was to be taken into consideration separately for determining whether or not any PE was constituted in terms of Article 5 of India and once it was found that

duration in respect of each contract was less than 9 months, it would not constitute PE, therefore in absence of any PE, there could not be any question of taxability of business profit as per article 7. Appeal of department was dismissed. (A.Y. 1997-98)

Dy. CIT v. J. Ray McDerrmott Eastern Hemisphere Ltd. (2012) 54 SOT 363 (Mum.)(Trib.)

S. 9(1)(i) : Income deemed to accrue and arise in India - Business connection - DTAA -India-Singapore - Despite payment of arms length remuneration to the agent, further profit could be attributable to the PE in India [Art. 7]

Assessee is a company incorporated in Cayman Islands and conducts its business operations from Singapore. Singapore tax authority had issued tax residency certificate to the tax payer confirming that its control and management was exercised from Singapore. During the relevant assessment year, the assessee was conducting its entire TV channel activities of Asia-Pacific Region from Singapore. The Assessing Officer held that the assessee had appointed an Indian company as it agent in India and Indian company was entitled to 15% commission on a gross advertisement revenue from India, the income of the assessee comprised only the advertisement time sold in by Indian company. Indian company collected the payments and remitted them to Singapore The Assessing Officer held that the assessee had an Agency PE in India. Assessing Officer further held that even if the assessee paid arm's length remuneration to the agent, further profits could be attributed to the agency PE. The Assessing Officer accordingly attributed profits at 40, 30, 25, and 25% for relevant assessment years. In appeal CIT(A) up held the further attribution of profits but reduced the quantum. On appeal the tribunal held as under

(a) The assessee had not maintained separate accounts for the Indian operations, hence application of Rule 10(i) read with Rule 10(iii) was proper

(b) The tax computation filed by the assessee with the Singapore tax authority in respect of its global operations reflected losses. Hence, margin attributed by the Assessing Officer was on higher side.

(c) Transponder charges and programme charges cannot be said to be only Indian operations since the satellite footprint also covered.

(d) Circular No. 742 of 1996 dated 2-5-2006 (1996) 219 ITR (st) 49 provided for presumptive taxation 10% of advertisement revenue of foreign telecasting companies as their income. Hence, even though the said circular was withdrawn as there was no change in the business model of the tax payer, attribution of 10% of the advertisement revenue earned by the tax payer from India was reasonable. The Tribunal laid down the principle that despite payment of arm's length remuneration to the agent further profit could be attributable the PE in India. (A.Y. 2002-03 to 2005-06)

MTV Asia LDC v. DDIT, ITA No. 3530/M/06, BCAJ Pg. 28, Vol. 43 B Part 6, March 2012 (Mum.)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - DTAA -India-USA - Term "attributable" equivalent to expression "effectively connected" - Interest on income tax refund chargeable to tax as per Article 11(2) [S. 90, Art. 7 & 11]

The assessee is a US company having its project office in India received interest on income tax. The Tribunal observed that expression "attributable" used in Article 11(5) of India US DTAA is equivalent to term "effectively connected". Thus, interest would be chargeable at the rate of 15% as per Article 11(2) of the India-USA DTAA and not at the rate of 40% as per Article 11(5). (A.Y. 2008-09)

Followed Special Bench decision of ACIT v. Clough Engineering Ltd. (2011) 130 ITD 137 (SB) (Delhi)(Trib.)

Bechtel International Inc. v. ADIT (2012) 135 ITD 377 / 72 DTR 458 / 150 TTJ 792 / (2013) 21 ITR 404 (Mum.)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Service fee - DTAA - India-Mauritius - Service fee paid to concerns at arm's length price and assessee did not have any PE India hence, not taxable in India [Art. 5]

The assessee is a foreign company incorporated in Mauritius, engaged in the business of telecasting of TV channels. B4U Multimedia International Ltd. and B4U Broad Band Ltd. '(B)' was granted general permission by RBI to act as advertisement collecting agent of the assessee. As per the agreement the 'B' had no powers to conclude the contract nor was dependent on the assessee. The assessee did not have any PE in India and hence not taxable in India. It was held that even if it is presumed that there was a PE of assessee in India, in view of the fact that payment of service fee by assessee to B was at arm's length price, there was no need to attribute profits to the PE. (A.Y. 2001-02)

DDIT (IT) v. B4U International Holdings Ltd. (2012) 137 ITD 346 / 148 TTJ 274 (Mum.)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Brokerage - Commission - Amounts received by assessee were income earned by assessee outside India and therefore is not liable to tax in India

The assessee was non-resident and was living in Singapore. He has earned brokerage and commission out of import and export of agricultural produce like cashew nuts. The imports were made from African Countries and exports were made to other countries and no activities was routed through Indian waters. The remittances was first received by foreign correspondent bank of Indian Bank and there after the amounts were transferred to NRE account in Chennai by way of cheques / DD / TTs. The Tribunal held that when funds were handed over first in accounts of foreign correspondent bank outside India, income could not be treated as income received or accrued or arose or deemed to accrue in India, therefore, not exigible to Indian taxation. (A.Y. 2004-05 to 2009-10)

JCIT v. V. Deenadayalavel (2012) 52 SOT 511 (Chennai)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Capital gains - Foreign exchange forward contracts - DTAA - India-Singapore - Gains earned on cancellation of foreign exchange forward contracts treated as capital gains

Gain earned on cancellation of foreign exchange forward contracts is a capital receipt and has to be treated as capital gains and, therefore, Assessing Officer and DRP were not justified in treating gains earned by assessee as income from other sources. (A.Y. 2007-08)

Credit Suisse (Singapore) Ltd. v.. ADIT(IT) (2012) 53 SOT 306 (Mum.)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - DTAA -India-UAE - Head office expenditure [S.44C,Art. 7(3)]

Assessee is a foreign bank incorporated in UAE. It had two branches i.e. PEs in India. Profits of PE were computed in hands of assessee as per provisions of article 7(3). An amount of Rs. 40.04 lakhs was allocated to PEs representing head office expenses incurred and attributable to such Indian PEs. The Assessing Officer restricted the deduction for head office expenses by applying provisions of section 44C. Applicability of domestic law, viz, section 44C had been provided for allowing deduction of section expenses of PEs by amendment brought in article 7(3) w.e.f. 1/4/2008 and it would not have any retrospective effect. Thus, provisions of section 44C had been provided for allowing deduction of expenses of PEs by amendment brought in article 7(3) w.e.f. 1/4/2008 and it would not have any retrospective effect. Hence, it was held that the provisions of the said section were not applicable to the instant case and therefore, income of Indian PEs of assessee was to be computed after allowing all expenses attributable to its business in India including head office expenses. (A.Y. 1995-96 to 2000-01)

Abu Dhabi Commercial Bank Ltd. v. ADIT (IT) (2012) 138 ITD 83 / 78 DTR 234 / 150 TTJ 85 (Mum.)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Interest payment to head office and overseas branches - Held not taxable in India since payments were to self which did not give rise to income that was taxable in India

The assessee is a commercial bank having its head office in France, carried on its activities including financing of foreign trade and foreign exchange transactions through its eight branches in India. It was held that the interest paid to the head office and overseas branches by Indian branches could not be taxed in India since these were payments to self which did not give rise to income that was taxable in India. (A.Y. 2002-03 & 2003-04)

BNP Paribas SA v. Dy. DIT (IT) (2012) 137 ITD 322 / 79 DTR 310 / 150 TTJ 395 (Mum.)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - DTAA India-Sri Lanka - Capital Gain - Article 13(4) gives exclusive power to tax such income in Sri Lanka [Art. 13(4)]

Assessee a resident of India was holding shares in company T incorporated in Sri Lanka. The said shares were sold by the assessee. The assessee claimed that the capital gain could not be taxed in India because such sale was governed by Article 13(4)of India-Sri Lanka DTAA. It was held that the words 'may be taxed' under Art. 13(4) of DTAA gave exclusive power to tax such income in Sri Lanka and thus, said income could not be taxed in India. (A.Y. 2007-08)

Apollo Hospital Enterprise Ltd. v. Dy.CIT (2012) 53 SOT 103/(2013) 85 DTR 378 (Chennai)(Trib.*)*

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - DTAA - India-Singapore - Income earned from termination of forward contract - Capital gain treated as exempt [S. 45, Art. 13]

Assessee was a Singapore based bank registered in India as FII. It took loan in foreign currency to invest in debentures. To safeguard itself from foreign exchange fluctuation risk it entered into forward contracts. Before selling debentures, it terminated forward contracts on which it earned profit. It was held that gain arising from early settlement of foreign exchange forward contract was not income from other sources but had to be treated as capital gain exempt under Article 13 of DTAA. (A.Y. 1998-99 & 2005-06)

Citicorp Investment Bank (Singapore) Ltd. v. Dy. DIT (2012) 54 SOT 119 (Mum.)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Income earned from assessee's foreign branches - Permanent establishment - Not taxable in India

Assessee-bank sought relief in respect of its income from foreign branches based on respective Double Tax Avoidance Agreements. In all foreign countries, operation was carried out through its branches which was permanent establishment situated outside India, therefore, income attributable to these branches could not be taxed in India. (A.Y. 2003-04)

Bank of India v. Dy. CIT (2012) 139 ITD 493 (Mum.)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Liaison offices - Permanent establishment - Agents merely carried out concluding step embodied in contracts, there was no PE in India and hence the assessee could not be taxed in India in respect of profits arising from its activities in India - DTAA - India-USA [Art. 5]

The assessee, a foreign company incorporated in USA, was engaged in money transfer business worldwide. For the purpose of carrying on its business in India, the assessee entered into agreements with department of posts, commercial Banks, non financial companies, and tour operators and appointed them as agents. The agents had power to appoint sub agents / representatives. If a person in

USA wanted to remit his money to a relative in India, he approach the assessee at USA and pays the money in dollars together with charges, thereupon he would be given a receipt by the assessee along with the computer generated unique Number(MTCN). The remitter would send the said unique number to his relative in India, who would approach the assessee's agent in India. The Agent would feed the MTCN into the computer with the help of software and the main frame computer of the assessee in the USA and after matching the number and satisfying himself about the identity, of the recipient / claimant the money would be paid in India. For the services rendered by Agents they were paid commission at an agreed percentage, which was termed as base compensation agreement. The assessee also opened the liaison offices in India, at Mumbai, Bangalore and Gurgaon, with prior approval of RBI. For the assessment years 2002-03, 2003-04 and 2005-06 the assessee filed the return of income declaring the NIL income. The assessing officer held that the assessee the activities of liaison offices were not of preparatory and auxiliary in nature, as the assessee had the business connection in India the assessee is liable to tax under section 9(1) of the income -tax Act, to pay tax in India on the profits arising from its activities in India. The Assessing Officer has also held that the work of liaison office is same as that of head office hence the liaison office constituted a permanent establishment within the meaning of article 5 of DTAA. On appeal the Commissioner (Appeals) following the order in assesses own case for the assessment year 2001-02, Western Union Financial Services Inc. v. ADIT (2007) 104 ITD 34 (Delhi), held that assessee had the business connection in India for all the relevant years, but did not have PE in India , he accordingly set aside the levy of tax on assessee. On appeal by the revenue the Tribunal held that, the assessee did not have any PE in India therefore the assessee could not be taxed in India in respect of profits arising from its activities in India, for coming to the conclusion the Tribunal relied on following reasons (1) the assessee did not exercise any control over computer systems which were independently owned by agents and were not provided by assessee, (2) Activities of agents were not wholly or almost wholly devoted on behalf of assessee, (3) Agents were not dependent agents of assessee (4) Agents were not party to contracts entered between remitter and assessee outside India (5) Agents merely carried out concluding step in arrangement embodied in contracts. Accordingly the revenue's appeals were dismissed and cross objects were allowed. (A.Y. 2002-03, 2003-04 & 2005-06)

Dy. DIT v. Western India Financial Services Inc. (2012) 50 SOT 109 (Delhi)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India - Sale of cars in India - Permanent establishment - DTAA - India-Germany - Delivery of goods took place outside India and payment was also made outside India - Held no business connection in India and thus, income from sale not chargeable to tax [Art. 5(2)(b), 5(2)(a)]

The assessee, a German company was engaged in the business of manufacture and sale of automobiles. It entered into a joint venture with company for manufacture / assembly and sale of cars in India. For direct sales to customers in India, the assessee rendered certain assistance services. It was held that delivery of goods took place outside India and payment was also being made for purchase of goods outside India and there was no business activity carried out by the assessee regarding sale of cars directly are not taxable in India. The said transaction does not give rise to a business connection in India. (AY 1997-98, 2000-01, 2002-03 and 2005-06)

ACIT v. Daimler Chrysler AG (2012) 52 SOT 93 (Mum.)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - PE - Liason Office - DTAA - India-USA - Liaison office merely co-ordinated purchases in India - Could not be regarded PE in India - No income attributable in India [Art. 5]

Assessee was a non-resident company dealing in cut and polished diamonds - A survey under section 133A was carried out. Assessing Officer on the basis of finding recorded by survey party issued a show-cause notice to assessee as to why its Liaison Office should not be treated as Permanent Establishment (PE) in India. Following order passed by co-ordinate Bench of Tribunal in assessee's

own case in Dy. DIT (IT) v. Fabricant & Sons Inc. (2011) 48 SOT 576 / 15 taxmann.com 358 (Mum.) it was held that where liaison office of assessee merely co-ordinated its purchases in India, it could not be regarded as assessee's PE in India and, thus, no income could be attributed to it under section 9. (A.Y. 2006-07 & 2007-08)

Dy. DIT(IT) v. M. Fabricant & Sons Inc. (2012) 54 SOT 135 / 20 ITR 118 (Mum.)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Banking business - Interest payment by the Indian branch of assessee bank to its overseas head office in Japan - Not chargeable to tax in India [S. 40(a)(ia), 195]

Interest paid by the Indian branch of assessee bank to its overseas head office in Japan was not chargeable to tax in India. Consequently, provisions of section 195 would not apply in respect of aforesaid payment. (A.Y. 2004-05)

Dy. DIT v. Mizuho Corporate Bank Ltd. (2012) 54 SOT 117 (Mum.)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Deduction at source - Payment for uploading and display of banner advertisement on non-resident's portal - No PE of non-resident in India - No TDS to be deducted [S. 40(a)(i), 195]

Payment made by assessee to non-resident for uploading and display of banner advertisement on non-resident's portal would not be liable for tax deduction at source in absence of any PE of non-resident in India. (A.Y. 2006-07)

Pinstorm Technologies (P.) Ltd. v. ITO (2012) 54 SOT 78 /(2013) 86 DTR 162/154 TTJ 173 (Mum.)(Trib.)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Contract for procurement of off-shore supplies for project - As no income arises in India therefore not liable to tax in India

Applicant is a HongKong based company, engaged in the business of engineering, procurement and construction of petroleum, petro-chemical and power plant. With a view to execute project awarded by company P, it entered into a consortium with an Indian Company to develop a terminal for receipt and storage of liquefied natural gas at Kochi. On question as to whether income received/ receivable by applicant for off-supplies from P was liable to tax in India, it was held that though applicant had a business connection in India, but it had not carried any part of business relating to off shore supplies to India. Under the deeming provision of Section 9(1) read with Explanation 1(a), any business income accruing or arising to the applicant can be taxed in India only in respect of operation carried in India. It was held that the applicant was not the owner of supplies in India and as the right, title, payment in supplies passed to P which was importing these supplies from outside India. Thus, all that income from transaction had not arisen in India and therefore, not liable to tax in India.

CTCI Overseas Corporation Ltd. (2012) 342 ITR 217 / 247 CTR 233 / 66 DTR 506 / 205 Taxman 297 (AAR)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Composite contract - Assessing Officer - Contract is indivisible and consortium is to be taxed as an Assessing Officer, the amount receivable for supply of equipment, material and spares allegedly outside India is taxable in India [S. 2(31)(v), 5(2)]

The applicant which consisted the consortium of two members for executing offshore activities. According to the applicant it is a divisible contract and its obligations under the contract are well defined, the offshore activities are not taxable in India. A PE would come into existence in India in terms of Art. 5.2(1) of DTAA between India and Germany only after the equipment reaches the site in India. The applicant approached the Authority for determination of tax liability. The Authority held that applicant is assessable as an Assessing Officer notwithstanding the internal division of

responsibility by the consortium members and reognition thereof or by making separate payments to two members. On the facts part of design and engineering work for manufacture and procurement of equipment done outside India being inextricably linked with the erection and commissioning of the project undertaken by the consortium , amount payable in respect of design and engineering is liable to be taxed in India as situs of the contract is in India . Amount receivable for supply of equipment material and spares allegedly outside India is also taxable in India .

ABC, In re (2012) 345 ITR 119 / 249 CTR 329 / 70 DTR 49 (AAR)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Offshore supply of equipment - Right title has passed outside India and the applicant is not owner, amount received is not liable to tax in India

As per the terms of the contract, applicant is responsible for off shore supplies, off shore services and mandatory spares (for off shore supplies). Applicant can be said to have a business connection in India, however, it has not carried out any part of the business relating to offshore supplies in India. As the applicant is not the owner of the supplies in India. Right title, payment, etc. in the supplies had passed on to P. Ltd. outside India, therefore, the amount received / receivable by the applicant from P. Ltd. for off shore supplies in terms of contract is not liable to tax in India.

CTCI Overseas Corporation Ltd. (2012) 342 ITR 217 / 247 CTR 233 / 66 DTR 506 / 205 Taxman 297 (AAR)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Offshore sale - Offshore sale amount received was not liable to tax in India

Applicant Chinese company entered in to a supply contract with JP Ltd. to carryout design, engineering, procuring and transportation to the port of loading of the equipment for a coal fire power station built for the Indian company. In the agreement the parties had stipulated for passing of the title to the equipment outside the country. Technical requirements were that of the owner. The payments were to be made in Euros and Dollars. In bill of lading and bill of entry, the Indian company was shown as the owner of the equipment, therefore, there was an off shore sale and amount received by the applicant was not liable to tax in India.

Sepco III Electric Power Construction Corporation (2012) 342 ITR 313 / 247 CTR 230 / 66 DTR 511 / 205 Taxman 115 (AAR)

Editorial: Followed,Ishikawajima-Harima Heavy Industries Ltd. v. DIT (2008) 288 ITR 408 (SC) and LS Cable Ltd., In re (2011) 337 ITR 35 (AAR)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Deduction at source - Non-resident - Commission - Service rendered from abroad - Since the order was executed in India, right of agent to receive commission arose in India hence the provision of withholding tax will apply [S. 5(2)(b), 195]

The applicant is an Indian company engaged in the manufacturing and supply of Rice Par Boiling and Dryer Plants as per requirement of customers. It had received orders from two agents situated in Pakistan. The plant was shipped and commission was payable to agents on completion of export orders. The question was raised whether the income of non-resident agent can be considered as deemed to accrue or arise in India and whether tax deduction would be mandatory under section 195 on export commission paid to non-resident agent if so, at what rate. The Authority for Advance Ruling held that the fact that the agents have rendered services abroad in the form of soliciting the orders and the commission is to be remitted to them abroad are wholly irrelevant for the purpose of determining the situs of their income. Following the ruling in Rajive Malhotra (2006) 284 ITR 564 (AAR), it is to be held that income arising on account of commission payable to the two agents is deemed to accrue and arise in India and is taxable under the Act in view of section 5(2)(b) read with

section 9(1)(i). The provision of section 195 would apply and the rate of tax will be as provided under the Finance Act for the relevant year.
SKF Boilers and Driers (P) Ltd (2012) 343 ITR 385 / 206 Taxman 19 / 248 CTR 121 (AAR)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Subsidiary - Permanent establishment - DTAA - India-Singapore - A subsidiary created for Indian business is a PE of the foreign parent [Art. 5(8)]
The applicant, a Singapore company, entered into an agreement with an Indian group subsidiary company for the performance of shipment transport services within & outside India. The agreement was on a principal to principal basis. The question arose as to whether applicant has a PE in India. The Authority held that a "permanent establishment" is something, either independent entity or a subsidiary, which enables a non-resident to carry on a part of its whole business in a particular country. The Aramex group could not have done business in India without a presence in India. As the subsidiary has a fixed place of business in India and the business of the applicant is carried on through it, the definition in Article 5(1) of India-Singapore DTAA is satisfied. The subsidiary is also a PE under Article 5(8) because it habitually secures orders in India wholly for the Aramex group and concludes contracts for the group. The exception in Article 5(10) does not apply because it is not a case of the subsidiary carrying on "its business" in India but it is a case of the entire group carrying on business in India through the subsidiary. Also, the fact that the agreement refers to the subsidiary as "independent" and "non-exclusive" is not relevant because it is a mere camouflage to screen the fact that the subsidiary is really a PE of the applicant's group in India.
Aramex International Logistics (P.) Ltd. In re, (2012) 348 ITR 159 / 251 CTR 9 / 208 Taxman 355 / 22 Taxmann.com 74 / 73 DTR 121 (AAR)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Permanent establishment - Outbound and inbound consignment - India-Singapore - DTAA - Receipts from outbound and inbound consignments attributable to PE [Art. 5]
Wholly owned subsidiary of AX group, which is facilitating the overseas express shipment business carried on by the said group in India through the applicant, a Singapore company, by securing orders, collecting articles, transporting them and delivering the same to addresses in various countries through the group entities is PE of applicant in India within the meaning of Art. 5 of Indo-Singapore DTAA and, therefore the receipts by applicant from outbound and inbound consignments attributable to PE in India are taxable in India.
Aramex International Logistics (P.) Ltd. In re, (2012) 348 ITR 159 / 251 CTR 9 / 208 Taxman 355 / 22 Taxmann.com 74 / 73 DTR 121 (AAR)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Business profits - Design - DTAA - India-France - Assessing Officer - Composite contract cannot be split to exempt profits from offshore supply of goods - A joint contract constitutes an Assessing Officer despite separate responsibility of parties [S. 2(31)(v), 5, Article 7]
The Applicant, a foreign company, entered into a consortium agreement with three other companies for the submission of a joint bid in response to the Bangalore Metro Rail Corporation Ltd's (BMRC) tender for "design, manufacture, supply, installation, testing & commissioning of signaling / train control and communication systems". The consortium parties agreed to be jointly and severally liable to BMRC for the performance of all obligations under the contract. However, the respective obligations of the parties was split up & each was separately responsible for its own profit/loss. The applicant filed an application for advance ruling and claimed, relying on Ishikawajima-Harima Heavy Industries Ltd. v. DIT (2007) 288 ITR 408 (SC), CIT v. Hyundai Heavy Industries Co. Ltd. (2007) 291 ITR 482 (SC) & Hyosung Corp. (AAR), that the income derived by it from offshore supply of plant and materials was not taxable in India as the title to the goods had passed, and payment was

received, outside India. It was also claimed that as each consortium member had separate responsibility and was accountable for its own profit / loss, the fact that the contract with BMRC was joint, did not make the consortium an "Assessing Officer". The Authority held that though in cases of Ishikawajima, Hyundai & Hyosung, it was held that that a composite contract was capable of being dissected and it was open to the assessee to raise the contention that parts of the contract should be treated separately for the purpose of deciding whether income from the performance of that part of the contract arose onshore or offshore and that part of the income attributable to offshore transaction cannot be taxed in India, this is no longer good law in view of the larger bench decision in Vodafone International Holdings where it was held that the transaction has to be looked at as a whole and not by adopting a dissecting approach.

On facts, the contract entered into with BMRC was a composite one for which a lump sum consideration was paid. Such a contract cannot be split up into separate parts as consisting of independent supply or sale of goods and for installation at the work site, leading to the commissioning and so on (Linde AG AAR 962 / 2010 & Roxar Maximum AAR 977 / 2012 followed).

Further, as the applicant and the others came together for jointly executing the project, they constituted an Assessing Officer & were liable to be taxed as such. The fact that between themselves, the members of the Consortium divide the performance of the obligation does not affect the nature and content of the obligation undertaken by them jointly. Thus claim of applicant was rejected and it was held that the income from it has to be taxed as a whole and the income received by the Consortium Members in terms of the contract, is taxable in India under Income-tax Act and under India-France DTAA.

Alstom Transport SA (2013) 49 ITR 202 / 208 Taxman 223 / 74 DTR 281 / 251 CTR 193 (AAR)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Resident of Switzerland - Partnership firm - Legal fees received is held to be taxable - DTAA - India-Switzerland [S. 2(31)(iv), 90, Art. 3(d), 4, 14]

A partnership formed in Switzerland not being a taxable entity under the Swiss law, is not a 'person' within the meaning of cl. (d) of art. 3 of the Indo-Swiss DTAA and, therefore, the applicant, a Switzerland based law firm cannot claim the benefit of the DTAA and, there is no occasion to apply Art. 14 of the DTAA on the basis that the fees received by it for legal services is a professional income.

Payment made by an Indian company to the applicant Swiss partnership firm for representing it in adjudication proceedings regarding a dispute with another Indian company arising out of a contract for construction of a structure or project in India is an income arising in India even though, as per the agreement, the site of the adjudication is outside India as the source of the income received by the applicant for rendering professional services is in India and, therefore, the legal fees received by the applicant is taxable in India.

Schellenberg Wittmer & Ors. In Re (2012) 76 DTR 293 / 253 CTR 178 / 210 Taxman 319 (AAR)

S. 9(1)(i) : Income deemed to accrue or arise in India - Business connection - Deduction at source - Assessing Officer - Supply of equipment, material and spares - Outside India - DTAA - India-Germany - When an indivisible contract and existence of an association of persons, amount payable to applicant would be taxable in India [S. 2(31(v), 4, 195, 197, Art. 5(2)(1)]

The applicant filed an application under section 197 of the Income-tax Act and claimed that no portion of the amount payable was liable to be with held under section 195 of the Act, since what it received were off-shore and hence not chargeable to tax in India. The Income-tax officer did not accept the plea of the applicant and directed OPAL to withhold tax on amounts paid to the applicant in terms of contract in question. The assessee moved application under section 245Q. The Authority held that in face of an indivisible contract and existence of an association of persons, amount payable

to applicant in respect of design and engineering and for supply of equipment, material and spares allegedly outside India would be taxable in India. The Authority for advance ruling held that the assessee is liable to deduct tax at source.
Linde AG (2012) 349 ITR 172 / 207 Taxman 299 / 74 DTR 265 / 251 CTR 177 (AAR)

S. 9(1)(ii) : Income deemed to accrue or arise in India - Salaries - Leave encashment - Termination of employment - Amount received by previous employer as retirement benefit has not accrued or deemed to accrue in India [S. 5(1)(c), 6, 17(3)(ii)]
The assessee was an employee of American company from 1991 till November, 1999 and during this period he was non-resident Indian. On termination of employment, he received certain amount as leave encashment according to the number of years of service. The assessee claimed that the said amount was exempt under section 5(1)(c) read with section 9(1)(ii). The Assessing Officer held that the said amount is taxable as perquisite treating the said amount as profit in lieu of salary. In appeal the Commissioner(Appeals) held that the amount received was in respect of past services, rendered outside India at a time when he was non-resident and thus could not be deemed to have accrued or arisen in India and would not come under the purview of section 9(1)(ii). In appeal Tribunal also confirmed the order of CIT(A). On appeal by revenue the court also confirmed the order of Tribunal and held that in terms of section 6 and 9(1)(ii), amount received by assessee had not accrued /deemed to be accrued /paid in India hence not taxable. (A.Y. 2001-02)
CIT v. Anant Jain (2012) 207 Taxman 117 (Delhi)(HC)

S. 9(1)(ii) : Income deemed to accrue or arise in India - Salaries - Salaries earned in India - Service provider - DTAA - India-Poland - Assessee has been functioning from India hence income is deemed to accrued or arise in India [S. 5(1)(b), 90, Art. 17]
The assessee in the return of income claimed that the salary received from Pharmaceutical Works Polpharma S.A. Poland being exempt from tax on the basis of DTAA between Poland and India. The Assessing Officer held that during the year the assessee was employed as a "service provider" providing services for Polpharma Indian representative office at Bangalore, thus the place of employment is Bangalore and not outside India and therefore any income that arise or accrued, due to employment, in India Only, hence, taxable in India. On appeal, Commissioner(Appeals) held that the assessee is entitled to relief under DTAA, and allowed the claim. On appeal by the revenue, the Tribunal held that, Assessee having been employed as "service provider" by a Polish company to support establishing and preparing organization of the company's representative office in India cannot be said to be holding "top level managerial position" and therefore, he is not entitled to benefit of Art. 17(2) of the Indo-Poland DTAA in respect of the salary received by him from the said company, further such income is to be deemed to have accrued or arisen in India as the assessee has been functioning mainly from India, hence, the income is deemed to accrue or arise in India. (A.Y. 2005-06 & 2006-07)
Dy. CIT v. Mohan Balakrishnam Pookulanagara (2012) 71 DTR 365 / 52 SOT 415 / 149 TTJ 73 (Ahd.)(Trib.)

S. 9(1)(ii) : Income deemed to accrue or arise in India - Salaries - Income from employment - DTAA - India-USA - Applicant has obligation to withhold taxes [S. 195, Art. 15]
Applicant company is fully owned subsidiary of US company T. It entered into an agreement with T for seconding certain number of employees. Seconded employees shall continue to have their pay roll processed by T but applicant is to reimburse T for those amounts and also pay Tax service charge. Right to terminate employee is with T. It was held that since applicant has not become employer of seconded employees, what applicant pays to T is income of T and not in nature of reimbursement of salary and while paying amounts applicant has obligation to withhold taxes under section 195.

Target Corporation India (P) Ltd In re (2012) 348 ITR 61 / 75 DTR 385 / 209 Taxman 601 / 252 CTR 242 (AAR)

S. 9(1)(v) : Income deemed to accrue or arise in India - Interest - Sale price of CCD difference is interest income and not capital gains [S. 2(28A)]

Where the sale price of CCDs issued by subsidiary company was linked to the holding period; CCDs were guaranteed by parent company; directors of subsidiary company had no powers of management; difference between the sale price and purchase price of CCDs held by Mauritian company was 'interest' and not 'capital gains' in terms of DTAA.

'Z Mauritius' In re, (2012) 20 Taxmann.com 91 (AAR), Dated 21-3-2012, BCAJ Pg. 35, Vol. 44-A, Part 2, May, 2012 (AAR)

S. 9(1)(vi) : Income deemed to accrue or arise in India - Royalty - Deduction at source -Non-resident - Software - Payment made by assessee to non-resident for purchase of software would constitute "royalty" under section 9 hence liable to deduct tax at source.

The Tribunal held that the assessee is not liable to deduct tax at source in respect of payments made for purchase of software as the same cannot be treated as income liable to tax in India as royalty or scientific work under section 9 of the Act read with Double Taxation Avoidance Agreements and treaties. On appeal by revenue the Court following the Judgment in CIT v. Samsung Electronics Co. Ltd. (2011) 203 Taxman 477 (Karn.)(HC) and in view of retrospective amendment in section 9 Explanation 4 and explanation from 1-6-1976, decided the issue in favour of revenue. The Court held that the assessee is liable to deduct tax at source. (A.Y. 2001-02)

CIT v. P. S. I. Data System Ltd. (2012) 208 Taxman 452 (Karn.)(HC)

S. 9(1)(vi) : Income deemed to accrue or arise in India - Royalty - Fees for included services - Deduction at source - Non-resident - DTAA - India-USA - Assessee is held liable to deduct at source [S. 195, Art.12]

Assessee obtained orders from Department of Telecommunications for manufacture and supply of telecommunications / switching equipments. In order to execute its orders in India it had placed orders on 'L' Technologies, USA for supply of software. Assessee also placed order with 'L' Technologies, Taiwan for supply of hardware. Assessing Officer took a view that payment made to 'L' Technologies USA for supply of software were in the nature of royalty under provisions of section 9(1)(vi) read with DTAA between India and USA and thus the assessee was required to deduct tax at source under section 195. On appeal the view of the Tribunal that acquisition of software without hardware did not serve any purpose hence, payment made to 'L' Technologies, USA could not be termed as royalty and not liable to deduction at source as it was an integrated import could not be sustained. In an appeal filed by revenue before the High Court, the Hon'ble High Court upheld the view of the Assessing Officer. (A.Y. 2000-01, 2001-02 & 2002-03)

CIT v. Sunary Computers (P) Ltd. (2012) 348 ITR 196 / 204 Taxman 1 (Karn.)(HC)
CIT v. Lucent Technologies (2012) 348 ITR 196 / 204 Taxman 1 (Karn.)(HC)

S. 9(1)(vi) : Income deemed to accrue or arise in India - Royalty - Copyright -Hardware - Software - Software supplied being an integral part of the mobile telephone system - On facts it is held as not taxable in India - DTAA - India-Sweden [S. 5(2)(b), Art. 13]

Assessee a Swedish company, supplied hardware and software to an Indian cellular operator under supply agreement whereby both the transfer of the property in the goods and risk passed outside India, and the installation activity having been carried out by two separate companies, though belonging to the same group, which received separate remuneration and have been independently assessed, in respect of their income, assessee did not have any business connection in India and therefore, not taxable in India. Software supplied by the assessee being an integral part of the GSM

mobile telephone system incapable of independent use and there being nothing to establish that the cellular operator has obtained any copy right of such software, no part of the payment received by the assessee under supply agreement can be classified as royalty either within the meaning of section 9(1)(vi) or under Article 13(3) of the DTAA between India and Sweden. (A.Y. 1997-98)

DIT v. Ericsson A.B. (2012) 343 ITR 470 / 66 DTR 1 / 246 DTR 422 (Delhi)(HC)
DIT v. Ericsson Radio System A.B. (2012) 343 ITR 470 / 66 DTR 1 / 246 DTR 422 (Delhi)(HC)
DIT v. Metapath Software International (2012) 343 ITR 470 / 66 DTR 1 / 246 CTR 422 / 204 Taxman 192 (Delhi)(HC)

S. 9(1)(vi) : Income deemed to accrue or arise in India - Royalty - DTAA - India-Korea - Payment for Shrink wrapped software held to be royalty [Art. 12(3)]

The assessee is a company engaged in the development of computer software and exported such software to its head office located in South Korea. The Assessing Officer held that the payment made by the assessee constituted royalty under section 9(1)(vi) and thus, liable for deduction of tax at source. It was held that the payment was made for by assessee to the non-resident for having imported shrink wrapped software/off-shelf software. It was clear from the material on record that what was transferred was the right to use software, an exclusive right which the owner of the copyright owned and what was transferred was only right to use copy of the software for the internal business. It was held that right for transfer would constitute "royalty" within the meaning of article 12(3) of the DTAA and the provisions of section 9(1)(vi) of the Act. (A.Y. 1999-2000 to 2001-02)

CIT v. Samsung Electronics Co. Ltd. (2012) 345 ITR 494 / (2011) 245 CTR 481 / 203 Taxman 477 / 64 DTR 178 (Karn.)(HC)

S. 9(1)(vi) : **Income deemed to accrue or arise in India - Software - Royalty - DTAA -India-Finland - Off-shore supply profits not taxable [S. 90, Art. 13]**

The assessee, a French company, sold GSM equipment manufactured in Finland to Indian telecom operators from outside India on a principal to principal basis, under independent buyer-seller arrangements. Installation activities were undertaken by the assessee's subsidiary. The Assessing Officer and Commissioner(Appeals) held that the assessee's liaison office and subsidiary constituted a Permanent Establishment (PE) and a portion of revenue was attributable to the PE and the whole of software revenue was held as assessable as "royalty" under section 9(1)(vii) and Article 13. The Tribunal decided the issue in favour of assessee. On appeal by revenue, the court held that as regards the profits on supply of equipment, the legal position is that the places of negotiation, the place of signing of agreement or formal acceptance thereof or overall responsibility of the assessee are irrelevant circumstances. The only relevant factor is as to where the property in the goods passes. As the goods were manufactured outside India and the sale has taken place outside India, even in a "composite contract", the supply has to be segregated from the installation and only then would question of apportionment arise to the determine the extent to which it arises in section 9(1)(i). The departmental argument that composite contracts cannot be split so as to exempt supply profit is not acceptable.

As regards the profits on supply of software, there is a distinction between the supply of a "copy right" and supply of a "copyrighted article". Though the Explanation 4 was added to section 9(1)(vi) by the Finance Act, 2012 with retrospective effect from 1-6-1976 to provide that all consideration for user of software shall be assessable as "royalty" the definition in the DTAA has been left unchanged. In CIT v. Siemens Aktiongesellschaft (2009) 310 ITR 320 (Bom.)(HC), it was held that amendments cannot be read in the treaty. As the assessee has opted to be assessed by the DTAA, the consideration cannot be assessed as "royalty" despite the retrospective amendments to the Act. (A.Y. 1997-98, 1998-99)

DIT v. Nokia Networks OY and others (2012) 78 DTR 41 / 253 CTR 417 / (2013) 212 Taxman 68 (Delhi)(HC)

DIT v. CIT Alcatel New Delhi (2012)78 DTR 41 / 253 CTR 417 (Delhi)(HC)
Nokia Net works OY v. ADIT (2012) 78 DTR 41 / 253 CTR 417 (Delhi)(HC)
ICEC India (P) Ltd. v. CIT (2012) 78 DTR 41 / 253 CTR 417 (Delhi)(HC)
DIT v. UOP LLC (2012) 78 DTR 41 / 253 CTR 417 (Delhi)(HC)

S. 9(1)(vi) : Income deemed to accrue or arise in India - Royalty - Business profits -Software royalty - Shrink - Warp application software - Business profits - Permanent establishment - View in favour of assessee should be followed

The assessee sold "shrink-wrap application software" called "Solidworks 2003″ to customers in India and claimed that the same was "business profits" not assessable to tax as it did not have a PE in India. The Assessing Officer held that the income was assessable to tax as "royalty" under section 9(1)(vi) / Article 12(3) though the Tribunal (for an earlier year) reversed it on the ground that the product was a "copyrighted article" and not "copyright". Before the Tribunal, the department claimed that the earlier view should not be followed in view of Samsung Electronics Co. Ltd. v. CIT (2011) 203 Taxman 477 (Karn.) while the assessee relied on DIT v. Ericsson AB (2012) 204 Taxman 192 (Delhi). Held by the Tribunal:

The department's argument that DIT v. Ericsson AB (2012) 204 Taxman 192 (Delhi) was confined to a case where the software was embedded to the equipment is not correct. The Court did hold that consideration paid merely for right to use cannot be held to be royalty and the ratio would also apply when "shrink wrap" software is sold. Where two views are possible, the view in favour of the assessee has to be preferred. This principle is applicable to non-resident assessees as well in view of Article 24(1) of the DTAA (non-discrimination) which provides that nationals of a Contracting State shall not be treated less favorably than the nationals of the other Contracting State.

Dy. DIT v. Solid Works Corporation (2012) 17 ITR 510 / 51 SOT 34 (Mum.)(Trib.)

S. 9(1)(vi) : Income deemed to accrue or arise in India - Royalties and fees for technical services - Non-resident - Production and distribution of films - As the assessee did not have any permanent establishment in India income arising outside Indian Territories could not be brought to tax as business income - DTAA - India-USA [Art. 12]

Assessee was a non-resident company having business in production and distribution of films. It entered into an agreement with an Indian company, WBPIPL whereby the assessee granted exclusive rights of distribution of cinematographic films on payment of royalty. The assessee received certain sum as royalty. WBPIPL deducted the tax at source while remitting the amount. The assessee filed the return and claimed the refund of tax deducted at source. The Assessing Officer held that the royalty received was taxable as per article 12(2) at 15%. The Commissioner (Appeals) held that royalty received was not taxable. The Tribunal held that assessee did not have any permanent establishment in India, income in question arising outside Indian Territories could not be brought to as business income. (A.Y. 2006-07)

ADIT (IT) v. Warner Brother Pictures Inc. (2012) 49 SOT 438 (Mum.)(Trib.)

S. 9(1)(vi) : Income deemed to accrue or arise in India - Royalty - Despite retrospective law By Finance Act 2012, "Royalty" is not taxable as DTAA prevails [S. 40(a)(ia), 195]

The assessee, a Mauritius company, made payment to Panamsat, USA, for hire of a "transponder satellite". The Assessing Officer held that the said hire charges constituted "royalty" and that the assessee ought to have deducted TDS under section 195 and that as it had not done so, the amount was to be disallowed under section 40(a)(ia). Before the Tribunal, the department argued that though as per Asia Satellite Telecommunications Co. Ltd. (2011) 332 ITR 340 (Delhi)(HC), the hire charges were not assessable as "royalty", this verdict was no longer good law in view of the amendment to section 9(1)(vi) by the Finance Act 2012 w.r.e.f. 1.4.1976 to provide that such hire charges shall be assessable as "royalty". Held by the Tribunal:

(i) In Asia Satellite Telecommunications Co. Ltd. v. Dy. CIT (2011) 332 ITR 340 (Delhi)(HC) it was held that in order to constitute "royalty", the payer must have the right to control the equipment. A payment for a standard service would not constitute "royalty" merely because equipment was used to render that service. A similar view was taken in Skycell Communications Ltd. v. Dy. CIT (2001) 251 ITR 53 (Mad.)(HC). In De Beers India Minerals (www.itatonline.org)(Karn.) & Guy Carpenter & Co. Ltd. (www.itatonline.org) (Delhi)(HC) it was held that to "make available" technical knowledge, mere provisions of service was not enough and the payer had to be enabled to perform services himself. The department's argument that the amendments by the Finance Act, 2012 changes the position is not acceptable because there is no change in the DTAA between India and USA and the DTAA prevails where it is favourable to the assessee;

(ii) Even otherwise as the payment is made from one non-resident to another non-resident outside India on the basis of contract executed outside India, section 195 will not apply as held in Vodafone International Holdings B.V. v. UOI (2012) 341 ITR 1 (SC). As section 195 did not apply, no disallowance can be made under section 40(a)(i);

(iii) Further, as prior to the insertion of section 40(a)(ia) in A.Y. 2004-05, payments to a resident did not require TDS, under the non-discrimination clause in the DTAA, the disallowance under section 40(a)(i) in the case of non-residents cannot be made as held in Herbalife International India (P) Ltd. (2006) 101 ITD 450 (Delhi)(Trib.), Central Bank of India & Millennium Infocom Technologies Ltd. v. ACIT (2008) 21 SOT 152 (Delhi)(Trib.) (A.Y. 2002-03)

B4U International Holdings Ltd. v. Dy. CIT (2012) 74 DTR 162 / 18 ITR 62 / 52 SOT 545 / 148 TTJ 237 (Mum.)(Trib.)

S. 9(1)(vi) : Income deemed to accrue or arise in India - Royalty - Deduction at source - DTAA - India-Canada - Rendering of services is not "supply of knowledge or information" to be "royalty" [S. 40 (ia), 195, Art. 12]

The assessee was engaged as a consultant by Essar Oil Ltd to provide consultancy services in connection with sale of its energy business. As the consultancy required high level technical and industry knowledge, the assessee engaged KPMG LLP, USA & KPMG Consulting LP, Canada for rendering professional services and paid Rs. 20 lakhs & Rs. 13 lakhs respectively. The Assessing Officer held that the said fees constituted "royalty" under section 9(1)(vi) & Article 12 and as there was no TDS, the amount was to be disallowed under section 40(a)(i). This was reversed by the CIT(A). On appeal by the department, held dismissing the appeal:

The professional services rendered does not fall in the definition of "royalty" in Article 12 of the DTAA. It was purely a professional service for consultancy which were rendered outside India and not for supply of scientific, technical, industrial or commercial knowledge or information. Thus, there was no liability to deduct TDS and consequently no disallowance under section 40(ia) can be made. (A.Y. 2001-02)

KPMG India P. Ltd. v. Dy. CIT (2012) 17 ITR 569 (Mum.)(Trib.)

S. 9(1)(vi) : Income deemed to accrue or arise in India - Royalty - Deduction at source - Transponder fees is not royalty not liable to deduct tax at source - DTAA - India-Sweden

Payment by ICO to FCO for transponder hire charges is not 'royalty' under provisions of income tax Act. Obligation to withhold tax at source only arises when income is chargeable to tax in India. (A.Y. 2007-08)(ITA No. 5868/M/10, dated 12-1-12)

Times Global Broadcasting Co. Ltd. v. Dy. CIT (2012) BCAJ Pg. 44, Vol. 44-A, Part 1, April, 2012 (Mum.)(Trib.)

S. 9(1)(vi) : Income deemed to accrue or arise in India - Software - Data card - Payment for actual cost for purchases/upgrades made, including data cards, application, support software

and OS/OS upgrades - Matter restored to file of CIT(A) as agreement and other material not on record and nature of software not examined

The assessee is a resident company engaged in the providing employment background screening services to its clients, which consists of checks such as education screening, employment screening, address verification. The assessee entered into an agreement with a US associate as per which the assessee had to pay US company actual cost for various purchases / upgrades made by said company which included data cards, application, support software and OS/OS upgrades. The Assessing Officer opined that the payment made amounted to royalty under section 9(1)(vi). The matter was restored back to file of CIT(A) on the premise that the assessee had reimbursed the expenses, and had not examined the nature of software acquired by the assessee, as the agreement and other material were not on record. (A.Y. 2008-09, 2009-10)

ACIT v. First Advantage (P.) Ltd. (2012) 52 SOT 406 (Mum.)(Trib.)

S. 9(1)(vi) : Income deemed to accrue or arise in India - Royalty - DTAA - India-Singapore - Payment made for taking dredger(equipment) on hire are not in the nature of royalty

The assessee entered into a contract with Singapore Dredger Company (EMPL) and took a dredger on hire and sub-contracted its work of dredging to EMPL. The dredger was made available to assessee to deploy its dredging work at Vishakapatnam. The assessee made payment to EMPL. The Assessing Officer held the hire charges made to EMPL is in the nature of royalty as it was for the use or right to use the dredger. On appeal to Tribunal it was held that the payment cannot be treated as royalty as assessee took the dredger only on hire and did not use the dredger on its own. Neither any right to use was given on and paid hire charges. Further, the said equipment was used by EMPL under supervision, control and employment of crew members for 24 hours. Thus, equipment cannot be construed as place of business of foreign company. (A.Y. 2005-06, 2006-07)

Dy. DIT v. Dharti Dredging & Infrastructure Ltd. (2012) 50 SOT 413 / 72 DTR 209 / 147 TTJ 238 (Hyd.)(Trib.)

S. 9(1)(vi) : Income deemed to accrue or arise in India - Royalties - Fees for technical services - DTAA - India-USA - Amount provided in books but not paid is not taxable [S. 5, 145, Art. 5, 12]

Following the judgment of Tribunal in case of CSC Technology Singapore Pte. Ltd. v. ADIT (2012) 50 SOT 399 / 19 Taxmann.com 123 (Delhi), the Tribunal held that with regard to royalty that initial point of taxation is arising of royalty in India, but it is finally taxed on basis of amount of royalty paid to non-resident. On the facts where amount was provided by licensee in its books of account but not paid to assessee, it is not taxable. (A.Y. 2003-04, 2004-05)

Pizza Hut International LLC v. Dy. DIT (IT) (2012) 54 SOT 425 (Delhi)(Trib.)

S. 9(1)(vi) : Income deemed to accrue or arise in India - DTAA - India-USA - Royalties - Fees for technical services - Tax to be deducted on gross amount by way of royalty and tax deduction at source [S. 10(6A), 198, Art. 12]

Assessee, a tax-resident of USA, earned royalty income from Indian concern under a 'technical license agreement'. It claimed that said royalty was to be taxed at rate of 15 per cent under DTAA. Issue arose as to whether rate of 15 per cent was to be applied on gross royalty or on royalty net of TDS. In view of section 198 which embodies in itself, principle that tax deducted at source is nothing but payment of income utilized for payment of tax on behalf of payee (assessee herein), 'gross amount' would have to be taken as being actual payment by way of royalty plus tax deducted at source and paid to Central Government on behalf of assessee. Appeal of assessee was dismissed. (A.Y. 2003-04, 2004-05)

Pizza Hut International LLC v. Dy. DIT (IT) (2012) 54 SOT 425 (Delhi)(Trib.)

S. 9(1)(vi) : Income deemed to accrue or arise in India - Royalty - Non-resident - DTAA India-Thailand - Service charges received from television channels for providing facility of broadcasting programmes through transponders located in satellites not royalty, hence not taxable in India

The assessee, a resident of Thailand, was the licensee of certain satellites owned by the Government of Thailand. It provided television channels the facility of broadcasting their programmes through transponders located in these satellites. For this facility, the assessee received service charges from the television channels. The Assessing Officer and the Commissioner (Appeals) held that the service charges received by the assessee were taxable in India as royalty within the meaning of section 9(1)(vi) of the Income-tax Act, 1961, as well as within the meaning of the Double Taxation Avoidance Agreement between India and Thailand. On appeals to the Tribunal, it was held allowing the appeals, that the service charges received by the assessee from various television channels on account of providing facility of broadcasting their programmes through the transponders located in the satellites were not liable to be taxed as royalty in India. (A.Y. 1998-1999 to 2004-2005)

Shin Satellite Public Co. Ltd. v. Dy. CIT (IT) (2012) 20 ITR 427 (Delhi)(Trib.)

S. 9(1)(vi) : Income deemed to accrue or arise in India - Royalty - Non-resident - DTAA India-UK - Subscription fee paid under an agreement for use of information collected and compiled in field of oil and gas exploration on website - Technical information made available by non-transferable and non-inclusive license-Payment was in nature of technical consultancy which is covered under definition of royalty [S. 195, Art. 13(3)]

The assessee, engaged in the business of exploration and development of hydrocarbon to augment the oil security of the country, acquired participating interest in oil and gas projects outside India and participated in oil exploration, production and development and the activities of its project. For the purposes of its overseas business, it needed information relating to economic conditions along with other aspects, specially an overview of oil and gas industry in different countries. Accordingly, the assessee subscribed by way of a research agreement to the website of a company, WM, which was a global energy and mining research unit. WM collected and compiled information in the field of oil and gas exploration and products thereof and such information was put on the website. Such information could be obtained on payment of certain fees by entering into an agreement. Under the agreement, the assessee paid subscription fees to WM for obtaining such information. In turn, WM granted non-transferable licence to the assessee for downloading such information from its websites and such downloaded information was to be used only by the assessee for its purposes. The agreement did not grant any right to sub-license, rent, loan, etc. To determine the taxability of the subscription fee paid by the assessee to WM, an application was filed before the Deputy Director of Income-tax (International Taxation). The Assessing Officer was of the view that such payment was in the nature of royalty under section 9(1)(vi) of the Act as well as article 13(3) of the DTAA between India and the United Kingdom and, therefore, the Assessing Officer rejected the claim of the assessee. The Commissioner(Appeals) upheld the Assessing Officer's opinion. On further appeals the Tribunal held that dismissing the appeals, that the information contained in the agreement was not for the public at large, rather such information, knowledge or skill could be used in terms of the agreement only. It was not the case that any person from the public could access this facility without an agreement or without making any payment. The payment was in the nature of technical consultancy. Oil and natural gas and its exploration was a field of specialized technical knowledge and not for the use of public at large. A specific training was required in the field. The information obtained by the assessee was also of technical nature. Therefore, the contention of the assessee that it contained general information was without any justification. What was being accessed by the assessee was a scientific work which had the character of intellectual property compiled on the website for the purposes of persons in the field of oil and gas exploration and production thereof. It was a segmented information and the product was in respect of a particular country or region. The assessee had been

specifically denied the right to sub-licence, rent or loan any product, nor was the assessee authorised to create derivative work based upon any project except as otherwise expressly provided in the agreement. WM had granted a non-transferable and non-inclusive licence to use the confidential name and passwords, if any, subject to the condition that it could enter the restricted portion of the website for the sole purpose of downloading to a permitted computer and reproducing in storage media permitted computer copies. Thus, the information/knowledge available to the assessee was made through a licence. Consequently it was covered under the definition of royalty under the section 9(1)(iv) and (vi) and Article 13(3) of the DTAA between India and the U. K. Appeal of assessee was dismissed. (A.Y. 2007-08 to 2009-10)

ONGC Videsh Ltd. v. ITO (IT) (2012) 20 ITR 767 / (2013) 141 ITD 556/88 DTR 302/155 TTJ 114 (Delhi)(Trib.)

S. 9(1)(vi) : Income deemed to accrue or arise in India - Royalty - DTAA - India-Denmark - Transportation of coal [S. 40(a)(ia), 195, Art. 12]

The assessee company carrying on business of transportation coal by chartering of vessels and availed services of vessels owned by foreign shipping companies and paid hire charges to those foreign comaonies for removing coal from various ports in India, the Tribunal held that the said payment would not amount to royalty and therefore section 195 does not apply hence, cannot be disallowed under section 40(a)(ia). (A.Y. 2007-08)

Sical Logistics Ltd. v. ADIT (2012) 72 DTR 29 / 53 SOT 313 / 147 TTJ 115 (Chennai)(Trib.)

S. 9(1)(vi) : Income deemed to accrue or arise in India - Non-resident - DTAA - India-USA - Royalty - Taxability of royalty under retrospective law & reimbursement of expenses [Art. 3(2)]

The assessee, a USA company, received Rs. 6.41 crores towards reimbursement of international telecom connectivity charges. The assessee claimed that the said amount did not fall within the definition of "royalty" in Article 12 of the India-USA DTAA apart from the fact that as it was a "reimbursement of expenses", it was not income. The department claimed that irrespective of the position under the DTAA, in view of the retrospective insertion of Explanation 5 to section 9(1)(vi) by the FA 2012 w.r.e.f. 1.6.1976, the said amount had to be assessed as "royalty". On appeal by the assessee to the Tribunal Held allowing the appeal:

(i) A retrospective amendment to the Act has no bearing on the DTAA because section 90(2) makes it clear that the provisions of the Act shall apply only to the extent that it is favourable to the assessee. While a retrospective amendment will alter the provisions of the Act, it will not per se have the effect of automatically altering the analogous provision of the Treaty. Further, though the DTAA provides that the laws in force in India shall govern the taxation of income, this is subject to the exception that there is nothing to the contrary in the DTAA. Similarly, under Article 3(2), as the term "royalty" is defined in Article 12, the definition in section 9(1)(vi) will have no application;

(ii) On merits, even if the retrospective amendment applied, the amount would not constitute "royalty" because it was not received "for the use or right to use any industrial, commercial or scientific equipment" owned by the assessee. The equipment was owned by the telecom operators and the amount could be considered as royalty in their hands but not in the hands of an intermediary like the assessee who merely made the payment and got the reimbursement;

(iii) Further, the said amount, being a pure reimbursement of expenses without any mark up cannot be considered as income in the hands of the assessee. However, the onus is on the assessee to show, by leading evidence, that there is no element of profit in such reimbursement and that the contract price has not been bifurcated to show a portion thereof as reimbursement. Mere nomenclature of "reimbursement" is not relevant. On facts, as the assessee established that there was no mark up, the amount was not assessable. (A.Y. 2006-07)

WNS North America Inc. v. ADIT (2013) 141 ITD 117 / 152 TTJ 145/ 25 ITR 582 (Mum.)(Trib.)

S. 9(1)(vi) : Income deemed to accrue or arise in India - Royalty - Agreement for distribution of cinematographic films - No PE in India - Indian company acted independently, hence, amount not taxable

Assessee-company was a tax-resident of USA. It entered into an agreement with an Indian company for distribution of cinematographic films in India. It was held that assessee did not have any PE in India as the Indian Company who obtained rights was acting independently, therefore, amount received by assessee was not taxable in India. (A.Y. 2007-08)

Warner Bros. Distributing Inc. v. ADIT (2012) 139 ITD 580 (Mum.)(Trib.)

S. 9(1)(vi) : Income deemed to accrue or arise in India – Royalty-Hire charges paid to shipping companies- Tax to be deducted.[S. 40(a)(ia), 163, 172, 195]

Assessee-Government undertaking was engaged in transporting coal from one port to another port. For said purpose, assessee was using its own vessels as well as hiring vessels from foreign companies. Payment made by assessee as hire charges was royalty and hence, on facts, provisions of section 9(1)(vi) were attracted. (A.Y. 2002-03 to 2004-05, 2006-07)

Poompuhar Shipping Corpoation Ltd. v. ADIT (IT) (2012) 53 SOT 451/(2013) 155 TTJ 81(UO) (Chennai)(Trib.)

S. 9(1)(vi) : Income deemed to accrue or arise in India - Fees for technical services -Business support services - Business support services is considered as fees for technical services and is taxable in India and liable to deduct tax at source under section 195 - DTAA - India-UK [Art. 13.4]

The applicant has entered into cost contribution agreement with foreign company SIPCL for the provision of business support services, in the form of general finance advice, taxation advice, legal advice on information technology, media advice on information technology, media advice, taxation advice, legal advice, etc. SIPCL is in the business of providing various advices and services to various Shell operating companies. On the facts the applicant will be able to use any know how intellectual property generated from the services independent, of the service provider and hence the services under the agreement are made available to the applicant, hence, payment received by SIPCL is chargeable to tax in India and the applicant is liable to withhold tax under section 195.

Shell India Markets (P) Ltd. (2012) 342 ITR 223 / 67 DTR 1 / 247 CTR 300 / 205 Taxman 288 (AAR)

Editorial:- SLP of assessee is dismissed. (2013) 214 Taxman 22 (Mag.(SC)

S. 9(1)(vi) : Income deemed to accrue or arise in India - Software - Royalty - Payment received from distributors is to be treated as royalty - DTAA - India-Australia [Art. 12.3]

Applicant is a company incorporated in Australia engaged in business of providing software services, it has appointed Indian company as non-exclusive distributor for sale of its software products in India. The applicant submitted that right acquired by purchaser from sale is only to use copyrighted article and not right to use copyright embedded in software and therefore sum received by applicant from distributor from sale of software is nature of revenue and cannot be classified as royalty as defined under section 9(1)(vi) or under Article 12 of Indo-Australian Treaty. The Authority for advance ruling held that whenever a software is assigned or licensed for use, there is involved an assignment of right to use embedded copyright in software or a license to use embedded an assignment of right, the intellectual property right in software, therefore it is not possible to divorce software from intellectual property right of creator of software embedded therein, therefore the payments received by applicant from distributor for sale of software product is in nature of royalty within the meaning of section 9(1)(vi) and consideration paid for right to use a copyright from distributor is to be treated as royalty within the meaning of Article 12.

Citrix Systems Asia Pacific Pty Ltd., In re (2012) 343 ITR 1 / 205 Taxman 320 / 248 CTR 141 / 68 DTR 185 (AAR)

S. 9(1)(vi) : Income deemed to accrue or arise in India - Royalty - Information through internet - DTAA - India-Singapore - Subscription received by Indian subscriber would be royalty [S. 195, Art. 12]

The applicant is a Singaporean company engaged in providing social media monitoring services for a company, brand or product. It is a platform for users to hear and engage with their customers brand ambassadors etc across the internet. The applicant offered services on charging a subscription. The clients who subscribed can log into its website to search on what is being spoken about various brands and so on. The applicant raised the two question before the Authority ;

(a) Whether the amount received by offering subscription bases services is taxable in India?

(b) Whether tax is required to be deducted from such amount by the subscribers who are resident in India?

The Authority for Advance Rulings held that the applicant being engaged in providing social media monitoring service by generating reports with analytics on the basis of the inputs given by the clients which amounts to business of gathering collating and making available or imparting information concerning industrial and commercial knowledge, experience and skill and therefore, the subscription received by it form the Indian subscribers would be royalty in terms of clause (iv) of Explanation 2 to section 9(1)(vi) as well as para. 12 of the India-Singapore DTAA, consequently tax is required to be deducted in terms of section 195 from the payment made to it by the subscribers who are resident in India.

Thoughtbuzz (P) Ltd. (2012) 346 ITR 345 / 250 CTR 1 / 71 DTR 105 (AAR)

S. 9(1)(vi) : Income deemed to accrue or arise in India - Royalty - DTAA - India-Saudi Arabia - Payment for acquiring the capacity - Obtained right to exploit the capacity and not title in capital asset - Taxable as royalty [S. 195, Art. 12, 13]

The applicant, an Indian company, is engaged in the business of providing telecommunication services. Saudi Telecom Limited ("STC"), a company registered in Saudi Arabia indirectly holds 18.5% in the applicant.

STC was part of the consortium which had entered into a Construction and Maintenance Agreement (C&MA) to plan and lay a cable system called Europe India Gateway Submarine Cable ('EIG'). As per the C&MA, STC acquired 7.125 percent stake in EIG for a consideration of USD 50 million. STC transferred the right to use 40 percent of its allocated capacity in the EIG system under an EIG - Capacity Transfer Agreement ("EIG CTA") with the applicant as per the terms of C&MA for a consideration of USD 20 million.

The applicant contented that payments made by it to STC under EIG CTA towards acquisition of EIG capacity would be not be chargeable to tax in India as it was a case of transfer of a capital asset, which is situated outside India. Relying on Article 13 of the India-Saudi Arabia tax treaty, capital gains, if any, shall not be chargeable to tax in India. Also, payment is mere recoupment of part costs initially paid by STC to the consortium for acquiring 40 percent of the originally allocated capacity.

The Authority observed that the applicant had obtained a non transferrable exclusive right to exploit the transferred EIG capacity. Post transfer, STC continued to be liable for any claims arising out of violations by the applicant. Hence, it was a consideration paid for the right to use the system and not transfer of absolute title of the capital asset. It further did not agree with the argument of reimbursement since the primary obligation to pay the consortium was still on STC and the applicant was in no way liable to the consortium.

The Authority accordingly ruled that the consideration paid for right to use a process and/or right to use a commercial or scientific equipment would clearly fall within the definition of royalty as per section 9 of the Act especially in light of the clarificatory amendment by Finance Act, 2012 by way of explanation 5 and 6 to section 9(1)(vi) of the Act with retrospective effect. Article 12 of the India-

Saudi Arabia tax treaty provided for taxation of royalties as per the domestic laws of the payer i.e. India in the case of the applicant.

Dishnet Wireless Ltd. (2012) 210 Taxman 644 / 80 DTR 70 / 254 CTR 468/(2013) 353 ITR 646 (AAR)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services -Deduction at source - DTAA - India-USA - UK-Kingdom of Thailand - Agreement for making interior and exterior changes - No technical services rendered - Not taxable in India [S. 5, 195, 201, Art. 5, 12, 13, 15.7, 14, 22]

The assessee was engaged in the business of running a five star hotel at Hyderabad. It entered into four separate and independent agreements with non-resident consultants for making interior and exterior changes and made payments in respect to certain services rendered. There was no permanent establishments for non-resident. It was held that the services rendered did not involve any technical expertise nor did it make available any technical know-how plan, design, etc. The services rendered by the non-resident company was inspection of the hotel, reviewing the facilities, comparing them with the standards and suggesting improvements or changes wherever required. Amount paid to non-resident is not assessable in India. (A.Y. 2003-04 to 2005-06)

ACIT v. Viceroy Hotels Ltd. (2012) 18 ITR 282 / 143 TTJ 627 / (2011) 60 DTR 1 (Hyd.)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services - Reimbursement - Permanent establishment - DTAA - India-Netherland - Fact that third party invoices are paid does not necessarily show "reimbursement". As the subsidiary had no technical expertise, the inevitable conclusion is that the assessee rendered technical services to its subsidiary and the payments are in the nature of fees for technical services. The subsidiary constituted a dependent agent PE (DAPE) of the assessee [S. 90, Art. 5, 12]

The assessee, a Netherlands company, was awarded a dredging contract to be carried out at Port Mundra. It assigned the contract to its fully owned Indian subsidiary. It also entered into a "cost allocation agreement" under which it agreed to provide to the subsidiary all services necessary to execute the dredging contract in return for a reimbursement of the costs. It received Rs. 11.53 crores from the subsidiary towards invoices raised by third parties and claimed that as it was a "reimbursement of expenditure" incurred by the assessee it was not chargeable to tax. The Assessing Officer & DRP assessed the receipts as "fees for technical services". It was also held that the subsidiary was a "Dependent Agent Permanent Establishment". On appeal by the assessee, held dismissing the appeal:

(i) While it is true that reimbursement of expenditure is not income, the payment made by the subsidiary to the assessee cannot be regarded as a "reimbursement" because (a) the subsidiary had no technical expertise to carry out the contract & the assessee had rendered technical services to it such as arranging the dredgers from abroad & choosing appropriate parties to execute the work. The facilities arranged by the assessee to support the operations of the subsidiary are not layman's activities and require technical know-how. The argument that the dredgers were simply brought from outside India and taken back is over-simplified, (b) though it is claimed that the expenses were reimbursed at par with the invoices issued by third parties, there is nothing on record to show that the price negotiated between the assessee and the third parties are prices comparable to similar services provided by international parties. It is not established that the assessee offered services to the subsidiary on cost to cost basis at best reasonable and competent prices available at that point of time. Therefore, an element of profit in the invoices raised by third parties cannot be ruled out even though what was paid by the subsidiary to the assessee is the amount reflected in the invoice. Therefore, the fact that what has was paid by the subsidiary to the assessee was only the amount reflected in the invoices issued by the third parties, does not go to support the argument that the payments were only reimbursement of expenditure and there was no element of profit in those amounts. As the subsidiary

had no technical expertise, the inevitable conclusion is that the assessee rendered technical services to its subsidiary and the payments are in the nature of fees for technical services;
(ii) The subsidiary constituted a dependent agent PE (DAPE) of the assessee because de facto the assessee was carrying on the contract work on behalf of the subsidiary and if we pierce the veil of the assignment contract and go to the root, there is interlacing of activities and interlocking of funds between the assessee and the subsidiary in executing the dredging contract. There is a relationship of agency and a PE is created. (A.Y. 2003-04)
Van Oord ACZ Marine Contractors BV v. ADIT (2012) 52 SOT 423 / 75 DTR 72 / 149 TTJ 124 / 17 ITR 103 / 75 DTR 72 (Chennai)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services -Deduction of expenses - Even if not assessable as "fees for technical services" under DTAA, bar in section 44D against deduction of expenses will apply
The assessee, an Australian company, set up a permanent establishment (PE) in India to render technical services for evaluation of coal deposits and conducting feasibility studies for transportation of iron ore. The Assessing Officer & CIT(A) held that the payments received by the assessee were taxable as "fee for technical services" under section 9(1)(vii) read with section 115A on a gross basis without any deduction in view of section 44D at the rate of 20%. On appeal, the Tribunal [Rio Tinto Technical Services v. Dy. CIT (2010) 39 DTR 327 (Delhi)] held that as the assessee had a PE in India, the receipts were chargeable to tax as "business profits" after deduction of expenses under Article 7 of the DTAA and section 44D & 115A did not apply. On appeal by the department, the High Court held partly reversing the view of the Tribunal:
(i) As the assessee had a PE in India from which the income arose, the income was chargeable to tax as "business profits" under Article 7 of the DTAA and not as "fees for technical services" under Article 12;
(ii) Article 7(3) permits a deduction of expenditure "in accordance with and subject to limitations of the law" relating to tax in India including executive and general administrative expenses so incurred regardless whether they have incurred in India or elsewhere. The words "in accordance with and subject to limitation of the law relating to tax" applies not only to the "executive and general administrative expenses" but to all expenditure;
(iii) The income received by the assessee, though not assessable as "fees for technical services" under the DTAA, is "fees for technical services" under Explanation 2 to section 9(1)(vii) because it is for providing technical information and does not arise from a "project". Consequently, section 44D, which provides that no deduction shall be admissible while computing income of the nature of "fees for technical services" shall apply.
DIT v. Rio Tinto Technical Services (2012) 340 ITR 507 / 66 DTR 401 / 206 Taxman 439 / 251CTR 366 (Delhi)(HC)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Non-resident - Insurance business - Fees for technical services - Make available - DTAA - India-UK - To "make available" technical knowledge, mere provision of service is not enough; the payer must be enabled to perform the service himself [S. 90, Art. 13(4)(c)]
The assessee, a UK based reinsurance broker, received commission from several Indian insurance companies for arranging reinsurance contracts. The Assessing Officer & CIT(A) held that the commission was assessable to tax in India as "fees for technical services" under section 9(1)(vii) & Article 13(4)(c) of the DTAA. However, the Tribunal (included in file), relying extensively on Raymond vs. Dy. CIT (2003) 86 ITD 791 (Mum.) & other judgements, held that "In order to fit the terminology "make available" in Article 13(4)(c), mere provision of technical services is not enough but the technical knowledge must remain with the payer, and he must be equipped to independently perform the technical function himself without the help of the service provider". It was held that, as

the nature of services rendered by the assessee was not "technical or consultancy services which made available technical knowledge" etc. to the payer, the commission was not assessable to tax. On appeal by the department, the Tribunal held dismissing the appeal:
The Tribunal conclusions are based on an assessment of the factual matrix. As there is no perversity in the findings, it does not give rise to a substantial question of law. (A.Y. 2006-07)
DIT v. Guy Carpenter & Co. Ltd. (2012) 346 ITR 504 / 72 DTR 105 / 254 CTR 243 (Delhi)(HC)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services or interest - Upfront appraisal fees - DTAA - India-UK [S. 2(28A), 90, Art. 7, 12, 13]
Fee was charged by the assessee irrespective of whether or not the loan transactions were entered into between the assessee and the applicants. Fee was charged prior to and entirely independent of the loan transaction that was subsequently entered into parties had agreed that the assessee would be entitled to the said fee irrespective of whether the loan transaction was entered into or not. Interest was separately charged by the assessee in respect of the moneys lent pursuant to the agreements that were entered into ,nor can the fee be said to be in respect of credit facilities granted but not utilized for the said fees preceded the credit facility and had nothing to do with it. Upfront appraisal fee, therefore, does not fall within the ambit of Art. 12(5) of the DTAA, further, by no stretch of imagination can it be said that the assessee imparted to the applicants or the borrowers, any technical services, much less technical services of the nature referred to in Art. 13(4)(c) of the DTAA, said Upfront appraisal fee was business income and as the assessee did not have a PE in India, the same could not be charged to tax in India under Art. 7 of the DTAA. (A.Y. 1998-99)
DIT (IT) v. Commonwealth Development (2012) 76 DTR 233 / 253 CTR 208 / 210 Taxman 310 (Bom.)(HC)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services -DTAA - India-Japan - Composite agreement for technical work through technical personnel is chargeable to tax in India [S. 90, Art. 3,10,12]
Technical work was carried out by Toyo and Toyo and was not merely provided technicians to carry out the work. Fees were, therefore, paid not merely for deputing technical experts, but for the technical services rendered by Toyo. That the services were rendered through technical experts engaged by Toyo does not detract from the fact that Toyo rendered the technical services. Technical services obviously had to be rendered, inter alia, through technical experts. Toyo rendered a package of facilities required for repairing the assessee's machinery. Repairs had to be undertaken with the involvement of technicians. Composite agreements providing for the carrying out of technical works through the technical personnel of the contracting party fall within the ambit of the term "technical personnel of the contracting party fall within the ambit of the term "technical services". A view to the contrary would render the working of the DTAA difficult. What is said in relation to section 9(1)(vii) would apply equally to Art. 12(4). Assuming that it applies to contracts such as these, the definition insofar as it includes the provision of services of technical or other personnel is merely clarificatory. (A.Y. 1981-82 & 82-83)
Zuari Agro Chemicals Ltd. vs. CIT (2012) 78 DTR 297 / 211 Taxman 171 / 253 CTR 529 (Bom.)(HC)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services - DTAA - India-Singapore - Services rendered for development of Balance Score Card, business management tool - Held to be Fees for Technical Services
The assessee is a foreign company located in Singapore providing services to various clients all over the world for development of Balance Score Card (BSC) project. The Assessing Officer held that the receipts to be divided into two parts : charging one as royalty for sale of software and other as professional fees from rendering the said services. On appeal before Tribunal it was held that the

software used by assessee cannot be considered independent, but part of services rendered by assessee to client. It was held that the fees for designing of BSC was Fees for Technical services as per provisions of Article 12 of India-Singapore DTAA as the assessee made available the knowledge for using BSC for their business purposes for meeting their long term targets and benefit ran into future. (A.Y. 2007-08)

Organisation Development Pte. Ltd. v. Dy. DIT (IT) (2012) 50 SOT 421 / 17 ITR 341 (Chennai)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services - Income from marketing services and 'Frequent Flier Program' and 'Starwood Preferred Guest' services outside India, held not fees for technical services

The assessee is a company engaged in the business of providing hotel related services to various hotels across the world. Following the view laid in the decision of Sheraton International Inc. v. Dy. DIT (2006) 207 ITD 120 (Delhi) and Dy. DIT v. Sheraton International Inc.(2009) 313 ITR 267 (Delhi), the Tribunal held income received from providing marketing services and 'Frequent Flier Program' and 'Starwood Preferred Guest' services outside India cannot be taxed as Fees for Technical Services. (A.Y. 2005-06, 2006-07)

Dy. DIT (IT) v. Sheraton International Inc. (2012) 135 ITD 373 / 72 DTR 351 / 17 ITR 457 / 150 TTJ 523 (Delhi)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Royalties - Fees for technical services - Reimbursement of expenses - No obligation to deduct at source - DTAA - India-UK [Art. 13]

The assessee is a manufacturer of auto mobile products in India. LDV is a resident of UK and is also in the business of manufacturing of automobiles in UK. The assessee and LDV had proposals for joint venture in the area of auto mobile manufacture. LDV wanted to do market research to find out the potential market for different vehicles and consumer preferences. LDV carried out market research and raised invoice on assessee. Assessee remitted certain amount to LDV without deducting tax at source. Lower authorities held that the payment was not confined to only market research but to provide technical assistance in improving quality of their minibus and to move towards fully engineered minibus and therefore, amount in question was part of fees for rendering technical services by LDV liable to deduct tax at source. The Tribunal held that since LDV merely conducted market research on acceptability of possible market for its product in India, and no technical service was being made available to assessee, payment in question was reimbursement of expenses and was not in nature of fees for technical services as contended by revenue, hence, there is no obligation to deduct tax at source. (A.Y. 1998-99)

Mahindra & Mahindra Ltd. v. ADIT (2012) 134 ITD 312 / 145 TTJ 400 / 69 DTR 105 (Mum.)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services - Repair of technical documents - Consideration received for supplying the repair technical documents are also in the nature of 'fee for technical services' and liable to be taxed

Assessee a public sector undertaking, engaged in ship building, ship repairs etc entered in to an agreement with a Russian Company for transfer of repair technical documentation and for supplying technical documents on detailed project report for augmentation of infrastructural facilities of Hindustan Shipyard Ltd. In the return of income the assessee claimed the exemption in respect of amount received on the ground that technical documents fell in category of goods and since, these goods were supplied outside India, there was no tax liability. Assessing Officer treated entire amount received by assessee as 'fees for technical services' under section 9(1)(vii) hence, taxable. The Tribunal held that the assignment undertaken by assessee involved study of existing infrastructural facilities available with Hindustan Shipyard Ltd. and making of appropriate suggestion for

augmentation and improvement of infrastructural facilities in order to enable Hindustan Shipyard Ltd. to undertake repair of a specific type of submarines. The Tribunal held that only because the detailed reports were received in bound volumes, it cannot be said that it is not 'fees for technical services'. Accordingly the Tribunal held that the Assessing Officer was justified in assessing the income as 'fees for technical services'. Assessee's appeal was dismissed. (A.Y. 2006-07, 2007-08)

Hindustan Shipyard Ltd. v. ITO (2012) 49 SOT 685 (Visakha.)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Supply chain management -Services outside India - Fees for technical services - International services were rendered outside India Provisions of section 9(1)(i), cannot be applicable

The assessee is a foreign company incorporated under the laws of Hong Kong is engaged in the business of provisions of supply chain management, including the provisions of freight and forwarding and logistic services. It entered into a 'Regional Transportation Services Agreement' with an Indian Company for providing freight and logistics services to each other. The Assessing Officer held that the transportation fees received by assessee from Indian Company is taxable as 'fees for technical services' under section 9(1)(vii), as it was for services in the nature of 'managerial, technical or consultancy services'. The view of Assessing Officer was confirmed by the Commissioner(Appeals). On appeal, the Tribunal held that the role of assessee in entire transaction was to perform only destination services outside India by unloading and loading of consignment hence, cannot be said to be managerial services. It has not rendered any consultancy services hence, it cannot fall within the ambit of section 9(1)(vii). On the facts the assessee has rendered 'International services' outside India the provisions of section 9(1)(i) cannot be applied hence cannot be taxed in India. (A.Y. 2006-07)

UPS SCS (Asia) Ltd. v. ADIT (2012) 50 SOT 268 (Mum.)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services - Reimbursement of Salary to US company, held not fees for technical services as no technical know how made available, hence, no liability to deduct tax deducted at source

The assessee company had made payment abroad to a US based company under the head "remittance of manpower cost" claiming that the payment were reimbursement of salaries to persons deputed by US company. The Assessing Officer held such a payment to be Fees for Technical Services under Section 9(1)(vii) of the Act and thus, fastened with the consequences under Section 40(a)(i). On appeal to Tribunal it was observed that the agreement between the assessee and US company clearly shows that no technical know-how was made available to the assessee and since expatriates were employees of US company which deducted tax at source, assessee had no liability to deduct tax at source. Therefore, as assessee made a bona-fide belief that no part of payment made to US company had any element of income in it, the assessee was not in default. (A.Y. 2002-03 to 2006-07)

ACIT v. CMS (India) Operations & Maintenance Co. P. Ltd. (2012) 135 ITD 386 / 148 TTJ 253 / 74 DTR 45 (Chennai)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Consultancy fees - Fees for technical services - Deduction at source - DTAA - India-Singapore - Consultancy fees, if not taxable as "fees for technical services", is not taxable as "other income", not liable to deduct tax at source [S. 40(a)(ia), 195, Art. 7, 12, 14, 22, 23]

The assessee paid consultancy fees to a Singapore company on which tax was not deducted at source. The Assessing Officer held that the said consultancy fees were assessable as "fees for technical services" under section 9(1)(vii) and that the failure to deduct TDS meant that the amount had to be disallowed under section 40(a)(ia). This was reversed by the CIT(A). On appeal by the department to the Tribunal, Held dismissing the appeal:

(i) While the consultancy fees may constitute "fees for technical services" under section 9(1)(vii), it does not fall within the ambit of that term in the India-Singapore DTAA because it does not "make available any technical knowledge, experience, skill, know-how or processes, which enables the person acquiring the services to apply the technology contained therein". The services were simply consultancy services which did not involve any transfer of technology and so were not assessable as "fees for technical services" (DIT v. Guy Carpenter & Co. Ltd. (2012) 207 Taxman 121 (Delhi)(HC) & De Beers CIT v. India Minerals Pvt. Ltd. (2012) 72 DTR 82 (Karn.)(HC) followed);

(ii) The department's argument that if the sum is not assessable as "fees for technical services", it is assessable as "other income". Article 23 of the DTAA is not acceptable because that Article applies only to "items of income which are not expressly mentioned in the foregoing Articles of this Agreement". Article 23 does not apply to items of income which can be classified under Articles 6.22 whether or not taxable under these articles. Therefore, income from consultancy services, which cannot be taxed under articles 7, 12 or 14 because the conditions laid down therein are not satisfied, cannot be taxed under article 23 either. (A.Y. 2008-09)

Dy. CIT v. Andaman Sea Food Pvt. Ltd. (2012) 74 DTR 353 / 148 TTJ 382 / 52 SOT 562 / 18 ITR 509 (Kol.)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Income earned in respect of Project Management Contract - Nature of service being mixture of managing, technical and consultancy services, assessee squarely fell within purview of 'fees for technical services' - Income liable to be computed only under section 44D [S. 44D]

The assessee is an engineering company incorporated in and tax resident of Japan. It was engaged in executing certain Project Management Contracts (PMC) with Indian Companies. In respect of the said revenue assessee followed taxation on net basis. The actual execution of the contract was carried out in India by local contractors who were appointed by Indian entities. It was also apparent that assessee's services were in nature of managing or supervising, construction, erection of units and not directly entering into this activity. Thus, it was held that the nature of assessee's activity was a mixture of managing, technical and consultancy services and therefore, amount received by assessee squarely fell within purview of 'fees for technical services' as Explanation 2 to section 9(1)(vii) and thus, income liable to be computed only under section 44D. (A.Y. 1999-2000)

Dy. DIT (IT) v. Toyo Engineering Corpn. (2012) 136 ITD 268 / 78 DTR 292 / 150 TTJ 43 (Mum.)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Commission - Deduction of tax at source - DTAA - India-UK - Non technical services provided by commission agent is not taxable in India as no PE of the non-resident and no managerial or technical services rendered hence not liable to deduct tax at source [S. 40(a)(i), 195, Art. 7]

The assessee is a firm engaged in the business of manufacturing and exporting of hand embroidery and handicraft items. The assessee used commission agent to procure export orders. It was held that the income earned was not taxable in India i.e. it did not accrue or arise in India as it was acting merely as a commission agent and did not provide any managerial / technical services. The agreement was merely of providing non-technical services. As also that there was no PE of the said non-resident in India there was no need to deduct tax at source. (A.Y. 2007-08)

Armayesh Global v. ACIT (2012) 51 SOT 564 (Mum.)(Trib.)

Editorial:- Referred to: Circular No. 23 dated 23/7/1969, (C&P Vol. 10 P. No. 142-5 Circular No. 786 dated 7/2/2000 (2000) 241 ITR 132 (St.) and Circular No. 7 dated 22/10/2009

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services - Technical repairs - Deduction at source - Fees for "routine technical repairs" not assessable as "fees for technical services", consequently no tax was required to be deducted [S. 195]

The assessee paid sums to foreign parties for repairing and refurbishment of equipment. The Assessing Officer held that the payments constituted "*fees for technical services*" under section 9(1)(vii) and that the assessee ought to have deducted TDS under section 195 r.w.s. 201 though the assessee argued that as there was *no intellectual aspect* involved in the repairs and refurbishment activity, it was no assessable as "*fees for technical services*". The CIT(A) allowed the claim. On appeal by the department to the Tribunal, Held dismissing the appeal:
The activities carried out by the foreign parties involved assembly, disassembly, inspection, reporting and evaluation. These are routine maintenance repairs and do not involve services of technical nature so as to be assessable as "fees for technical services" under section 9(1)(vii). Routine repairs do not constitute 'FTS' as they are merely repair works and not technical services. Technical repairs are different from 'technical services'. The assessee was not required to deduct tax at source under section 195 (Lufthansa Cargo India Pvt. Ltd. v. Dy. CIT (2005) 274 ITR (AT) 20 (Delhi)(Trib.) followed; Mannesmann Demag Lauchhammer v. CIT (1988) 26 ITD 198 (Hyd.)(Trib.) distinguished) (A.Y. 2001-02 to 2006-07)
ADIT v. BHEL-GE-Gas Turbine Servicing (2012) 77 DTR 29 / 53 SOT 460 / (2013) 151 TTJ 126 (Hyd.)(Trib.)
BHEL-GE-Gas Turbine Servicing v. ADIT (2012) 77 DTR 29 / 53 SOT 460 / (2013) 151 TTJ 126 (Hyd.)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services -Necessary that some sort of 'managerial' 'technical' or 'consultancy' services should have been rendered in consideration
It was held that to constitute "fees for technical services", it is necessary that some sort of 'managerial' 'technical' or 'consultancy' services should have been rendered in consideration. In the instant case, services rendered under a buying service agency agreement are routine services offering procurement assistance. They consist of negotiating between the Principal and manufacturers for purchase of merchandise. Hence, consideration received was classified as "commission" and not for "fees for technical services" Appeal of the assessee was allowed. (A.Y. 2007-08)
Adidas Sourcing Ltd. v. ADI (2012) 80 DTR 396 / 150 TTJ 801 / (2013) 21 ITR 697 (Delhi)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services - Consultancy charges
Where consultancy charges were paid by the Indian Company to non-resident consultants rendering services on Indian Company's offshore projects, source rule exclusion carved out under section 9(1)(vii)(b) is applicable even though the payments are made from India. (A.Y. 2008-09)(ITA No. 349/Mds./2012, Dt.25-06-2012)
Ajappa Integrated Project. v. ACIT (2012) BCAJ Pg. 38, Vol. 44-A Part 5, August, 2012 (Chennai)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for Technical Services - No FTS as services rendered did not involve any technical, managerial or consultancy services
The assessee was engaged in the business of manufacturing and export of garments. It made remittances to a non-resident company SEL, without deduction of tax at source. It was held that the payment in the issue did not fall within the ambit of Fees for technical services under section 9(1)(vii) as the services were availed to ensure that imports were received in India import were received in India on time and in correct quantity. It was clear from the records that SEL nowhere was involved in identification of exporter or selecting material and negotiating price and thus, no consultancy services were involved. Role of SEL did not involve much technical knowledge. Further, there was no

managerial services involved as SEL was acting on behalf of assessee as its agent and there no independent application of thought process in any activity. (A.Y. 2007-08)
Jeans Knit (P.) Ltd. v. Dy. CIT (2012) 53 SOT 76 (Bang.)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for included services - DTAA - India-USA Telecom engineering services - As contract for providing technical experts and making available expertise, hence, held as fees for included services [S. 90, Art. 12(4b)]
The assessee was a US company specialized in providing highly qualified technocrats and technology relating to telecom sector and higher solutions in telecom engineering services. The assessee entered into an agreement with an Indian company for providing qualified technocrats for its project in India. It was held that as it was clear from various clauses of agreement that it was a contract for providing technical experts and making available expertise of assessee in this field, hence, the service rendered by the assessee clearly fell within purview of clause 4(b) of Art 12 of Indo-US DTAA, and thus amount received in respect of said services was taxable in India as fees for included services. (A.Y. 2003-04)
Avion Systems Inc. v. Dy. DIT (2012) 138 ITD 57/ 150 TTJ 687 / 78 DTR 330 (Mum.)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services -DTAA - India-UK - Receipts from marketing contribution and value added service (VAS) was taxed as fess for technical services [S. 115A]
Receipts from marketing contribution and value added service (VAS) is to be treated as fees for technical services (FTS) as per section 9(1)(vii) and article 12 of Indo-UK tax treaty. It was held that receipt is to be taxed at rate of 10 per cent under section 115A(1) instead of 15 per cent on gross basis. (A.Y. 2008-09)
De Beers UK Ltd. v. Dy. DIT (IT) (2012) 53 SOT 319 (Mum.)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India - DTAA - India-USA - Payment for supplying personnel - Not Fees for technical services [Art. 12]
Assessee, a non-resident company, entered into a base agreement with IBM-USA. As per the said agreement, IBM-India (a subsidiary of IBM-USA) made a deal with assessee through ISPL-India, for procuring software personnel in USA for projects of IBM in USA. In terms of agreement, orders were issued by IBM to ISPL who in turn passed that to assessee. Assessee's case was that its activity was purely recruiting and supplying of skilled personnel to IBM-India through ISPL and these technical personnel were neither employee nor were they working under supervision of assessee and thus, payment received by assessee was for personnel supplied to IBM for its projects outside India and it had no relationship or nexus with work or services or software developed by said personnel for the IBM's client. Hence, it was held that the amount received by assessee, a non-resident company, for supplying software personnel to an Indian company to carry out its projects outside India, was not taxable as fee for technical services either under Act or under article 12 of Indo-US DTAA. (A.Y. 2005-06)
Apollo Consulting Services Corporation Ltd. v. Dy. CIT (2012) 54 SOT 82 (Mum.)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India - DTAA - Indo-UK - Fees for technical services - Market development fee - Fee paid to UK based company not taxable in India as fee for technical services either under section 9(1)(vii)
Assessee-company was engaged in the manufacture and export of cotton yarn fabrics and garments. It was noticed that assessee paid market development fee to a UK company. It was noted from records that non-resident company was rendering services to assessee in course of their business and, therefore, such payment clearly went out of ambit of section 9(1)(vii) through exclusion specified in clause (b) there under. Moreover, even if one considered it as technical services, nothing was made

available to assessee in nature of any technical knowledge, experience, skill, know-how or processes and, thus, payment in question could not be considered as fee for technical services in terms of DTAA between India and UK. Hence, it was held that amount paid by assessee to non-resident company was not taxable in India and, therefore, impugned revisional order passed by Commissioner was not sustainable. (A.Y. 2006-07)

Gama Industries Coimbatore Ltd. v. CIT (2012) 54 SOT 104 (Chennai)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fess for technical services - DTAA - India-USA - Payment made to US based mobile services company for purchase of software - Payment amounts to royalty

Where assessee, providing mobile services, made payment to a US based company for purchase of software, said payment would amount to royalty taxable under section 9(1)(vii). (A.Y. 2009-10)

Onmobile Global Ltd. v. ITO (IT) (2012) 54 SOT 124 (Bang.)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services - DTAA - Indo-US - Instructions sent by entity abroad which gave a technical expertise to assessee - Instructions could be used even after expiry of contract thereby giving it an enduring benefit in its business, it would fall within meaning of 'fees for included services' [Art. 12.4]

Under three separate service agreements, namely, marketing service, offshore development facilitation service and overseas services, assessee's US subsidiary helped assessee in e-publishing business. US Subsidiary collected the manuscript from US customers, prepared soft copy and retrieved same in India and passed on technical instructions of customers. Assessee would typeset same accordingly and sent back to US-US subsidiary would take print and deliver same to US customers. It was held that with regard to Marketing Agreement and Overseas Services Agreement, no technical service whatsoever was involved since no technical knowledge or skill or experience was made when these services were rendered by US Subsidiary abroad. It was further held that in case of 'Offshore Development (Facilitation) Agreement', as assessee had to use instructions sent by US Subsidiary along with files for carrying out digitalization services and such instructions were in nature of technical knowledge which imbibed in assessee any technical expertise, which in turn could help it in its e-publication business and, thus, assessee received, an enduring benefit then of course, such services would come within the purview of clause (b) of Article 12.4 of Indo-US DTAA and, only in such cases, section 195 would apply. (AY 2007-08)

ACIT v. TexTech International (P.) Ltd. (2012) 139 ITD 382 (Chennai)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services -Payment towards voice charges - Services neither managerial, technical or consultancy nature - Hence, no fees for technical services. [S. 40(a)(ia), 195]

Where assessee engaged in business of IT enabled services, made payments to Novatel, a U.S. company, towards voice charges, income of Novatel was in form of service charges payment and Novatel had not rendered services of managerial, technical or consultancy nature hence, the assessee had no obligation to deduct tax at source from payment made, to Novatel, therefore, disallowance cannot be made. (A.Y. 2008-09)

Clearwater Technology Services P. Ltd. v. ITO (2012) 139 ITD 479 (Bang.)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services - Reimbursement of expenses - DTAA - India-UK [S. 40(a)(ia), 195, Art. 13]

Abbey UK entered into an outsourcing agreement with an Indian company. As per the agreement services provided by Abbey UK were outsourced to Indian Company. To facilitate outsourcing agreement, a secondment agreement was entered into by Abbey UK with assessee which was its Indian group company. Under said agreement trained staff of Abbey UK was seconded to assessee. Under terms of secondment agreement, Abbey UK remained as employer of secondees - Abbey UK

bore all expenses in relation to secondees and assessee reimbursed all such expenses to Abbey UK. Assessing Officer disallowed deduction of said expenditure by invoking section 40(a)(i) on ground that assessee was liable to deduct tax at source under section 195 on such payment, as said payment was made for receiving 'managerial service' from secondees, which constituted 'fees for technical services' under section 9(1)(vii). The Tribunal held that since payment made by assessee to Abbey UK was pure reimbursement of expenses without any profit element, it could not be regarded as income chargeable to tax in hands of Abbey UK. Further since agreement was for secondment of employees only, it could not tantamount to rendering of technical services and, therefore, reimbursement made could not be categorised as fees for technical services. (A.Y. 2005-06 & 2006-07)

Abbey Business Services (India) (P.) Ltd. v. Dy. CIT (2012) 53 SOT 401 (Bang.)(Trib.)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services - Managerial services - DTAA - India-France - Article 7 &13 - Payment made for advisory services is fees for technical services hence tax there on is not to exceed 10 percent of the gross amount of fees and tax deduction at source under section 195(1) has to be on that basis [S. 90, 195]

The applicant and its parent company in France, are both in the business of manufacturing electrical components. Under the service agreement, Mersen has undertaken to provide the applicant with services in the nature of assistance, professional and administrative consultation and training. The issue raised for consideration was whether the payment by the applicant is towards fees for technical services as per art 13(4) of the India-French DTAA read with the protocol to the said DTAA. If yes what is the rate of tax to be deducted under section 195(1). The Authority for Advance ruling held that advisory services rendered by a French company to the applicant an Indian company, under service agreement in the field of management, international relationship, finance financial control and accounting, taxation and law insurance ,purchase and sales environment and safety and human resources issues are in the nature of managerial as well as consultancy services which are made available to the applicant and therefore ,payment made by the applicant to the French company towards such advisory services is fees for technical services in terms of Art. 13 of India-France DTAA read with Protocol thereto. The Authority also held that in terms of para. 2 of Art. 13, tax thereon is not to exceed 10% of the gross amount of fees and consequently TDS under section 195(1) has to be on that basis.

Mersen India (P) Ltd. (2012) 70 DTR 121 / 249 CTR 345 / 208 Taxman 486 / 353 ITR 628 (AAR)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services - Make available - Fees received for IVTC services are chargeable to tax as fees for technical services under section 9(1)(vii). [S. 90, 139, 195]

The applicants are engaged in the business of inspection, verification, testing and certification (IVTC) services. The applicants approached the Authority for Advance Rulings on the question whether they are liable to be taxed on these transactions in India as "fees for technical services" or "royalty" in the absence of PE in India, whether there was obligations on the Indian customer to with hold the tax under section 195, whether the applicants have an obligation to file a return of income. The Authority for Advance Rulings held that payments received or receivable by the applicants in connection with IVTC services rendered to Indian customers are chargeable to tax as fees for technical services under section 9(1)(vii) but not under the provisions of the article on "Royalties and fees for technical services" under respective DTAAs or when the said article is read with the most favoured nation clause; Since technical services do not "make available" technical knowledge, experience, skill knowledge or process while preparing reports. Since, the applicants do not have a tax presence in

India, Indian customers are not required to with hold taxes under section 195, however the applicants are bound to file returns in India under section 139.
XYZ (2012) 348 ITR 31 / 249CTR 241 / 206 Taxman 494 / 69 DTR 155 (AAR)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Royalties - Fees for technical services - DTAA - India-USA - Receipts as per the contract for overhauling services would be taxable as fees for technical services [S. 90, 195, Art. 12]
The applicant is a Company located in San Diego and incorporated under the America. It has a branch office in Singapore. The applicant is a manufacture of industrial gas turbines. In addition to supply and installation, the applicant has entered in to a contract with ONGC for carrying out trouble shooting repair and maintenance of the turbines. It had also entered into another contract for repair and over haul services of turbines. The applicant approached the authority for a ruling on the question whether the amount received by it for fulfilling its obligations under the contract for overhauling and repair is chargeable to tax in India. The authority held that part of the amount received by the applicant a US company, for overhauling the gas turbines supplied and installed by it at the ONGC's facility in Mumbai which is attributable to the services rendered in modifications and replacement of parts and make available intellectual property rights in engineering, designs, data and specifications to ONGC in terms of the contract is taxable as included services in India under Article 12 of the DTAA, and on that part of the apportioned payment, tax has to be with held under section 195.
Solar Turbines International Company (2012) 250 CTR 337 / 72 DTR 145 / 209 Taxman 21 / (2013) 353 ITR 656 (AAR)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services - DTAA - India-US
Income from inspection, verification, testing and certification services (IVTC) provided by FCO in India qualifies as Fees for technical services (FTS) under I.T. Act. IVTC does not qualify as FTS under treaties containing a 'make available' clause, as services cannot be independently applied by service recipient. Under treaties having a most favoured nation (MFN) clause, benefit of a restricted meaning of FTS in terms of make available clause is available. Income from IVTC qualifies as 'other income' under treaties not having specific FTS article. (AAR Nos. 886 to 911, 913 to 924, 927, 929 and 930 of 10), Dated 19-3-12)
XYX(2012) BCAJ Pg. 36, Vol. 44-A, Part 3, June, 2012 (AAR)

S**. 9(1)(vii) : Income deemed to accrue or arise in India - Royalty - DTAA - India-Germany - Consideration for use of process or formula developed by research member would be assessable as royalty [Art. 12.3]**
The applicant is a German company engaged in the business of executing contracts for assembly and supervision of paint shop, including supply of materials and supervision of installation for various automobile companies. A group of companies are its affiliates. The group companies has formulated a research and development policy. As per the policy all Research and development activities for A group is co-ordinate through applicant. Entire cost is to be shared by the parties to the agreement based on key allocation. The participants are allowed a royalty-fee unlimited access to the research results including any intellectual Property Rights generated from the research and development. Though all are joint owners of the Intellectual Rights, the rights are registered in the name of the applicant. The applicant approached the Authority for a ruling whether the payments made to the applicant by "A" India, in terms of the Cost allocation Agreement can be treated as income in the hands of the applicant and whether it is not merely reimbursement of the expenses incurred for the Research and Development. The Authority held that in terms of agreement it appears that it is only an agreement to share product of research and development allegedly without payment of royalty, but paying a consideration for use described as contribution costs of research incurred by researching

party. This payment occurs only on use of product of research and not otherwise. Thus on facts, payment made by any party to the applicant can only be understood as a consideration for use of process or formula developed by researching member and thus, would satisfy definition of royalty under Explanation 2 to section 9(1)(vii), therefore, payment received by applicant from "A" India under agreement would be royalty in terms of article 12.3 and section 9(1)(vii). The question is answered in favour of revenue.

'A' Systems, In re (2012) 345 ITR 479 / 208 Taxman 137 / 74 DTR 305 / 251 CTR 241 (AAR)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services - 100 percent subsidiary - DTAA - India-Australia [S. 90, 195, Art. 5,12]

Applicant, an Indian Company, engaged in the business of development of computer software and related services, undertakes work in Australia and sub contracts a part thereof to its Australian subsidiary Infosys Australia which performs the work wholly in Australia. Though Infosys Australia is a 100 per cent subsidiary of the applicant, they are independent entities in the eye of law. Unless it is postulated that the applicant is a PE of Infosys Australia, the income of Infosys Australia from the work done by it cannot be taxed in India. As per para. 5 of Art. 12 of the DTAA, it has to be deemed that the income has arisen in India. As per para. 5 of Art. 12 of the DTAA, it has to be deemed that the income has arisen in India. Fact that the services are rendered in Australia cannot override the legal effect of the circumstances that the contract, as far as Infosys Australia is concerned, is secured from India and the applicant is giving directions to Infosys Australia about the performance of its work. Admittedly, the payment made to Infosys Australia would be fees for technical services under section 9(1)(vii). However, no services are performed in India by Infosys Australia. Thus, it cannot be held that Infosys Australia is making available any technical service to the applicant to as to satisfy the requirement of cl. (g) of para. 3 of Art. 12 of the DTAA, therefore, the fees for technical services paid to Infosys Australia is not chargeable to tax in India in terms of the DTAA, hence the provisions of section 195 would not be applicable.

Infosys Technologies Ltd. (2012) 253 CTR 16 / 210 Taxman 295 / 76 DTR 287 / (2013) 350 ITR 178 (AAR)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Composite contract - DTAA - India-Netherlands - DTAA - Fees for Technical Services [S. 90, 195, Art. 12]

Applicant, a Dutch Company, having entered into a contract with an Indian Company for supply of machinery, spare and wearing parts and technical documentation for the production of autoclaved aerated concrete, and another contract on the same day for supply of project services for erection and installation of the machinery supplied under the first contract, it was actually one indivisible contract for supply, erection, commissioning, testing, etc. of the project which was artificially split up merely to ward off liability to tax on the whole of the transaction and, therefore, the consideration received by the applicant is fees for technical services under the Act as well as the Indo-Netherlands DTAA, chargeable to tax in India and it does not fall under the exception in para. 6(a) of Article 12 of the DTAA.

HESS ACC Systems B.V., In Re (2012) 349 ITR 529 / 76 DTR 122 / 252 CTR 457 / 210 Taxman 290 (AAR)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services -Business of exploration, etc. of mineral oil - Gathering of seismic data for contractor - FTS and not as undertaking the mining project - Exemption under Explanation 2 to S. 9(1)(vii) is not available - Covered under s. 44D and not s. 44BB [S. 44BB, 44DA]

The applicant, an Austrian company, was awarded work of acquisition & processing of 3D land seismic data in a block by an Indian consortium. It contended that the activity rendered by it is a mining activity and the fees received were not covered within the definition of FTS by virtue of the exception enacted by Expln. 2 to section 9(1)(vii) of the Act which provides for specific exclusion for

any consideration received for any construction, assembly, mining or like project undertaken by the recipient. It further relied on the ruling in Geofizvka Torun Sp. zo. (AAR No. 813 of 2009) and contended that it would be assessable only under section 44BB(1).
The Authority observed that a person who has merely gathered seismic data for a contractor who has undertaken a mining or like project cannot be said to have undertaken a mining project. Hence, it cannot claim benefit of exception contained in Expln. (2) of section 9(1)(vii) and hence consideration is in nature of Fees for Technical Services. Further, section 44DA was introduced w.e.f. 1.4.2011 after the ruling in Geofizvka was given. Subsequent to such amendment, the instant case cannot be brought under section 44BB if section 44DA or section 115A is applicable to it. Hence, it ruled that the said consideration is not covered under section 44BB but is liable to be taxed as fees for technical services under section 9(1)(vii) (A.A.R. No. 1119 dt. 31/07/2012).
C.A.T. Geodata Gmbh, Austria (2012) 82 CCH 109 (AAR)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services - Business of exploration, etc. of mineral oil - Mineral oils - Services in connection with exploration and extraction of mineral oil - Project is undertaken by Indian concern - income in nature of FTS and not covered under section 44BB [S. 44BB, 44DA]
The applicant, incorporated in Cayman Islands, has a Project Office in India. It enters into a contract with an Indian concern for rendering services in connection with exploration and extraction of mineral oil. It contends that the consideration would not qualify as Fees for Technical Services under section 9(1)(vii) due to exception contained in Expln. (2) thereto and hence should be assessed under section 44BB(1). It further relied on the wide scope of the expression 'in connection with' in section 44BB(1) with reference to the ruling in Geofizvka Torun Sp. zo. (AAR No. 813 of 2009). The Authority observed that the project is undertaken by the Indian concern and the applicant can only claim that it is rendering services in connection with such project. Hence, it cannot claim benefit of exception contained in Expln. (2) of section 9(1)(vii) and hence, consideration is in nature of Fees for Technical Services. Further, as services are in connection with extraction of mineral oil, prima facie, applicant could invoke section 44BB(1). But section 44DA was introduced w.e.f. 1.4.2011 after the ruling in Geofizvka was given. Subsequent to such amendment, the instant case cannot be brought under section 44BB if section 44DA or section 115A is applicable to it. Hence, it ruled that the said consideration is not covered under section 44BB but is liable to be independently taxed as fees for technical services under section 9(1)(vii). (AAR No. 968 dated 1-8-2012)
M-1 Overseas Ltd. (2012) 349 ITR 166 / 252 CTR 8 / 75 DTR 144 / 209 Taxman 589 (AAR)

S. 9(1)(vii) : Income deemed to accrue or arise in India - Fees for technical services -DTAA - India-Australia - Payment to Australian co for software development & related services - Source of income in India, FTS and not royalty under article 12, not chargeable to tax in India under DTAA [S. 90, 195, Art. 5, 12]
Infosys India, the applicant, has a 100% subsidiary Infosys Australia. The applicant undertakes work for software development & related services for its clients in Australia. It then sub-contracts a part of the work to its subsidiary, Infosys Australia. Infosys Australia performs the work wholly in Australia. The applicant makes payment to Infosys Australia for such work. The issue is whether the payments made by it to Infosys Australia as consideration for the sub-contract work, is chargeable to tax in India, either under the IT Act or under the DTAA between India and Australia.
The applicant contends that Infosys Australia is not performing any services in India. The source of income of Infosys Australia is Australia, the place where the services are performed. Under Article 7.1 of the DTAC between India and Australia, this income of Infosys which is in the nature of business income of that entity, is taxable only in Australia and not in India since Infosys Australia does not have any permanent establishment in India. The applicant is not a permanent establishment of Infosys Australia going by Article 5 of the Convention. Even if the source is deemed to be where

the payer, the applicant, is situated, even then, by virtue of the Explanation to section 9(1)(i)(a) of the Act only such part of the income that could be attributed to the activities in India can be taxed in India.
The Authority observed that source of income is India. It further ruled that what is paid to Infosys Australia is fees for technical services under section 9(1)(vii) of the Act, but it is not royalty in terms of Article 12 of the DTAC between India and Australia in terms of the requirements of paragraph 3(g) of the said Article. Further, since the payment is in the nature of FTS, the question of permanent establishment in India does not arise. Hence in terms of DTAA, the fees for technical services paid is not chargeable to tax in India.
Infosys Technologies Ltd. (2012) 253 CTR 16 / 210 Taxman 295 / 76 DTR 287 / (2013) 350 ITR 178 (AAR)

S. 9(1)(vii)(b) : Income deemed to accrue or arise in India - Fees for technical services - Export sales is not a "source of income outside India". Expenditure on fully convertible debentures is deductible [S. 40(a)(ia), 195]
The assessee, an Indian company, paid Rs. 14.71 lakhs to a US company for 'KEMA' certification which was necessary to enable it to sell its products in the European markets. The assessee claimed that though the said amount was 'fees for technical services' under section 9(1)(vii), it was paid "for the purpose of earning income from a source outside India" (i.e. the exports) and so it was not taxable in India under section 9(1)(vii)(b). The Assessing Officer & CIT (A) rejected the claim though the Tribunal upheld it. On appeal by the department, held reversing the Tribunal:
(i) S. 9(1)(vii)(b) provides that fees for technical services payable by a resident in respect of services utilised in a business or profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India shall not be taxable in India. The term "source" means not a legal concept but one which a practical man would regard as a real source of income. It is a spring or fount from which a clearly defined channel of income flows. The assessee manufactured goods in India and concluded the export contracts in India. The source of income is created the moment the export contracts are concluded in India. The customer located outside India is not the source of the income though he is the source of the monies received. There is a distinction between the source of income and the source of receipt of monies. In order to fall under section 9(1)(vii)(b), the source of the income, and not the receipt, should be situated outside India. Further, though the profits arise both from the manufacturing activity and from the sale, bifurcation of the fees is not permissible (CIT v. Aktiengesllschaft Kuhnle Kopp and Kausch (2003) 262 ITR 513 (Mad.) not followed); (A.Y. 2005-06)
CIT v. Havells India Ltd. (2012) 208 Taxman 114 / 73 DTR 57 / 253 CTR 271 / (2013) 352 ITR 376 (Delhi)(HC)

S. 9(1)(vii)(b) : Income deemed to accrue or arise - Fees for technical services - Payment for Inspection, Verification, Testing and Certification (IVTC) services is chargeable as fees for technical services [S. 139, 195]
Section 9(1)(vii)(b) shows that, when a resident of India is engaged in a business carried on outside India or earns any income from any source outside India, makes a payment by way of a fee falling under the definition of FTS, then such payment despite being in the nature of FTS is out of charge to tax in India. In the instant case, the payment received in connection with Inspection, Verification, Testing and Certification (IVTC) services are taxable as FTS under section 9(1)(vii) and exceptions under section 9(1)(vii)(b) are not available. As the applicant has tax presence in India. Indian Customers are required to with hold taxes under section 195 at the rate in force mentioned in the Finance Act for the relevant year on the payment made / proposed to be made to the applicant. The applicant has taxable income in India it is required to file to tax return under the provisions of Section 139.

XYZ Ltd., In re (2012) 348 ITR 20 / 206 Taxman 416 / 249 CTR 123 / 69 DTR 89 (AAR)

S. 9(1)(viii) : Income deemed to accrue or arise in India - Managerial, technical or consultancy services - What constitutes a "Dependent Agent Permanent Establishment" & "Place of Management"

(i) The fees received by the assessee, a Swiss company, from enabling sellers registered on its offshore website to sell goods to buyers in India is not assessable as "fees for technical services" under section 9(1)(viii) as the assessee does not render any "managerial, technical or consultancy services" to the payers. The assessee's websites are analogous to a market place where the buyers and sellers assemble to transact. By providing a platform for doing business the assessee is not rendering services either to the buyer or to the seller which can be assessed as "fees for technical services";

(ii) In order to constitute a "Dependent Agent Permanent Establishment" of the assessee under Article 5(5) of the DTAA, it is essential that the agent should "habitually exercise an authority to negotiate and enter into contracts for or on behalf of' the assessee". On facts, though eBay India & eBay Motors conducted activities exclusively on behalf of the assessee and thus became its dependent agents, they did not constitute a "Dependent Agent Permanent Establishment" because they did not conduct any of the activities set out in the three clauses of Article 5(5) of the DTAA. By simply providing marketing services to the assessee or making collection from the customers and forwarding the same to the assessee, it cannot be said that eBay India entered into contracts on behalf of the assessee. There are also no examples of any contract entered into by eBay India or eBay Motors for or on behalf of the assessee. Thus the test laid down in Article 5(5)(i) of the DTAA is not satisfied.

(iii) eBay India & eBay Motors also do not constitute a "place of management" so as to be a PE under Article 5(2)(a) of the DTAA. A "place of management" ordinarily refers to a place where overall managerial decisions of the enterprise are taken. eBay India & eBay Motors are not taking any managerial decision. They are simply rendering marketing services to the assessee in the form of collection of amount from the customers and remitting the same to the assessee, apart from creating awareness amongst the Indian sellers about the availability of the assessee's websites in India. All business decisions and deals are settled through the assessee's websites. eBay India & eBay Motors have no role to play either in the maintenance or the operation of the websites. They have absolutely no say in the matter of entering into online business agreements between the sellers and the assessee or the finalization of transactions between the buyers and sellers resulting into the accrual of the assessee's revenue. Consequently, they are not a "place of management" of the assessee's overall business. (A.Y. 2006-07)

eBay International AG v. ADIT (2013) 151 TTJ 769 / 140 ITD 20 / 82 DTR 89 (Mum.)(Trib.)

S. 10(1) : Exempt income - Agricultural income - Floriculture project - Income from floricultural project on land taken on lease held to be agricultural income

Assessee acquired land from agriculturist on lease and constructed a green house floriculture project on said land. It started growing of rose flowers / plants on bridge of plastic trays erected with help of M.S. stand 2.3 ft. above land. The assessee claimed the income from rose flowers as exempt. The Assessing Officer held that the rose plants were not planted on earth land and no basis operation was carried out by assessee on land hence, not eligible for exemption. According to assessee, for plantation of roses a very well treated soil was required, manures were mixed in soil for preparing a base for growing rose plants trays were filed with mixture of soil, insecticides were sprinkled on plants to save plants from any disease, root stocks were brought from market and planted in green house, mother plant was otherwise reared on earth, subsequently saplings were planted on plastic trays which were kept at height of 2-3 ft. placed on M.S. stand, purpose of growing rose plants at a height was primarily to avoid pest and to develop in a controlled atmosphere and green house was used for various benefits so that sunlight and humidity level both could be maintained. The Tribunal held that the claim of exemption was justified. (A.Y. 2005-06).

Dy. CIT v. Best Roses Biotech (P) Ltd. (2012) 49 SOT 277 / 67 DTR 337 / 144 TTJ 647 / 17 ITR 211 (Ahd.)(Trib.)

S. 10(10C) : Exempt income - Voluntary retirement schemes - Amount received in excess of amount permissible u/r 2BA - Deduction is allowed [S. 154, Rule 2BA]

Assessee was a former employee of a bank. In previous year, she received an amount of Rs. 25.42 lakhs from bank under voluntary retirement scheme. She claimed deduction of Rs. 5 lakhs under section 10(10C). It was held that assessee was entitled to deduction of Rs. 5 lakhs under section 10(10C), even though amount received on voluntary retirement was in excess of amount permissible under rule 2BA. (A.Y. 2004-05)

Uttara Ghosh (Smt) v. Dy. CIT (2012) 139 ITD 88 / (2013) 152 TTJ 517 / 82 DTR 181 (Kol.)(Trib.)

S. 10(10CC) : Exempt income - Perquisite - Employee - Tax on employees' salary is a "non-monetary" perquisite exempt under section 10(10CC) [S. 17(2)(iv)]

The assessee-employer entered into agreements with the employees pursuant to which it agreed to bear the income tax payable by the employees on their salary. The question was whether such tax payment was "income in the nature of a perquisite, not provided for by way of monetary payment, within the meaning of clause (2) of section 17" so as to be exempt in the hands of the employee. Held by the High Court:

The tax on the salary paid by the employer was a "perquisite" under section 17(2)(iv) because it was paid in respect of the employees' obligation and it was not by way of monetary payment to the employees concerned but for or on their account to the Income-tax department. Consequently, it is a "non-monetary" payment of a perquisite to the employee which is eligible for exemption under section 10(10CC).

DIT v. Sedco Forex International Drilling Inc. (2012) 252 CTR 447 / 75 DTR 421 / 210 Taxman 25 (Uttarakhand)(HC)

S. 10(10CC) : Exempt income - Perquisite - Salary - Tax paid by employer on salary income is exempt

The assessee an employee claimed that the tax paid by the employer on his salary income is not liable to be included in his total income as it is exempt under section 10(10CC). Assessing Officer disallowed the claim. The Tribunal following the Special bench in RBF Rigs Corpn. LIC (RBFRC) v. ACIT (2007) 109 ITD 141 (SB)(Delhi)(Trib.) held that tax borne by the employer on behalf of the employee would constitute a non-monetary payment as such the same is exempt under section 10(10CC). (A.Y. 2008-09)

ADIT v. Halliburton Offshore Services Inc. (2012) 49 SOT 544 (Delhi)(Trib.)

S. 10(10D) : Exempt income - Key man insurance - Amount received by employee director on maturity of insurance policy is exempt

Amount received by employee director on maturity of insurance policy, which was taken earlier by company and which was assigned to him by the company is not taxable in the hands of director.

CIT v. Rjan Nanda (2012) 349 ITR 8 / 249 CTR 141 / 69 DTR 250 (Delhi)(HC)
CIT v. Naresh Kumar Trehan (2012) 249 CTR 141 / 69 DTR 250 (Delhi)(HC)

S. 10(13A) : Exempt income - House rent allowance - No rent paid by assessee hence denial of exemption justified [Income-tax Rules,1962- Rule .3]

Assessee employee is getting HRA of Rs. 3 lacs approximately per month and special HRA of Rs. 1.70 lacs per month and he is reimbursing to the employer actual rent of leased premises (Rs. 1.70 lacs) and thus perquisite value of rent free accommodation provided by employer to assessee

employer being nil as computed in terms of R. 3 of the IT Rules, 1962, there is no rental payment made by assessee for the purpose of working out exemption of HRA under section 10(13A) and the Assessing Officer was justified in denying exemption under section 10(13A). (A.Y. 2006-07)
Dy. CIT v. Kuldeep D. Kaura (2012) 80 DTR 122 (Ahd.)(Trib.)

S. 10(14) : Exempt income - Special allowance - Development officer - Reimbursement of expenses certified by LIC can be held taxable
The assessee a development officer of LIC filed the return of income claiming deduction in respect of incentive bonus, conveyance allowance and additional conveyance allowance received from LIC. The Assessing Officer rejected the claim of assessee. On appeal to the Tribunal, the Tribunal held that where LIC certified that reimbursement of expenses incurred in performance of duties of Office, of employment the same has to be held as not taxable for the purpose of exemption under section 10(14). (A.Y. 1996-97 , 1997-98)
Satish Gupta v. ITO (2012) 134 ITD 686 (Delhi)(Trib.)

S. 10(15) : Exempt income - Interest - Foreign currency loans - Withdrawal of exemption by Government - Interest payment to non-resident is exempt
Assessee had raised foreign currency loans in form of External Commercial Borrowings (ECBs) towards part of financing its import of capital goods and services. ECBs were duly approved by Government of India. As certain conditions of approval were violated, approval was withdrawn and exemption available under section 10(15)(iv)(f) was also withdrawn. Subsequently, assessee made payment of interest to non-resident lenders and claimed exemption under section 10(15)(iv)(f). Assessing Officer rejected the claim. On appeal the Commissioner (Appeals) held that exemption withdrawn by Central Government holding, interest as not exempt under section 10(15)(iv)(f) was to be ignored and it was held that interest payment by assessee to non-resident lenders as per ECB loa n approved by Central Government would continue to be exempt. The Tribunal confirmed the view of Commissioner (Appeals). (A.Y. 2002-03 & 2004-05)
ADIT v. Reliance Industries Ltd. (2012) 49 SOT 181 (Mum.)(Trib.*)*

S. 10(15) : Exempt incomes Interest payable - Interest payable by industrial undertakings, industrial finance corporation - Moneys borrowed - Following earlier year decision, exemption granted
Assessee had raised foreign currency loans by way of External Commercial borrowing (ECB) for purpose of financing import of capital goods and services. Requisite approval for said purpose was obtained from Government. Thereafter, assessee made remittance of interest on said loan but did not deduct TDS and claimed exemption under section 10(15). Assessing Officer found that due to violation of some conditions said approval was withdrawn and exemption under section 10(15) was also taken back. It was held that in assessee's own case in earlier year in ADIT (IT) v. Reliance Industries Ltd. (2011) 16 taxmann.com 233 /(2012) 49 SOT 181 (Mum.), similar issue had been decided and exemption was granted. Therefore, following said decision interest payment made by assessee would continue to be exempted. (A.Y. 2007-08)
ITO (TDS)(LTU) v. Reliance Industries Ltd. (2012) 139 ITD 95 (Mum.)(Trib.)

S. 10(15)(iv)(h) : Exempt income - Interest for period when bonds not allotted is also entitled to exemption
Expression "in respect of" in section 10(15)(iv)(h) unlike the term "on" in section 10(15)(iv)(a), (b), (c) (e) and (f) has a wider connotation. Fact that interest was paid for a brief period of about six days in the present case would not made it any less an amount of interest payable "in respect of the bonds". Interest for the period when bonds were not allotted is also entitled to exemption under section 10(15)(iv)(h). (A.Y. 1988-89 & 1998-99)

CIT v. Bharat Heavy Electrical Ltd. (2012) 80 DTR 7 / 210 Taxman 155 (Mag.) / (2013) 352 ITR 88 (Delhi)(HC)

S. 10(15A) : Exempt income - Operation of aircraft - Lease - Agreement on or after 1st day of April, 2007 - Existence of lease agreement and aircraft

A lease, a understood in law, requires transfer of interest / right in the property by the owner to a third person. A lease cannot be created in favour of a third person unless the goods / property is transferred to the lessee and the lessee is in a position to use and utilize the said goods / property. When goods are not in existence, goods/property cannot be transferred to lessee. It is only when an Indian company acquires aircraft on lease under an agreement, which was entered into on or before the 1st April 2007, benefit under the said section is available. Thus, the twin conditions that the agreement should have been entered into on or before 1st April 2007 and there should be acquisition of aircraft under the lease before the said date, have to be satisfied. If the two conditions are not satisfied, benefit under the said section cannot be granted. Intention behind the proviso to section 10(15A) is to restrict and not grant benefit after the particulars / specified cut off date i.e. 1st April 2007. However, the legislature did not want to deny benefit in respect of earlier agreements, which had fructified and had been entered into and were already in operation before the said date in the present case, there was no lease but only a possibility or an expectancy as the property or goods in question were not in existence on the date of the so called agreements. Agreements cannot be treated as leases but only as agreements for leases which will/may operate in future exemption under section 10(15A) was not therefore available. The Writ petition was dismissed.

Go Airlines (I) P. Ltd. v. UOI (2012) 76 DTR 353 / 209 Taxman 329 /(2013) 356 ITR 333(Delhi)(HC)

Kingfisher Airlines Ltd. v. UOI (2012) 76 DTR 353 / 209 Taxman 329/(2013) 356 ITR 333 (Delhi)(HC)

S. 10(20) : Exempt income - Local authority - Himachal Pradesh Marketing Board -Himachal Pradesh Marketing Board is not local authority hence not exempt - General Clauses Act, 1897 [S. 3(31)]

H. P. Marketing Board constituted under section 3 of the H. P. Agricultural Produce Markets Act, 1969 is not a 'local authority' hence not exempt under section 10(20).The phrase 'local authority' is interpreted in this case only in the context of section 3(31) of the General Clauses Act, 1897, since the assessment years in question are for a period prior to the amendment of section 10(20) of the Income-tax Act, where by Explanation defining 'local authority' for the purpose was added by the Finance Act of 2002.

CIT v. H. P. Marketing Board (2012) 66 DTR 124 / 246 CTR 535 / (2011) 203 Taxman 159 (HP)(HC)

S. 10(20) : Exempt income - Local authority - U.P. Jal Nigam is not a local authority and not entitled to exemption [Constitution of India, Art. 243(d) 243P & 245, General clauses Act . S. 3]

There was conflict of opinion between the Judges of Division Bench whether the U. P. Jal Nigam which is created by the State Legislatures under U. P. Water supply and Sewerage Act 1975 is not a "local authority" for the purpose of section 10(20) even prior to insertion of the Explanation by the Finance Act, 2002, the matter was referred to third Judge. The third Judge also held that U. P. Nigam established under the U. P. Water Supply and Sewerage Act, 1975 is not a local authority for the purpose of section 10(20) even prior to insertion of Explanation there to by Finance Act, 2002, therefore not entitled to exemption under section 10(20). The Court held that Article 254 of the Constitution of India to the extent of repugnancy, the provisions contained in section 10(20) of the Income-tax Act shall prevail over the provisions of U. P. Water supply and Sewerage Act 1975. (A.Y. 2002-03)

CIT v. U. P. Jal Nigam (2012) 348 ITR 238 / 70 DTR 65 / 249 CTR 467 (All.)(HC)

S. 10(20) : Exempt income - Local authority - Agricultural produce market

After the insertion of the Explanation, vide the Finance Act, 2002 with effect from 01.04.2003 Agriculture Produce Market Committee was held to be not a local authority within the meaning of section 10(20) of the Act. (A.Y. 2003-04 to 2008-09)

Agriculture Produce Market Committee, Solan & Ors. v. CIT (2012) 71 DTR 281 / 250 ITR 432 (HP)(HC)

S. 10(23C) : Exempt income - Educational institutions - Profit motive - Collection of fees - Horticulture Income - Utilised for educational activity - Exemption to be allowed

Application of petitioner trust for grant of exemption under section 10(23C)(vi) was rejected on grounds that assessee was engaged in non educational activities of horticulture and generating income from same; and that petitioner had collected fees under head 'placement and training' from students which was not in conformity with fees prescribed. It was held that amount received from horticulture had been utilized in educational activities of institutions and for infrastructural development, it could not be treated that profit was earned for non educational activities. Denial of exemption was held to be not valid. Matter remanded to examine whether fees collected by assessee. Educational institution under head "placement and training" is within the scope of law as has been prescribed by the State Govt. So that assessee could avail exemption under section 10(23C)(vi). It is to be further examined by the CCIT that how the income so earned is utilized, i.e. whether for educational purpose or non educational purpose and income earned is utilized for educational purpose, assessee is eligible to be granted exemption under section 10(23C)(vi). (A.Y. 2009-10)

Orissa Trust of Technical Education and Training v. CCIT (2012) 209 Taxman 552 / 79 DTR 305 / 254 CTR 269 (Orissa)(HC)

S. 10(23C) : Exempt income - Educational institution - Approval cannot be refused for alleged irregularities in the books of accounts when the books were audited every year

Assessee society engaged in imparting education and running school sought approval under section 10(23C)(vi). DGIT(E) found that there were serious irregularities in books of account of assessee which related to payment made by assessee in connection with annual day celebration of school and accordingly, denied approval. The Court held that since books of account of assessee were audited every year and all payments were made through cheques and bank statements were also produced before DGIT(E), such crucial facts were not rightly ignored by DGIT(E). Therefore, impugned order passed by DGIT(E) refusing to grant approval to assessee under section 10(23C)(vi) was to be quashed and set aside. (A.Y. 2008-09 to 2010-11)

Mahavira Foundation v. Dy. CIT (2012) 210 Taxman 548 / 80 DTR 333 (Delhi)(HC)

S. 10(23C) : Exempt income - Educational institution - Matter remanded for fresh consideration to decide the exemption considering the facts of relevant year

Petitioner, a Horticulture Board, claimed exemption under section 10(23C). It filed complete information with audited accounts for Assessment year 2010-11 and submitted that balance sheet for A.Y. 2011-12 was under compilation. However, CCIT denied exemption on account of non-filing of relevant accounting documents and denial of exemption in earlier years. It was discerned from records that petitioner stopped charging processing fees from 1-2-2000, which was ground for denial of exemption in earlier years and that impugned order being dated 26-4-2011 for A.Y. 2011-12, time for getting accounts audited and file balance sheet was still available. The Court held that since CCIT had failed to consider these factors, his order could not be legally sustained hence the matter remanded. (A.Y. 2011-12 to 2013-14)

National Horticulture Board v. CCIT (2012) 210 Taxman 555 / 80 DTR 341 (P&H)(HC)

S. 10(23C)(iv) : Exempt income - Educational institution - Registration - Registration cannot be refused only on the ground that abnormal variation in administration expenses

The Court set aside the order of the competent authority, who refused the registration on the allegation of abnormal variation of administrative expenses and improper maintenance of books of account and vouchers. Authorities were directed to decide application for registration a fresh. (A.Y. 2009-10).

The Synodical Board of Health Services v. DGI (2012) 341 ITR 459 / 66 DTR 433 (Delhi)(HC)

S. 10(23C)(vi) : Exempt income - Approval - Rejection of application - Opportunity of hearing must be given before rejecting the application

The assessee trust made an application seeking approval under section 10(23C)(vi) of the Act. The prescribed authority called certain information which was furnished by the assessee. The prescribed authority rejected the application, without giving any opportunity of hearing. The action of the prescribed authority rejecting the application was challenged in a Writ petition before the Court. The Court held that it is necessary that the petitioner is afforded an opportunity of responding to the grounds on which their application has been rejected. Accordingly the petition was allowed. The prescribed authority is directed to pass a reasoned order, after hearing the petitioner.

Rukmanrani Education Foundations v. CCIT (2012) 74 DTR 218/(2013) 260 CTR 167 (Bom.)(HC)

S. 10(23C)(vi) : Exempt income - Educational Institution - Profit motive

An educational institution would not cease to exist solely for educational purpose and for purposes of profit merely because it has generated surplus income. (A.Y. 2009-10)

Santan Dharam Shiksha Samiti v. CCIT (2012) 253 CTR 518 (P&H)(HC)

S. 10(23C)(iv) : Exempt income - Charitable purpose - Notification - The notification issued does not itself tantamount to allowing the claim of exemption - Assessing Officer is entitled to look in whether the conditions are satisfied - The assessee has not maintained separate books of accounts - Profits from provision of facilities is taxable as business income

During the financial year 2000-01, the assessee had organized an exhibition called "International Textile Machinery Exhibitions 2000" (ITME) and earned a profit of Rs. 12,52,75,120/-. The assessee filed the return of income declaring nil income. The assessment was completed treating the income as business income. The assessment was annulled by the Commissioner (Appeals) only on the ground that the notice was served after 12 months from the end of the month in which return of income was furnished. The assessment was reopened thereafter. The reassessment was held to be valid by the Tribunal. In quantum appeal the Commissioner(Appeals) decided the issue in favour of assessee. On appeal the Tribunal held that the Assessing Officer has jurisdiction to look into whether the conditions of section 10(23C)(iv) has been complied with. On the facts as the assessee has not maintained the separate books of accounts for providing facilities to the participants the assessee charged the profit make up, the profits from provisions of facilities are taxable as business income . The assessee is entitled to exemption only on accumulations and income from organizing exhibitions. Accordingly the appeal of revenue was partly allowed. (A.Y. 1997-98, 2001-02)

ADIT v. India ITME Society (2012) 14 ITR 519 / 67 DTR 217 / 144 TTJ 427 (Mum.)(Trib.)

S. 10(23C)(vi) : Exempt income - Educational institution - Natural justice - Must be given an opportunity if commissioner desires to use evidence against an assessee

The Commissioner must give an opportunity to the assessee if he desires to use the evidence collected against the assessee through reports of subordinate authorities. On the facts the court held that order passed by Chief Commissioner denying approval under section 10(23C)(vi), relying upon certain adverse material without supplying the same to the petitioner and without allowing an opportunity of

rebuttal thereof does not fully meet the requirement of principles of natural justice and therefore, it can be sustained. The matter was set aside to the Commissioner to decide a fresh.

Rastra Sahayak Vidyalaya Samiti v. CCIT (2012) 246 CTR 154 / 65 DTR 1 (Raj.)(HC)

S. 10(23C)(vi) : Exempt income - Educational institution - Music - Dance - Teaching and promoting all forms of music and dance Western, Indian or any other is entitled to exemption

Assessee society which is teaching and promoting all forms of music and dance, western, Indian or any other form and is run like school or educational institution in a systematic manner with regular classes, vacations, attendance requirements, enforcement of discipline and so on meets the requirement of educational institution within the meaning of section 10(23C)(vi). High Court quashed the order of prescribed authority and directed to pass the order by giving a reasonable opportunity. (A.Y. 2010-11)

Delhi Music Society v. DIG (2012) 65 DTR 337 / 246 CTR 327 / 204 Taxman 231 /357 ITR 265(Delhi)(HC)

S. 10(23C)(vi) : Exempt income - Educational institution - Investment in share market - Profit motive - Solely for educational purpose - Not entitled for exemption

Assessee made investments in the share markets and did not maintain separate books of account. Commissioner of Income tax refused the registration on the ground that the institution does not exist solely for the educational purpose and the nature of activities undertaken by it amounts to carrying on business, hence, it is not entitled to exemption under section 10(23C)(vi). On writ petition, the High Court held that on the basis of material, the prescribed authority has rightly held that the petitioner-institution does not exist solely for the educational purposes hence, it is not entitled for exemption under section 10(23C)(vi). (A.Y. 2007-08)

Xavier's Institute of Management v. State of Orissa & Ors. (2012) 66 DTR 169 / 247 CTR 268 / Vol. 42 Tax L.R. March, 285 (Orissa)(HC)

S. 10(23C)(iiiad) : Exempt income - Educational Institution - Assessing Officer is not justified in refusing exemption merely because surplus had arisen in the educational activity

The assessee who was running two schools was not required to get approval from the prescribed authority as the total receipts did not exceed 1 crore. Further it was also observed that the Assessing Officer was not justified in refusing exemption under Section 10(23C)(iiiad) of the Act and observing that the assessee was not existing for educational purposes merely because assessee earned surplus during the course of carrying on the education activity. (A.Y. 2000-01 to 2006-07)

Gagan Education Society v. Addl. CIT (2012) 145 TTJ 230 / (2011) 131 ITD 442 / 56 DTR 199 (Agra)(Trib.)

S. 10(23C)(iiiad) : Exempt income - Educational institution - Term 'existing' - From construction period educational institution are held to be existing eligible for exemption

The main emphasis of the assessee is that expression 'existing' employed in section 10(23C)(iiiad) does not convey the meaning of actual functioning of the institution. The term 'existing' is associated with the society and not functionality of the institution. It was held in Doon Foundation (1985) 154 ITR 208 (Cal.)(HC) and Sree Narayana Chandrika Trust (1995) 212 ITR 456 (Ker.)(HC) that it is from construction period that the educational institution is existing and thus eligible for exemption. (A.Y. 2002-03 & 2003-04)

Nitya Education Society v. JCIT (2012) 51 SOT 103 (Delhi)(Trib.)

S. 10(23C)(iiiad) : Exempt income - Training for priesthood - Education

Training for priesthood involves extensive coaching in religious studies making a person fit to perform the duties of priest which is a profession and it amounts to education within the meaning of section 10(23C)(iiiad) of the Act and entitle for exemption under section 10(23C) of the Act.

CIT v. St. Mary's Malankara Seminary (2012) 348 ITR 69 / 71 DTR 153 / 250 CTR 294 / 206 Taxman 429 (Ker.)(HC)

S. 10(29) : Exempt income - Income from letting out of godowns, etc. - Fumigation, disinfestations and supervisory charges - Fumigation, disinfestations and supervisory charges collected from customers is eligible for exemption

Assessee an authority constituted under the provisions of the Karnataka Warehouse Act, 1961, has claimed exemption in respect of Fumigation, disinfestations and supervisory charges collected by assessee, a State warehousing corporation from its customers to whom warehouse is let out for purpose of storage and then facilitate marketing of commodities, such an assessee is eligible for exemption under section 10(29). (A.Y. 1992-93 to 1997-98)

Karnataka State Ware Housing Corporation v. Dy. CIT (2012) 66 DTR 484 (Karn.)(HC)

Editorial:- Section 10(29) is omitted by the Finance Act, 2002, w.e.f. 1-4-2003.

S. 10(29) : Exempt income - Income from letting of godowns - Marketing authorities -Letting of godowns is entitled to exemption

Assessee society, constituted under Airports Authority of India Act, 1994 which was engaged in letting out godowns and warehouses at airports for storage, processing or facilities marketing of commodities was entitled to exemption. (A.Y. 1995-96, 1997-98 to 2001-02)

Airports Authority of India v. CIT (2012) 134 ITD 34 / (2011) 12 ITR 482/(2013) 153 TTJ 676 (Delhi)(Trib.)

S. 10(33) : Exempt income - Units 64 - Long term capital loss - Long term loss on conversion of units under US 64 scheme into 6.75 percent tax free bonds, it was not entitled to carry forward same for set off in subsequent assessment years

The assessee is engaged in the business of manufacturing automobile tyres and tubes valves, etc. It had acquired certain units under the US 64 Scheme of Unit Trust of India, during the A.Y. 1992-93 to 2001-02. The said units were converted by UTI into 6.75% tax free bonds in the previous year relevant assessment year 2004-05, with effect from 1-6-2003. The assessee worked out indexed cost of acquisition arrived at a long term capital loss and carry forward the same for set off in subsequent years. The said claim was rejected by the Assessing Officer holding that conversion of US 64 into 6.75 percentage tax free bond did not amount to 'transfer'. On appeal the Commissioner(Appeals) held that when capital gains accruing on US 64 were specially exempted from taxation under section 10(33), in similar manner capital loss accruing on transfer of US 64 was also to be disallowed. He directed the Assessing Officer to exclude the entire loss from the computation of income. The Tribunal also confirmed the view of Commissioner (Appeals) and held that the assessee is not entitled to carry forward same for set off in subsequent years. (A.Y. 2004-05)

Schrader Duncan Ltd. v. Addl. CIT (2012) 50 SOT 68 / 150 TTJ 559 / 79 DTR 25 (Mum.)(Trib.)

S. 10(38) : Exempt income - Long term capital gains - Transfer - Since shares were not sold to allottees in stock exchange, transaction would not be eligible for concessional rate of 10 percent for assessing the capital gains [S. 2(47), 45, 48, 112]

The Assessing Officer held that the since the shares were not listed securities at the time of transaction, the tax was payable at normal rate and not concessional rate. The view of Assessing Officer was confirmed by the Commissioner (Appeals) and Tribunal. The Court held that trading of these shares in the Stock exchange commenced only in the morning of 6-1-2006. The shares were transferred from the demat account of the assessee on 5-1-2006 the credit of sale consideration was credited on 6-1-2006 would not be relevant to determine the transfer. The court held that once shares were transferred from demat account of assessee to account of 'Registrar to issue' and then to demat accounts of allottees, transfer is complete in terms of section 2(47) by 5-1-2006. On the facts transfer

for purchase being completed prior to listing of shares and commencement of trading in stock exchange being on 6-1-2006, transaction cannot be held to be in stock exchange hence the assessee would not be eligible for payment of capital gains tax at lower rate of 10 percent, normal rate is applicable. (A.Y. 2006-07)

Uday Punj v. CIT (2012) 348 ITR 98 / 209 Taxman 29 / 76 DTR 166 / 253 CTR 22 (Delhi)(HC)

S. 10(38) : Exempt income - Capital Gains - Delay in transferring shares into Demat account from date of purchase of share - Assessing Officer not justified in ignoring the relevant evidences and doubt the date of purchase - Exemption under section 10(38) was allowed

The assessee purchased the shares in the physical form and opened the Demat account on a belated date. As the assessee provided all the relevant details such as address of registered office of the company, signature of authorized signatory along with signature of 2 directors, value of shares purchased in each company, date of issue of certificate, certificate number, registered folio, etc., it was held that Assessing Officer was not correct in doubting the genuineness of the transaction and declared date of purchase merely because there was substantial delay in transferring the shares in Demat account. Thus, the exemption under Section 10(38) on long term capital gain on shares held to be allowed. (A.Y. 2006-07)

ITO v. Ajay Shantilal Lalwani (2012) 145 TTJ 511 / 69 DTR 135 (Pune)(Trib.)

S. 10A : Free trade zone - Newly established undertakings - Interest income - Interest of Foreign Currency Deposit Account - Income from other sources - Since question as to whether there was a direct nexus between interest income and industrial undertaking had not been examined by authorities below impugned order was set aside and remanded back to Tribunal for disposal a fresh [S. 56]

The assessee is a 100% Export Oriented Unit, which develops and exports software. It earns foreign exchange. It has earned interest income on Foreign Currency Deposit Account permitted by FERA under Banking Regulations. The said interest was assessed under section 56 as income from other sources. The view of Assessing Officer was also confirmed by the High Court. On appeal the Supreme Court referred the case in CIT v. Menon Impex (P) Ltd. (2003) 259 ITR 403 (Mad.)(HC), where in after examining in details the court has taken the view there was no direct nexus between the interest and industrial undertaking. Accordingly the order of High Court set aside to the Tribunal for deciding the matter a fresh after examining the transaction in question as done by the Madras High Court in Menon Impex (P) Ltd. ITAT will give an opportunity to the assessee to produce relevant documents in support of the transaction in question before deciding the question of law. (A.Y. 2002-03)

India Comnet International v. ITO (2012) 210 Taxman 566 / 254 CTR 339 / 79 DTR 303 /(2013) 354 ITR 673(SC)

S. 10A : Free trade zone - Newly established undertakings - Export oriented undertaking - Software development - Shifting of unit to different State - Consistency method may be accepted, method of apportionment was held to be justified

Assessing Officer has accepted the head count method adopted by the assessee for allocation of indirect expenses between STP unit and non STP unit in the past but has rejected it only for the years, under appeal, it would disturb or distort the profits; method adopted by the assessee has been consistently accepted by the departmental authorities and there being no just cause for abandoning the same it could not be disturbed. Method of apportionment was held to be justified. (A.Y. 2001-02 & 2002-03)

CIT v. EHPT India (P) Ltd. (2012) 65 DTR 187/ 246 CTR 217 / (2013) 350 ITR 41 / 204 Taxman 639 (Delhi)(HC)

S. 10A : Free trade zone - Newly established undertakings - Export oriented undertaking - Unabsorbed losses - Depreciation from earlier year - Loss of non STP unit cannot be set off against income of section 10A unit [S. 32(2), 72(2)]

Income of section 10A unit has to be excluded at source itself before arriving at gross total income, the loss of non section 10A unit cannot be set off against the income of section 10A unit. Exemption under section 10A, has to be allowed without setting off brought forward unabsorbed losses and depreciation from earlier assessment year or current assessment year either in the case of non STP units or in the case of very same undertaking. The Court observed that when section 10A, was recast by the Finance Act, 2000, the Parliament was aware of the character of relief given in Chapter III. Chapter deals with incomes which do not form part of total income. If the parliament intended that relief under section 10A should be by way of deduction in the normal course of computation of total income, it could have placed the same in Chapter VI-A, which houses the sections like section 80HHC, 80IA, etc. The Parliament was aware of the various restrictions and limiting provisions like section 80A, section 80AB, which were in Chapter VI-A, which do not appear in Chapter III. The fact that even after recast, the relief has been retained in Chapter III indicates the intention of Parliament that it is to be regarded as an exemption and not deduction. This is supported by Circular No. 7 of 2003 dt. 5th September, 2003 (2003) 263 ITR (St.) 62. (A.Y. 2001-02 to 2006-07)

CIT v. Yokogawa India Ltd. & Ors. (2012) 341 ITR 385/ 65 DTR 170 / 246 CTR 226 / 204 Taxman 305 (Karn.)(HC)

S. 10A : Free trade zone - Newly established undertakings - Export oriented undertaking - Method of computation - Total turnover - Expenditure incurred should not be included in total turnover

The assessee company is engaged in the business of Call Center operations. The assessee incurred expenses in foreign exchange towards communication expenses. While arriving at the total turnover, the assessee did not include the expenses incurred by it towards communication expenses. Assessing Officer held that no deduction is possible. The Tribunal relying on the judgment of Supreme Court in CIT v. Lakshmi Machine Works (2007) 290 ITR 667 (SC) held that the expenditure incurred should not form part of total turnover and directed the Assessing Officer to recomputed the relief under section 10A of the Act, excluding the said communication charges from export turnover as well as from total turnover. On appeal by the revenue the Court held that for the purpose of computing exemption under section 10A when the export turnover in the numerator is to be arrived at after excluding communication expenses, the same should also be excluded in computing the export turnover as a component of total turnover in the denominator. (A.Y. 2001-02 to 2005-06)

CIT v. Tata Elxsi Ltd. & Ors. (2012) 349 CTR 98 / 65 DTR 206 / 247 CTR 334 / 204 Taxman 321 (Karn.)(HC)

S. 10A : Free trade zone - Newly established undertakings - Export oriented undertaking - Sale of software - STP Unit - Exemption is allowed though not claimed in the return

Assessee had shown the income from the sale of software as long term capital gain. The Assessing Officer held that the same is taxable as trading receipt. It was contended that if it was held to be trading receipt the same is exempt under section 10A. The Tribunal held that the assessee is entitled to exemption under section 10A. The Court held that concurrent finding was arrived by the Assessing Officer, Appellate Authority and Tribunal that income from sale of software was trading income and not capital gains after establishment of STP unit, the assessee is entitled to exemption under section 10A, the fact that the assessee did not claim exemption under section 10A while filing the return cannot come in the way of holding that assessee is entitled to benefit of section 10A,Since it was alternatively argued before the Assessing Officer and the Appellate Authority that if income is treated as trading receipt, exemption under section 10A may be granted. High Court upheld the order of Tribunal. (A.Y. 1997-98)

CIT v. Infosys Technologies Ltd. (No. 3) (2012) 349 ITR 598 / 65 DTR 271 / 205 Taxman 389 (Karn.)(HC)

S. 10A : Free trade zone - Newly established undertakings - Export oriented undertaking - Manufacture - Pure gold converted into jewellery amounts to Manufacture or production [S. 10B]

Assessee received pure gold from a non-resident. The assessee converted same into jewellery and thereupon exported it to said non-resident, activity undertaken by assessee amounted to 'manufacture or production' which qualified for deduction under section 10A/10B. (A.Y. 2007-08)

CIT v. Lavlesh Jain (2012) 204 Taxman 134 / 67 DTR 232 (Delhi)(HC)

CIT v. Shashi Kant Mittal (2012) 204 Taxman 134 / 67 DTR 232 (Delhi)(HC)

S. 10A : Free trade zone - Newly established undertakings - Setting off loss - Profit for purpose of deduction under section 10A, should be allowed without setting off unabsorbed loss and depreciation [S. 72]

The assessee claimed the exemption under section 10A, without setting off of unabsorbed loss and depreciation, which was allowed by the Assessing Officer. The said order was revised under section 263. In an appeal by the assessee the revision order was quashed. On appeal by the revenue the High court on merit held that profit for purpose of deduction under section 10A should be allowed without setting off of unabsorbed loss and depreciation and refrained to express any opinion as regards the jurisdiction under section 263. The order of Tribunal was confirmed the appeal of revenue was dismissed. (A.Y. 2002-03)

CIT v. Tyco Electronics Tools India (P) Ltd. (2012) 205 Taxman 403 (Karn.)(HC)

S. 10A : Free trade zone - Newly established undertakings - Set off of losses - Brought forward unabsorbed losses - Eligible and non-eligible unit - Deduction is allowable without set off of losses of non-eligible units

The question arose whether the brought forward unabsorbed depreciation and losses of a unit which was not eligible for section 10A deduction could be set-off against the current profit of a unit eligible for section 10A deduction. The Tribunal, relying on Scientific Atlanta India Technology (P) Ltd. v. ACIT (2010) 129 TTJ 273 / 2 ITR 66 (Chennai)(SB) held that the section 10A deduction had to be allowed before set-off of the losses of the non-eligible unit. On appeal by the department to the High Court, Held dismissing the appeal:

Section 10A is a deduction provision and not an exemption provision. Section 10A has to be given effect to at the stage of computing the profits and gains of business. This is anterior to the application of the provisions of section 72 which deals with the carry forward and set off of business losses. A distinction has been made by the Legislature while incorporating the provisions of Chapter VI-A. Section 80A(1) stipulates that in computing the total income of an assessee, there shall be allowed from his gross total income, in accordance with and subject to the provisions of the Chapter, the deductions specified in section 80C to 80U. Section 80B(5) defines for the purposes of Chapter VI-A "gross total income" to mean the total income computed in accordance with the provisions of the Act, before making any deduction under the Chapter. What the Revenue in essence seeks to attain is to telescope the provisions of Chapter VI-A in the context of the deduction which is allowable under section 10A, which would not be permissible unless a specific statutory provision to that effect were to be made. In the absence thereof, such an approach cannot be accepted. Accordingly, the decision of the Tribunal is affirmed since it is plain and evident that the deduction under section 10A has to be given at the stage when the profits and gains of business are computed in the first instance (Hindustan Unilever Ltd. vs. Dy. CIT (2003) 325 ITR 102 (Bom.) followed) (A.Y. 2006-07)

CIT v. Black & Veatch Consulting Pvt. Ltd. (2012) 348 ITR 72 / 72 DTR 252 / 251 CTR 265 / (2012) Vol. 114(4) Bom.L.R. 2064 (Bom.)(HC)

S. 10A : Free trade zone - Newly established undertakings - Export of Computer Software - No material to show that assessee indulged in arrangement with foreign buyers to inflate profits - Assessing Officer not entitled to invoke provisions of Section 80I(9) and determine reasonable profits [S. 80I(9)]

The assessee was engaged in the business of manufacture of hardware and software and exported its products (both hardware and software), the assessee claimed exemption in respect of its two units. It was held that the Assessing Officer was not entitled to presume existence of close connection or arrangement of the assessee with the foreign buyer for purpose of invoking Section 80I(9) and determine reasonable profits as there was no material to indicate that the course of business had been so arranged so as to inflate profits. (A.Y. 1995-96, 1996-97 and 1998-99)

CIT v. H. B. Global Soft Ltd. (2012) 342 ITR 263 / 247 CTR 562 / 67 DTR 306 / 206 Taxman 41 (Karn.)(HC)

S. 10A : Free trade zone - Newly established undertakings - Splitting up - Allocation of expenses - Support services - Acquiring a division on slump basis cannot be considered as splitting up or reconstruction, exemption under section 10A cannot be denied - Support services allocation on the basis of turnover is justified

Assessee acquired a software division of Indian Organic Chemicals Ltd as a going concern on a slump sale basis. Assessee made claim under section 10A. The Assessing Officer rejected the claim on the ground that (1) if an STP undertaking was already engaged in manufacture of software programs before 1st April 1994 the benefit of section 10A cannot be extended (ii), it should not be formed splitting up or reconstruction of a business already in existence and it should not be formed by the transfer to new business of plant and machinery previously used for any purpose. The Assessing Officer also held that the undertaking was carrying on same business before 1995-96. The finding of Assessing Officer was confirmed by Commissioner (Appeals). On appeal to the Tribunal the Tribunal the Tribunal held that the entire software division was transferred as a going concern by an agreement dated 19th October, 1994. The soft ware unit has two sources of income viz. from the non STP activity and the STP activity. The assessee has made a claim only in respect Activity which was set up only on 24th May, 1994, hence the requirement of commencement of production on or after 1st April 1994 was fulfilled. The Court also affirmed the view of Tribunal. As regards concept of reconstruction of a business implies that the original business is not to cease functioning and its identity is not lost. Where the ownership of a business or undertaking changes hands that would not be regarded as reconstruction. As regards the splitting up of a business, the relevant test is whether an undertaking is formed by splitting up of a business already in existence. Unless the formation of the undertaking takes place by the splitting up of a business already in existence, the negative prohibition would not be attracted. In the present case, the entire business of the software undertaking was transferred to the assessee. The undertaking of the assessee was not formed by the splitting up of the business. Tribunal was therefore justified in holding that the assessee was entitled to exemption in respect of profits derived from the STP undertaking on the basis that conditions of section 10A(2) are fulfilled. As regards allocation of expenses the Court held that the Tribunal was justified in remanding the case with the direction to allocate interest and depreciation of the support services division in the ratio of turnover between the section 10A and non section 10A activities. (A.Y. 1998-99)

CIT v. Sonata Software Ltd. (2012) 343 ITR 397 / 249 CTR 441 / 70 DTR 369 (Bom.)(HC)

S. 10A : Free trade zone - Newly established undertakings - Computation of period of five years - Initial year

Assessee which had commenced its manufacturing activities in the previous year relevant to A.Y. 1984-85, could claim exemption for A.Y. 1984-85 to 1988-89 and had no option of choosing any five consecutive years for availing the benefit of exemption under section 10A. In case of an assessee who

had already started availing the benefit of section 10A in any assessment year prior to substitution of sub-section (3), there is no manner in which it could exercise option under the new sub-section (3), Hence assessee could not claim exemption under section 10A for the assessment year, 1986-87 to 1990-91. (A.Y. 1990-91)

Expo Packing v. ACIT (2012) 76 DTR 12 (Guj.)(HC)

S. 10A : Free trade zone - Newly established undertakings - Exemption granted in earlier years - No change in facts - Assessee entitled to exemption for subsequent years

The assessee was engaged in the business of development of software for in flight entertainment of aircraft passengers. For the asst. years 2000-01 and 2001-02 the relief granted under section 10A of the Act to the SEEPZ unit had not been withdrawn. There was no change in the facts which were in existence during the asst. year 2000-01 vis-à-vis the claim to exemption under section 10A of the Act. Therefore, it was not open to the dept. to deny the benefit of section 10A for the subsequent asst. years .Where a benefit of deduction available for a particular number of years on satisfaction of certain conditions under the provisions of the Income-tax Act, 1961, then unless relief granted for the first assessment year in which the claim was made and accepted is withdrawn or set aside, the Income tax Officer cannot withdraw the relief for subsequent years. More particularly so, when the revenue has not even suggested that there was any change in the facts warranting a different view for subsequent years. (A.Y. 2002-03, 2003-04 and 2004-05)

CIT v. Western Outdoor Interactive P. Ltd. (2012) 349 ITR 309 / 254 CTR 593 / 80 DTR 246 (Bom.)(HC)

Editorial:- Followed CIT vs. Paul Bros (1995) 216 ITR 548 (Bom.)(HC), Direct Information P. Ltd. vs. ITO (2012) 349 ITR 150 (Bom.)(HC)

S. 10A : Free trade zone - Newly established undertakings - Computation - Transactions with related concern - Gross profit cannot be reduced by applying the provisions of section 10A(7) read with section 80IA(10)- Computed without adjustment of loss from trading unit. [S. 80IA(10)]

Assessee wholly owned subsidiary of a German company has two divisions in India. One division at Kandla is engaged in the manufacture and export of industrial sewing machine needles. Other division at Mumbai is engaged in trading in industrial sewing machine needles which are imported from Germany. Applying section 10A(7) r.w.s. 80IA(10), the Assessing Officer concluded that the profits of the assessee for the purpose of deduction under section 10A have to be arrived at by adopting 60 per cent gross profit ratio as against 77.91 per cent shown by the assessee. Tribunal after considering the entire evidence, having come to the conclusion that the profits earned by Kandla export division of the assessee are not abnormally high due to any arrangement between the assessee and its German principal from whom goods are imported or different quality, gross profit could not be reduced by Assessing Officer by applying section 10A(7) r.w.s. 80IA(10). Exemption under section 10A has to be computed without setting off of the loss from the trading unit against the profits of the export oriented unit entitled to deduction under section 10A. (A.Y. 2004-05)

CIT v. Schmetz India (P) Ltd. (2012) 79 DTR 356 / 254 CTR 504/211 Taxman 59(Mag.) (Bom.)(HC)

S. 10A : Free trade zone - Newly established undertakings - Export Promotion zone (EPZ) - Treatment of current losses and brought forward losses of non-EPZ unit

Section 10A provides for an exemption and not merely a deduction even after the amendment by the Finance Act, 2000, as it has been retained in Chapter III of the Act notwithstanding the change in the language of sub-section (1) hereof and therefore, current loses as well as brought forward losses of the non EPZ unit cannot be deducted or reduced from the profits of EPZ unit for computing the deduction under section 10A. (A.Y. 2002-03 & 2003-04)

CIT v. Tei Technologies (P) Ltd. (2012) 78 DTR 225/(2013) 259 CTR 186 (Delhi)(HC)

S. 10A : Free trade zone - Newly established undertakings - Exemption granted to proprietary concern - Conversion of proprietorship into partnership - Partnership entitled to exemption - Circular No. 7 of 2003, dated 5-9-2003 - Beneficial circular binding on the Revenue

The assessee claimed exemption under section 10A of the Act. This was denied by the Assessing Officer on the ground that the assessee was earlier a proprietorship concern, but during the previous year, it had been converted into a partnership. The Tribunal held that the assessee was entitled to the exemption. On appeal to the High Court;

Held, dismissing the appeal, that there was no dispute that for the earlier A.Y. exemption had been granted to the undertaking. The denial of exemption on the ground that conversion of the proprietorship into partnership disentitled the assessee to the benefit under section 10A was not borne out either from the plain language of sub-sections (9) and (9A) of section 10A or in view of Circular 7 of 2003, dated Sept. 5, 2003. The beneficial circular is binding on the Revenue. Moreover, the sub-sections were no longer in existence with effect from April 1, 2004, for the A.Y. 2004-05. There was also no other provision for disallowance of the benefit to the assessee under section 10A. Therefore, the Tribunal was justified in holding that the assessee was entitled to exemption under section 10A. (A.Y. 2004-05)

CIT v. Bullet International (2012) 349 ITR 267 (All.)(HC)

S. 10A : Free trade zone - Newly established undertakings - Splitting up or reconstruction of existing business - No question of law

The assessee purchased new plant and machinery, out of 70 employees only 8 were from the earlier concern, there was no diversion of funds .The finding of CIT(A) as well as Tribunal and other facts and circumstances of the present case, make it clear that all these questions are relating o questions of facts and there is a concurrent finding of facts recorded by CIT(A) as well as Tribunal. No substantial questions of law involved appeal dismissed.

CIT v. Sagun Gems (P) Ltd. (2012) 253 CTR 614 / 78 DTR 195 (Raj.)(HC)

S. 10A : Free trade zone - Newly established undertakings - Splitting up or reconstruction of existing unit

Finding of fact of Tribunal based on material on record to the effect that the STP unit was not reconstruction of existing unit so as to be hit by section 10A(2)(ii) and that the lower authorities were not justified in denying relief under section 10A only because assessee did not maintain separate accounts for old and new units not being perverse, no interference was called for Material produced by the assessee would clearly show that the STP unit was established with plant and machinery and assets purchased after 31st March, 1996 only and the staff was also recruited and the earlier establishment also continued to work with the machinery that was purchased prior to 31st March, 1996. (A.Y. 1999-2000)

CIT v. Fusion Software Engg. (P) Ltd. (2012) 79 DTR 130 / 205 Taxman 396 (Karn.)(HC)

S. 10A : Free trade zone - Newly established undertakings - Reimbursement of expenses incurred in obtaining ISO certification, relating to rent satellite charges, printing, stationery corporate charges paid form sister concern is entitled to exemption

The assessee was engaged in the business of manufacture and export of computer software. It spent a sum of Rs. 23,52,000 in obtaining ISO quality certification. 50 per cent of this expenditure was reimbursed by the Exim Bank. The Tribunal found that the total expenses incurred by the assessee were much higher, namely, Rs. 23,52,000/- which sum was allowable as expenditure and, therefore, the grant being 50 per cent of the expenses incurred in obtaining the ISO quality certification would qualify for exemption under section 10A of the Income-tax Act, 1961. The assessee incurred certain

expenses on behalf of its sister concern. The expenses were reimbursed in the form of corporate charges. Similarly, the assessee was also reimbursed for the use of work stations belonging to the assessee for and on behalf of its sister concern. The Tribunal held that what was received by the assessee was by way of reimbursement of expenses and that since the expenses were debited to the profit and loss account and while computing the profits of the eligible undertaking, the profits were reduced to the extent of expenses, the amount received by way of reimbursement of expenses could not be reduced from the profits of business of the eligible industrial undertaking. The Tribunal directed the Assessing Officer not to reduce the profits of business by the amount of Rs. 20 lakhs received by way of corporate charges and Rs. 9,00,250/- received by way of reimbursement recovered for use of work stations. On appeal by revenue High Court confirmed the order of Tribunal. (A.Y. 1999-2000)

CIT v. Perot Systems TSI India Ltd. (2012) 349 ITR 563 (Delhi)(HC)

S. 10A : Free trade zone - Newly established undertakings - Reconstruction / splitting up of business - Programme management services - Held eligible exemption

The assessee, which had claimed and was granted the benefit of section 80HHE during an earlier year, claimed benefit of section 10A for the A.Y. 2001-02. The Assessing Officer was of the opinion that the assessee's claim was impermissible on the ground that the assessee had already secured deduction under section 80HHE for the assessment year 2000-01 and, consequently, was not permitted deduction under section 10A for the subsequent years. The Assessing Officer appears to have taken into consideration the fact that the STP unit was set up in Chennai thus, suggesting that it was formed by splitting up an existing unit under section 80HHE. He held therefore, that the unit was not eligible for the deduction by reason of section 10A(2)(ii). The other ground on which the Assessing Officer seems to have disallowed the claim was that by virtue clause (i) of Explanation 2 to section 10A, the only activity which qualified for the benefit was 'computer software development' and that the assessee's activity i.e., programme management services did not fall within the definition so as to be eligible for benefit. On appeal, the Tribunal deleted the additions and disallowance made by the Assessing Officer. On appeal to the High Court by revenue the Court held the expression 'splitting up' and 'reconstruction' have to be read along with word 'business'. Since besides a mere statement that setting up of unit in Chennai amounted to splitting up of an already existing unit, Assessing Officer did not seem to have recorded any other finding, such assumption based finding could not be accepted. Further program management services' which is a method of providing software to achieve a particular end would fall within ambit of term 'computer software' occurring in Explanation 2 to section 10A and would be eligible for deduction under section 10A. Appeal of revenue was dismissed. (A.Y. 2001-02)

CIT v. EDS Electronic Data Systems (India) (P.) Ltd. (2012) 211 Taxman 133 (Delhi)(HC)

S. 10A : Free trade zone - Newly established undertakings - Software development -Matter remanded [S. 80IB]

Assessee, a scientific technology company, had set up a Global Technology Centre and claimed deduction under section 10A treating it to be a STP involved in software development. Assessing Officer disallowed claim holding that services and products of assessee were not eligible for deduction under section 10A. Assessing Officer also disallowed assessee's alternative claim for deduction under section 80IB. While deciding issue Assessing Officer had not considered decisions relied upon by assessee, hence, matter was remanded back to him. (A.Y. 2007-08)

GE India Technology Centre (P.) Ltd. v. Dy. CIT (2012) 54 SOT 130 (URO)(Bang.) (Trib.)

S. 10A : Free trade zone - Newly established undertakings - Export - Communication charges to be excluded from export turnover as well as total turnover

Tribunal held that while computing exemption under section 10A of the Act, communication charges to be excluded from the export turnover as well as the total turnover. (A.Y. 2005-06)
ACIT v. Ckar Systems P. Ltd. (2012) 20 ITR 817 / (2013) 55 SOT 553 (Hyd.)(Trib.)

S. 10A : Free trade zone - Newly established undertakings - Product must be of STPI Zone - Outsourcing certain services - Exemption cannot be denied
Writing of computer programme at premises of assessee's unit is not relevant matter and so long as product is produced by assessee in STPI zone, assessee would be entitled for benefit of section 10A. Outsourcing is part and parcel of manufacturing activity and, therefore, merely because assessee has outsourced certain services necessary for producing an article or a thing, it cannot be a ground to reject assessee's claim for exemption under section 10A**.** Appeal of department was dismissed. (A.Y. 2003-04, 2004-05)
ACIT v. Technics Consulting Ltd. (2012) 54 SOT 128 (Hyd.)(Trib.)

S. 10A : Free trade zone - Newly established undertakings - Demerger - Exemption cannot be allowed and income also not assessable in the hands of transferor [S. 2(19AA), 72A]
The assessee company set up an approved STPI in the assessment year 2002-03. On 1-10-2004, i.e., in A.Y. 2005-06, the STPI undertaking was demerged and transferred to LTVE in a scheme of demerger after due approval by the High Court. The assessee filed its return of income for assessment year 2005-06 claiming deduction under section 10A in respect of income attributable to the export turnover of the STPI unit from 1-4-2004 to 30-9-2004, i.e., the date of the demerger. The Assessing Officer disallowed the assessee's claim for deduction under section 10A holding; *inter alia* that in view of demerger, the provisions of section 10A(7A) become applicable and, accordingly, the assessee-company was not eligible to claim deduction under section 10A of the Act for assessment year 2005-06. The Commissioner(Appeals) allowed the assessee's appeal. On appeal to the Tribunal, the Tribunal held that, before a period of 10 years assessee's STPI unit was demerged and transferred to another company on 1-10-2004. In view of section 10A(7), assessee was to be denied deduction under section 10A for entire previous year relevant to A.Y. 2005-06. Income for this period was also not assessable in assessee's hands but in transferee company's hands which was also entitled to deduction under section 10A. Partly in favour of assessee. (A.Y. 2005-06)
JCIT v. Valdel Engineers & Constructors (P.) Ltd. (2012) 54 SOT 137 (URO) (Bang.)(Trib.)

S. 10A : Free trade zone - Newly established undertakings - Provisions of section 10A as amended with effect from 1-4-1999 were not there in statute on first day of assessment year 1998-99, assessee could not claim exemption under section 10A for relevant assessment year
Assessee claimed exemption under section 10A for a period of five years from assessment years 1991-92 to 1995-96. Provisions of section 10A were amended by Income-tax (Second Amendment) Act, 1998 with effect from 1-4-1999 extending benefit of exemption under section 10A for a period of ten consecutive assessment years beginning with assessment year in which eligible undertaking began to manufacture or produce. Relying on said amendment, assessee claimed exemption under section 10A for year under consideration, i.e., 1998-99, on basis that it was ninth year from assessment year in which its eligible undertaking began manufacture or production. Assessing Officer rejected assessee's claim on ground that such exemption was not claimed by assessee in preceding two years, i.e., A.Y. 1996-97 and 1997-98, and extended period of exemption upto ten years was applicable only to those undertakings which were currently enjoying benefit of section 10A. Since provisions of section 10A as amended with effect from 1-4-1999 were not there in statute on first day of A.Y. 1998-99, assessee could not claim exemption under section 10A for relevant assessment year relying on said amended provisions. Therefore, Assessing Officer was justified in denying claim of assessee. (A.Y. 1998-99 to 2001-02)
TATA Consultancy Services Ltd. v. ACIT (2012) 54 SOT 221 (URO)(Mum.)(Trib.)

S. 10A : Free trade zone - Newly established undertakings - Loss-Set-off

Assessee has three units / undertakings all of which qualify for deduction under section 10A as separate undertakings. Set off of loss from one of the section 10A units is allowable against the taxable profits from the other section 10A units and non section 10A unit. (A.Y. 2004-05 & 2005-06)

ACIT v. Genesys International Corporation Ltd. (2012) 80 DTR 4 / (2013) 151 TTJ 588 (Mum.)(Trib.)

S. 10A : Free trade zone - Newly established undertakings - Conversion - Conversion of existing unit to STP unit, rejection of claim was held to be justified

The assessee company has set up its industrial undertaking in the assessment year 1996-97 in domestic tariff area. The assessee received approval of STPI on 28-3-2000. The claim of deduction under section 10A was rejected by the assessing officer on the ground that there was conversion of the undertaking established in assessment year 1996-97 into STPI unit and the ownership/beneficial interest had been transferred in the year under consideration in terms of section 10(A)(9), read with Explanation 1. On facts the Tribunal found that in the application for conversion of existing unit, the assessee had included infrastructure, staff and skilled labour etc of existing unit in STP unit which cannot conversion of a unit already set up. The Tribunal also held that beneficial share holdings were less at 47.70 % as on 31-3-2001 as against shares held by them as on 31-3-2006. As the beneficial share holdings were less than 51 percent, provisions of section 10(A)(9) is applicable. Accordingly the Tribunal confirmed the order of assessing officer rejecting the claim under section 10A. (A.Y. 2002-03)

Infrasoft Technologies Ltd. (2012) 135 ITD 19 / 144 TTJ 622 (Delhi)(Trib.)

S. 10A : Free trade zone - Newly established undertakings - Depreciation - Deduction under section 10A / 10B has to be allowed only after deducting depreciation from profits of eligible business though such a claim for depreciation has not been raised by assessee [S. 10B, 32]

The assessee claimed deduction under section 10A/10B without claiming depreciation. The Assessing Officer held that in the past the assessee has claimed the depreciation, accordingly the Assessing Officer has allowed the depreciation, which was confirmed in appeal by Commissioner(Appeals). On appeal to the Tribunal, the Tribunal following the ratio of decision in Indian Rayon Corporation Ltd. v. CIT (2003) 261 ITR 98 (Bom.), up held the order passed by the Assessing Officer. (A.Y. 2001-02)

Siemens Information Systems Ltd. v. Dy. CIT (2012) 135 ITD 196 / 71 DTR 12 / 146 TTJ 303 (Mum.)(Trib.)

S. 10A : Free trade zone - Newly established undertakings - Avoidance of tax - Transfer pricing - Deduction under section 10A, cannot be worked on arm's length price [S. 14A, 92C, 144C]

The Assessing Officer referred the matter to Transfer Pricing Officer to determine the arm's length price in respect of finance and accounting services to its associate enterprise. The Transfer Pricing Officer has accepted the method adopted by the assessee and no adjustments were made. However, the Transfer Pricing Officer, passed the a draft order under section 144C(1) restricting the claim under section 10A by deducting the lease line charges incurred by the assessee from export turnover on the ground that those expenses were incurred by delivery of software outside India and foreign travel expenses from export turn over for the reasons that they were incurred in providing technical services outside India. He also proposed disallowance of 0.5% of the investment expenditure estimated to have been incurred for earning non-taxable income in accordance with of rule 8D, read with section 14A. The Assessing Officer reduced the quantum of deduction under section 10A. The Dispute Resolution Panel rejected all the objections of assessee and confirmed the order of Transfer Pricing Officer. On appeal the Tribunal held that section 10A deduction not to be worked out on basis of Transfer Pricing Officer. That all such adjustments made by the Assessing Officer to the export

turnover of the assessee had also to be made in the total turnover of the assessee. The disallowance under rule 8D was held to be not justified. A reasonable disallowance can be made. The draft assessment order cannot be said to be bad in law. When adjustments made by the were deleted by the Tribunal that irregularity was automatically cured. In such circumstances the assessment order need not be invalidated. Therefore, the assessment is not time barred. (A.Y. 2007-08)

Visual Graphics Computing Services (India) P. Ltd. v. ACIT (2012) 15 ITR 393 / 75 DTR 243 / 148 TTJ 621 / 52 SOT 172 (URO)(Chennai)(Trib.)

S. 10A : Free trade zone - Newly established undertakings - Export oriented undertaking - Expenses disallowed - Expenses disallowed and added to profits of business is eligible deduction [S. 80IA(10)]

If any addition is made to the profits by way of disallowance of expenses, the amount added would form part of the profits of the business and the same has to be considered while working out deduction under section 10A. (A.Y. 2004-05)

Sanghvi Jewellery Mfg. Co. (P) Ltd. v. ITO (2012) 68 DTR 177 / 145 TTJ 137 (Mum.)(Trib.)

S. 10A : Free trade zone - Newly established undertakings - Losses of S. 10A eligible units allowed to be set-off against normal business income

Tribunal held that the losses of Section 10A eligible units are allowed to be set-off against the normal business income of the assessee while calculating the income as per normal provisions of the Act. (A.Y. 2002-03 & 2003-04)

Patni Computer Systems Ltd. v. Dy. CIT (2012) 135 ITD 398 / 16 ITR 533 / (2011) 60 DTR 113 / 141 TTJ 190 (Pune)(Trib.)

S. 10A : Free trade zone - Newly established undertakings - Manufacture - Blending and processing of tea is held to be manufacture hence entitled to exemption [S. 2(29BA), 10AA, 10B, Special Economic Zones Act, 2005 S. 2(r)]

The Special Bench had to consider whether the assessees engaged in the business of blending & processing of tea and export thereof can be said to be "manufacturer/producer" of the tea for the purpose of section 10A/10B of the Act. Held by the Special Bench, after a comprehensive review of the entire law on the subject, and deciding in favour of the assessee:

The assessee was exclusively engaged in blending and packing of tea for export and was not manufacturing or producing any other article or thing. It was recognised as a 100% EOU division and the Department had no case that the assessee's unit engaged in export of tea bags and tea packets was not a 100% EOU. If exemption was denied on the ground that products exported were not produced or manufactured in the industrial unit of the assessee's 100% EOU, it would defeat the very object of s. 10B of the Act. When the products for which the assessee's unit is recognized as a 100% EOU are tea bags, tea in packets and tea in bulk packs and the assessee is exclusively engaged in blending and packing of tea for export may not be manufacturer or producer of any other article or thing in common parlance. However, for purposes of section 10A, 10AA & 10B, the definition of the word "manufacture" as defined in section 2(r) of SEZ Act, Exim Policy, Food Adulteration Rules, 1955, etc have to be considered. The definition of 'manufacture' as per section 2(r) of SEZ Act, 2005 is incorporated in section 10AA of the I. T. Act w.e.f. 10.02.2006. This amendment is clarificatory in nature. The definition of 'manufacture' under the SEZ Act etc is much wider than what is the meaning of the term 'manufacture' under the Income-tax Act. (A.Y. 2003-04 to 2005-06)

Madhu Jayanti International Ltd. v. Dy. CIT (2012) 137 ITD 377 / 148 TTJ 1 / 74 DTR 401 / 18 ITR 1 (SB.)(Kol.)(Trib.)

Narendra Tea Co. (P) Ltd. v. JCIT (2012) 148 TTJ 1 / 74 DTR 401 / 18 ITR 1 (SB.)(Kol.)(Trib.)

Rajrani Exports (P) Ltd. v. Dy. CIT (2012) 148 TTJ 1 / 74 DTR 401 / 18 ITR 1 (SB.) (Kol.) (Trib.)

Tea Promoters (India) (P) Ltd. v. Dy. CIT (2012) 148 TTJ 1 / 74 DTR 401 /18 ITR 1 (SB.) (Kol.) (Trib.)

S. 10A : Free trade zone - Newly established undertakings - Section 10A(9) applied prospectively but its omission has retrospective effect

Till A.Y. 2003-04, the assessee's shares were held by British Airways and Warburg Pincus. In A.Y. 2003-04, there was a change in the beneficial interest in the shareholding. For A.Y. 2004-05, the assessee claimed section 10A deduction of Rs. 19 crores in respect of its STPs which were set up pre-2000. The CIT took the view that the section 10A deduction was not allowable for A.Y. 2003-04 & 2004-05 in view of section 10A(9) which was introduced in A.Y. 2001-02 to provide that if the "beneficial interest" in the undertaking was transferred, section 10A deduction would not be allowed. For A.Y. 2003-04, the CIT's stand was upheld by the Tribunal. However, for A.Y. 2004-04, Held by the Tribunal, reversing the CIT:

(i) Circular No. 8 of 2002 dated 27.8.2002 states that section 10A(9) was inserted in A.Y. 2001-02 to "to curb trading in incentives by shell companies and to discourage unscrupulous shopping of EOUs and STPs and not to discourage genuine business re-organizations". On facts, the change in the assessee's shareholding was by way of global re-organization of the business and cannot be said to be non-genuine;

(ii) When section 10A(9) was omitted in A.Y. 2004-05, the Finance Minister said in the budget speech that the provision was "illogical" and had to be removed. Given the object & purpose of the omission, it can be held that the omission has retrospective effect and applies to change in the ownership in A.Y. 2003-04. Further, sub-section (9) was omitted without any saving clause and it is not a case of repeal. If a provision in a statute is unconditionally omitted without any saving clause in favour of the pending proceedings, all actions must stop where such an omission is found. As section 10A(9) has been omitted, it is as if the sub-section never existed in the statute (G.E. Thermo Matrix, ITAT B'lore followed);

(iii) Though for A.Y. 2003-04, the Tribunal upheld the CIT's stand, this cannot be followed as a precedent because (a) while in A.Y. 2003-04, section 10A(9) was on the statue and there was a change in shareholding, in A.Y. 2004-05, it was not, (b) In Zycus Infotech (2011) 331 ITR 72 (Bom.) it was held that section 10A(9) does not have retrospective effect and is applicable only to undertakings set up after 1.4.2001. As the assessee's STP undertakings were set up before that date, section 10A(9) had no application. (A.Y. 2004-05)

WNS Global Services Pvt. Ltd v. ITO (2012) 20 ITR 470 (Mum.)(Trib.)

S. 10A : Free trade zone - Newly established undertakings - Not provide for excluding an income from total income - Allows deduction of profits and gains

Provisions of section 10A are no longer provisions which provides for excluding an income from total income of an assessee (exempt income) but which envisages and allows a deduction of profits and gains specified therein. (A.Y. 2003-04, 2004-05, 2007-08)

Opus Software Solutions Ltd. v. ACIT (2012) 139 ITD 427 (Pune)(Trib.)

S. 10A : Free trade zone - Newly established undertakings - Foreign remittance certificate should refer the period of within six months

Assessee, engaged in business of manufacturing and export of processed food products, claimed deduction under section 10A. It was held that In terms of provisions of section 10A, unless foreign remittances are credited in the account of the assessee or at least credited in account of bank, it cannot be said that export proceeds have been received in or brought into India. Since certificate issued by Bank did not state that foreign remittances had been credited in its account within period of six months so that it could be considered as having brought into India, assessee's claim was rightly rejected. (A.Y. 2007-08)

Capital Foods Exports (P.) Ltd. v. ACIT (2012) 139 ITD 584 (Mum.)(Trib.)

S. 10A : Free trade zone - Newly established undertakings - Conversion of DTA to STP is allowed hence there is no splitting up or reconstruction of existing business assessee is entitled to exemption

Conversion from DTA to STP unit was allowed pursuant to the application filed by the assessee with STPI. There was no restructuring and/or transfer of the business as such. There was no violation of the conditions as mentioned in section 10A(2)(ii) and (iii) as there was neither splitting up nor reconstruction of the business already in existence. Conversion and splitting up or reconstruction are completely different terms. Moreover, conversion cannot be termed as transfer. As regards non intimation of commercial production to STPI, there is nothing on record to suggest that the permission granted by STPI, was subsequently cancelled or withdrawn on the basis that the assessee did not give intimation to STPI in respect of the commencement of commercial production. Moreover, in the subsequent year, STPI itself intimated the Assessing Officer that the condition of intimation is immaterial. Therefore, assessee is entitled for exemption under section 10A. (A.Y. 2007-08)

Cadtrium Engineering Solutions (P) Ltd. v. ITO (2012) 78 DTR 347 / 111 TTJ 124 / (2013) 58 SOT 3 (URO)(Delhi)(Trib.)

S. 10A : Free trade zone - Newly established undertakings - Delay in filing return - Mandatory [S. 139, 234A]

The special bench was constituted to decide the following question, "Whether the proviso to section 10A(IA) of the Income-tax Act which says that no deduction under section 10A shall be allowed to an assessee who does not furnish a return of his income on or before the due date specified under section 139(1) is mandatory or merely directory?". The Tribunal held that provisions of section 10A(IA) are mandatory and not directory; deduction under section 10A cannot be allowed to an assessee who does not furnish return on or before due date specified under sub section (1) of section 139. The charging of interest is held to be mandatory. When one of the consequences for not filing return of income within due date prescribed under section 139(1) is mandatory then other consequences cannot be held to be directory and the same is also mandatory. (A.Y. 2006-07)

Saffire Garments v. ITO (2013) 140 ITD 6 / 151 TTJ 114 / 20 ITR 623 / 81 DTR 131 (SB) (Rajkot)(Trib.)

S. 10AA : Special economic zones - Newly established Units - Manufacture - Precious and semi precious stones - Trading in re-export of imported goods is entitled to deduction

The assessee firm was engaged in the business of trading and manufacturing of precious and semi precious stones, diamond and studded gold jewellery. It claimed deduction under section 10AA, in respect of profits from Surat Unit. The Assessing Officer has disallowed the claim. The Commissioner(Appeals) allowed the claim of the assessee. On appeal to the Tribunal by revenue, the Tribunal held that vide instruction No. 1/2006 dated 24-3-2006 of Ministry of Commerce, it was clarified that trading unit can be set up in SEZ. Further, modification was made to it by another instruction dated 24-5-2006, in which it was made clear that deduction under section 10AA will be available in respect of trading in the nature of re-export of imported goods. Since the said instruction modifying it was not yet withdrawn or Board has not issued any other instruction modifying it that the same would not be applicable for purpose of allowing under section 10AA, assessee is entitled deduction under section 10AA. The order of Commissioner(Appeals) is confirmed. (A.Y. 2008-09)

Dy. CIT v. Goenka Diamond & Jewellers Ltd. (2012) 50 SOT 307 / 69 DTR 209 / 146 TTJ 68 (Jaipur)(Trib.)

S. 10B : Hundred per cent export-oriented undertakings - Newly established - Reconstruction of business - Shifting of unit was done with the permission of Government entitled to exemption

Assessee company was engaged in software development from its unit located at Gujarat. It commenced its business in the year 1989.It was entitled to benefit of section 10B for a period of 10 years. During 1992-93 it shifted its unit to Bangalore and claimed deduction under section 10B. Assessing Officer held that the shifting of unit will amount to reconstruction of business, hence, not entitled to exemption under section 10B. Hon'ble High Court held that, when the shifting had been done with permission of Government and after shifting, there was only one undertaking whose identity, integrity and continuity was maintained, therefore, the assessee was entitled to claim exemption under section 10B. (A.Y. 1992-93)

CIT v. Sasken Communications Tech. Ltd. (2012) 204 Taxman 84 / 347 ITR 362 (Karn.)(HC)

S. 10B : Hundred per cent export-oriented undertakings - Newly established Extended period of deduction - Amended provisions came into force on 1st April, 1999 - Assessee is entitled for extended tax holiday under amended provision

Assessee commenced its production in the 100 percent EOU in the year 1993-94 and claimed the exemption for five years from 1993-94 to 1997-98. Amended provision came into force on 1st April 1999, under which the assessee was entitled to claim the benefit of tax holidays for 10 years and accordingly the assessee claimed deduction for 1999-2000, 2000-01 and 2001-02. Assessing Officer denied the deduction for the period 2001-02. The High Court held that where the assessee is entitled to the tax holiday under the amended provision for further period of five years i.e. from 1993-94 to 2002-03 as per amendment of section 10B w.e.f. 1st April, 1999 extending the benefit to 10 Years. (A.Y. 2001-02)

CIT v. DSL Software Ltd. (2012) 66 DTR 97 / 246 CTR 542 / (2013) 351 ITR 385 (Karn.)(HC)

S. 10B : Hundred per cent export-oriented undertakings - Newly established - EOU - Set off of loss - Loss of eligible unit can be set off against the income arising from other units [S. 70, 80IA(5)]

After substitution by Finance Act, 2000 w.e.f. 1st April, 2001, section 10B is not a provision for exemption, but a provision which enables an assessee to claim a deduction, therefore, a loss which is sustained by an eligible unit can be set off against the income arising from other units under the same head of profits and gains of business or profession. (A.Y. 2005-06)

CIT v. Galaxy Surfactants Ltd. (2012) 343 ITR 108 / 249 CTR 38 / 69 DTR 42 (Bom.)(HC)

S. 10B : Hundred per cent export-oriented undertakings - Newly established - Amalgamation

The subsidiary company amalgamated with the holding company w.e.f. 1st Jan., 1993 and as a result of the merger, the business of the amalgamating company became the business of the assessee company. Given the fact that the assessee is a holding company of the subsidiary company, when the assets stood transferred to the amalgamated company, evidently, the export business done by the assessee is not a business formed by splitting up or reconstruction of a business already in existence. As far as sub cl. (iii) of section 10B(2) is concerned, the criteria for grant of the relief is that the undertaking is not formed by transfer to a new business of machinery or plant previously used for any purpose. On merger, the amalgamating company looses its entity. But, then by such merger there is no formation of new business to disqualify the claim of the assessee for deduction under section 10B. The CBDT Circular F. No. 15/5/63-ITA-I, dated 13th Dec., 1963, referred the benefit of section 84 as available to successor for remaining years. After the deletion of section 84 from the statute book, and insertion of 80J and thereafter benefit under section 10B being attached to the undertaking, there is no ground to reject the assessee's claim for 100 per cent deduction attached to the undertaking. (A.Y. 1994- 95)

CIT v. Shri Renuga Textiles Mills Ltd. (2012) 77 DTR 355 / 254 CTR 423 (Mad.)(HC)

S. 10B : Hundred per cent export-oriented undertakings - Newly established - Notification - Mere approval under STP Scheme does not entitled to exemption

In the absence of any notification or official document suggesting that either the Inter Ministerial Committee or any other officer or agency was nominated to perform the duties of the Board constituted under section 14 of Industries (Development and Regulation) Act, 1951 for the purposes of approvals under section 10B, mere approval for the purpose of STP does not entitle the unit to benefit under section 10B. Appeal of revenue was allowed. (A.Y. 2003-04, 2004-05, 2006-07 & 2007-08)

CIT v. Regency Creations Ltd. (2012) 79 DTR 24 / 211 Taxman 152 (Mag.) / (2013) 255 CTR 63 /353 ITR 326 (Delhi)(HC)

CIT v. Valiant Communications Ltd. / (2012) 79 DTR 24/211 Taxman 152/(2013) (2013) 255 CTR 63 /353 ITR 326 (Delhi)(HC)

S. 10B : Hundred per cent export-oriented undertakings - Newly established Manufacture - Cutting of marble blocks entitled to exemption

Activity of cutting marble blocks and converting into the polished slabs and tiles constitutes manufacture or production and therefore assessee was entitled to exemption under section 10B. (A.Y. 2004-05)

Grace Exports v. ITO (2012) 79 DTR 361 / 254 CTR 449 (Raj.)(HC)

S. 10B : Hundred per cent export-oriented undertakings - Newly established - Splitting up or reconstruction-Reconstitution of partnership firm does not amount to splitting up or reconstruction of partnership business already in existence so as to deny exemption under section 10B - Matter remanded to verify whether the activity amount to manufacture.[Income – tax Rules 1962, Rule 46A]

The assessee was a partnership firm engaged in the business of export of handicrafts items. In the return of income the assessee claimed the entire business income to be exempt under section 10B. The Assessing Officer rejected the assessee's claim on the ground that, there was a reconstitution of assessee-firm which resulted in reconstruction or splitting up of existing business, the assessee was not engaged in the manufacture or production of any article or thing as required by clause (i) of sub-section (2) of section 10B, the EOU belonging to assessee was not custom bounded and no bonding license had been obtained as required by the Development Commissioner, SEZ. Commissioner(Appeals) allowed the claim of assessee, which was confirmed by Tribunal. On revenue appeal the Court held that Mere reconstitution of partnership firm does not amount to splitting up or reconstruction of partnership business already in existence so as to deny exemption under section 10B, in order to claim exemption under section 10B, custom-bonding is required only where imports are contemplated for purposes of manufacture, production, packaging etc. for purposes of export of goods or services out of India. To examine the issue whether the assessee was engaged in the manufacturing or production of article or thing the matter was remanded to the Assessing Officer. (A.Y. 2006-07, 2007-08)

CIT v. Arts Beauty Exports (2012) 211 Taxman 155 (Mag.) / (2013) 82 DTR 17/357 ITR 276 (Delhi) (HC)

S. 10B : Hundred per cent export-oriented undertakings - Newly established -Computation - Set off of losses of earlier years - Deduction to be computed without setting off any carried forward losses of earlier assessment years

While calculating deduction under section 10B of the Act, the Assessing Officer held that brought forward losses should be set off before grant of deduction under section 10B. The Commissioner(Appeals) held that deduction under section 10B was to be computed without setting off any carried forward losses of earlier assessment years. On appeal by the Department, the Tribunal

held that exemption under section 10B was to be allowed without setting off brought forward unabsorbed loss and depreciation from the earlier assessment year or the current assessment year. (A.Y. 2005-06)
ACIT v. Charon Tech. P. Ltd. (2012) 20 ITR 487 (Chennai)(Trib.)

S. 10B : Hundred per cent export-oriented undertakings - Newly established - Eligible units - Allocation of common expenses - Remuneration of managing director is to be allocated
The Tribunal held that while computing profits and gains of eligible units under section 10B all expenditure relatable to such units are to be deducted for computing eligible profits. Therefore, remuneration paid to managing director being common expenditure between eligible units and non-eligible unit run by assessee-company it needed to be allocated in order to determine eligible profits of business under section 10B. The appeal of assessee was dismissed. (A.Y. 2007-08)
Nahar Spinning Mills Ltd. v. JCIT (2012) 54 SOT 134 (URO)(Chd.)(Trib.)

S. 10B : Hundred per cent export-oriented undertakings - Newly established -Computation - Carry forward business losses and depreciation cannot be set off
Carry forward business losses and depreciation cannot be set off against profits of an undertaking while working out claim under section 10B. (A.Y. 2005-06 to 2007-08)
ASB International (P.) Ltd. v Dy. CIT (2012) 54 SOT 140 (URO)(Mum.)(Trib.)

S. 10B : Hundred per cent export-oriented undertakings - Newly established - Splitting up - Reconstruction-Separate undertaking for production of similar goods - Entitled for exemption
Assessees earlier undertaking which started in the A.Y. 1994-95, stopped its sales with effect from the A.Y. 1998-99 onwards. New undertaking was set up in the A.Y. 2002-03. The Tribunal held that provisions of section 10B do not place any bar on the assessee having a separate new undertaking for manufacture and production of same or similar goods as done earlier. Development Commissioner did not take any objection. Process carried on by assessee to produce quilts, bed sheets, bed spreads and bed covers etc. are commodities different from the new raw cloth or consumables out of which they are manufactured. (A.Y. 2002-03 & 2003-04)
Taurus Merchandising (P) Ltd. v. ITO (2012) 138 ITD 204 / 143 TTJ 1 / 65 DTR 48 (Delhi)(Trib.)

S. 10B : Hundred per cent export-oriented undertakings - Newly established - Allocation of expenses - Charity - Miscellaneous expenses should be excluded - Management salary expenses is to be allocated in the ratio of sales turnover
Charity and miscellaneous expenses should be excluded from allocation of expenses pertaining to export oriented unit. As regards the management salary, the allocation should be made in the ratio of sales turnover as adopted by the assessee itself to allocate other expenses. This method of allocation was more accurate and correct to facts of the case. The basis adopted by the assessee of time estimated in proportion to the production capacity employed in export oriented units and non-export oriented plants was unreliable and unscientific. (A.Y. 2004-05, 2005-06, 2006-07)
Dy. CIT v. Cosmo Films Ltd. (2012) 13 ITR 340 / 139 ITD 628 (Delhi)(Trib.)

S. 10B : Hundred per cent export-oriented undertakings - Newly established - Software development - Computation - Exemption to be allowed separately in respect of each unit without setting off of losses of the units
The assessee has five units which are developing the software. Four units suffered the loss and one unit earned the profit. Assessee claimed the exemption under section 10B on the income of profit making unit and carried forward the losses of other units. Assessing Officer computed the gross total income after setting off the losses of other units against the profit making unit. On appeal

Commissioner(Appeals) confirmed the view of Assessing Officer. On appeal to Tribunal, the Tribunal held that the assessee is entitled to deduction in respect of eligible units, while the loss of other units could not be set off against normal business income. i.e. Deduction under section 10B(4) can be allowed in respect of each unit separately without setting off losses of other units, matter remanded for consideration. (A.Y .2002-03)

Aithent Technologies (P) Ltd. v. ITO (2012) 134 ITD 521/ 144 TTJ 731 / 68 DTR 68 (Delhi)(Trib.)

S. 10B : Hundred per cent export-oriented undertakings - Newly established - Interest on income-tax refund - Claimed netting off same against interest paid - Netting off is not allowable as income tax refund has no connection with the business of assessee

During the year the assessee earned interest on income tax refund. The assessee claimed the exemption under section 10B. The Assessing Officer disallowed the claim. On appeal the Commissioner(Appeals) allowed the claim. On appeal by revenue, the Tribunal held that, since interest received by assessee from department on income tax refund had no connection with business of assessee no deduction could be allowed under section 10B. (A.Y. 2002-03)

Dy. CIT v. American Express (India) (P) Ltd. (2012) 135 ITD 211 / 70 DTR 330 / 146 TTJ 442 (Delhi)(Trib.)

S. 10B : Hundred per cent export-oriented undertakings - Newly established - Commercial production - Extension of relief period available for existing units

The assessee, a 100% EOU, commenced commercial production in A.Y. 1992-93 and was entitled to claim exemption under section 10B(3) in any 5 consecutive assessment years falling within the period of 8 years. The assessee did not claim a deduction in the first 3 assessment years as there was a loss and claimed it for the first time in A.Y. 1995-96. The eligibility period was upto A.Y. 1999-2000. With effect from 1.4.1999, the period of exemption prescribed under section 10B(3) of 5 years was substituted by 10 years. The assessee claimed that it was entitled for exemption under section 10-B for a further period of two years i.e. A.Y. 2000-01 and 2001-02. Thereafter, w.e.f. 1.4.2001, section 10B was substituted by the Finance Act, 2000. The assessee's claim was resisted by the Assessing Officer & CIT(A) on the ground that the benefit applied only to "new undertakings" set up after that date and not to existing units. Held by the Special Bench:

(i) In A.Y. 1999-2000, before expiry of the original time limit of five consecutive assessment years for which deduction was available as per then applicable law, the amended law became applicable and the assessee was accordingly eligible for deduction for the extended period of 10 years, as against 5 years allowed under the preamended law (DSL Software Ltd followed);

(ii) If there is only one decision of a non-jurisdictional Hon'ble High Court on the issue, it is binding on the Special Bench in view of the settled principle of judicial proprietary;

(iii) The department's argument that the new units set up by the assessee was a mere "capacity extension" and not a separate industrial undertaking on the basis that the certificates granted by the EOU authorities was for enhanced capacity and not for setting up a new industrial undertaking is not acceptable because section 10B does not stipulate the issue of a separate approval for each unit from the competent authority. The only requirement is that the undertaking should be approved (Saurashtra Cement & Chemical Industries (2003) 260 ITR 181 (SC) distinguished)

(iv) On the question whether export incentives are "derived" from the undertaking and are eligible for deduction under section 10B, section 10B(4) stipulates a formula by apportioning the profits of the business of the undertaking in the ratio of turnover to the total turnover. Thus, though section 10B(1) refers to profits "derived" by the EOU, the manner of determining such eligible profits has to be done as per the formula. Section 10B(4) does not require an assessee to establish a direct nexus with the business of the undertaking and once an income forms part of the business of the

undertaking, the same would be included in the profits of the business of the undertaking and be eligible for deduction. (A.Y. 2001-02, 2002-03)
Maral Overseas Ltd. v. ACIT (2012) 136 ITD 177 / 146 TTJ 129 / 70 DTR 170 / 16 DTR 565 (SB)(Indore)(Trib.)

S. 10B : Hundred per cent export-oriented undertakings - Newly established - Export or transfer of film software - Deduction under both section is not allowable [S. 80HHF]
Assessee set up an EOU unit. It claimed deduction under section 10B. With regard to its other businesses it claimed deduction under section 80HHF. While computing deduction under section 80HHF it included export profit of EOU. The Commissioner(Appeals), however, reduced profit derived from EOU on ground that profit derived by EOU was exempt from tax under section 10B. The Tribunal held that the express intention of Legislature with regard to sections 10B and 80HHF is not to allow deduction under both sections and further, both of said sections expressly prohibits to allow deduction other than allowable under respective sections. Therefore, order of Commissioner(Appeals) was confirmed. (A.Y. 2001-02)
ACIT v. Sri Adhikari Brothers Television Network Ltd. (2012) 137 ITD 154 / 149 TTJ 324 / 76 DTR 244 (Mum.)(Trib.)

S. 10B : Hundred per cent export-oriented undertakings - Newly established - Exemption - Customization of SAP programmes as per the specification of client & its transmission through internet or e-mail - Falls in definition of 'Computer Programme' and 'Produce', hence, entitled to exemption
The activity of customization of SAP programmes as per the specification and requirements of the overseas clients and transmission thereof through internet or e-mail by the assessee fall within the definition of 'computer programmes' as clarified in section 10BB as well as under Expln. 2 to section 10B and the same fits into the definition of the term 'produce' and, therefore, assessee is entitled for exemption under section 10B in respect of the receipts from overseas clients. (A.Y. 1997-98 & 1999-2000)
Cybertech Systems & Software Ltd. v. CIT (2012) 149 TTJ 17 / 76 DTR 1 (Mum.)(Trib.)
CIT v. Cybertech Systems & Software Ltd. (2012) 149 TTJ 17 / 76 DTR 1 (Mum.)(Trib.)

S. 10B : Hundred per cent export-oriented undertakings - Newly established - Interest income - No direct nexus with the income derived from undertaking by the export of the computer software, no exemption
Interest income has no direct nexus with the income derived by the assessee from its undertaking by the export of the computer software and, therefore, assessee is not entitled to exemption under section 10B in respect of interest income. (A.Y. 1997-98 to 1999-2000)
Cybertech Systems & Software Ltd. v. CIT (2012) 149 TTJ 17 / 76 DTR1 (Mum.)(Trib.)
CIT v. Cybertech Systems & Software Ltd. (2012) 149 TTJ 17 / 76 DTR1 (Mum.)(Trib.)

S. 10B : Hundred per cent export-oriented undertakings - Newly established - Exemption - To claim exemption under section 10B, there is no legal bar against outsourcing of activities
Provisions of section 10B do not place any bar on assessee having a separate new undertaking for manufacture and production of same or similar goods, as done earlier because what is required to claim exemption under said section is that undertaking established must be a newly established undertaking. Existence of business is a pre-supposition for formation of a new undertaking by reconstruction or splitting up thereof. Therefore, in a case when there is no business in old unit of assessee before start of production by new EOU, it cannot be concluded that new unit is formed by reconstruction or splitting up of a business already in existence so as to deny exemption under section 10B. In order to claim exemption under section 10B, there is no legal bar against outsourcing of

activities involved in manufacturer or processing of goods as what is required is that undertaking must mainly engage itself in manufacturer or processing of goods, either itself, or through some agency under its supervisory control or direction. (A.Y. 2002-03 & 2003-04)
Taurus Merchandising (P) Ltd. v. ITO (2012) 138 ITD 204 / 143 TTJ 1 / 65 DTR 48 (Delhi)(Trib.)

S. 10B : Hundred per cent export-oriented undertakings - Newly established - Interest on housing loan given to employees eligible for exemption
Loan was given to the employees during the course of carrying on of the assessee's business. There is also a direct nexus between interest paid and interest received by the assessee. Therefore, deduction under section 10B is allowable in respect of interest earned on housing loans. (A.Y. 2003-04)
American Express (India) (P) Ltd. v. JCIT (2012) 79 DTR 127 / 150 TTJ 316 (Delhi)(Trib.)
S. 10B : Hundred per cent export oriented undertakings - Newly established - Software development - Registration - Exemption was allowed
The assessee-company was engaged in software development. The Assessing Officer rejected the assessee's claim for exemption under section 10B for reasons that the assessee-company had failed to comply with the requirement of filing audit report with form 56G and, moreover, the assessee failed to produce the attested copy of the bills raised from STPI and customs authority, copy of Softex Forms, copy of STPI registration for which software development it was registered and details of software developed by it. In appeal the Commissioner(Appeals) opined that the assessee-company was given approval as an STPI unit on 3-1-2006 and had carried out the business of development/manufacture and export of computer software/IT enabled services from 1-2-2006. Therefore, based on the CBDT Circular No. 1/2005, dated 6-1-2005 and the details filed by the assessee which were also filed at the assessment stage, the assessee-company qualified as an eligible unit for exemption under section 10B with effect from 1-2-2006. He, therefore, directed Assessing Officer to carefully verify the computation with regard to their accuracy and authenticity and allow exemption under section 10B on the profits, if any derived for the period 1-2-2006 to 31-3-2006 as per law. On revenue's appeal The Tribunal held that, where it was found that assessee-company's EOU was given approval as STPI unit and it had carried out business of development/manufacture and export of computer software/IT enabled services, assessee's claim for deduction under section 10B was to be allowed**.** (A.Y. 2006-07)
ITO v. RSG Media (P.) Ltd. (2012) 53 SOT 588 (Delhi)(Trib.)

S. 10BA : Export of wooden articles or things - DEPB - DEPB as profit derived from export business is eligible for exemption
DEPB as a profit derived from export business for the purpose of computing deduction under section 10BA. Revenue conceded the issue before the High Court. (A.Y. 2003-04 to 2005-06)
CIT v. Arts & Crafts Exports (2012) 66 DTR 85 / 246 CTR 463 (Bom.)(HC)
Editorial:- Arts & Crafts Exports v. ITO (2012) 66 DTR 69 / 144 TTJ 56 (Mum.)(Trib.)

S. 11 : Property held for charitable purposes - Contribution - Application of income - Contribution to Mandi Parishd to Constitutes application of income under section 11(1)(a) of the Act [S. 2(15), 12]
The word 'contribution' under Uttar Pradesh Krishi Utpadan Mandi Adhiniyam, 1964 is in context of what the members contribute to the funds held statutorily by Mandi Samiti which merely transfers the amounts to the funds of the Mandi Parishad. Thus, the question of voluntary contribution under section 11(1)(d) / 12(1) does not arise. Neither section 11(1)(d) nor 12(1) of the Act is attracted to the question whether the amounts statutorily transferred to Rajya Krishi Utpadan Mandi Parishad would constitute application of income for charitable purposes under section 11(1)(a) of the Act. The

transfer of the amounts by the Mandi Samiti constitutes application of income under section 11(1)(a) of the Act.

CIT v. Krishi Utpadan Mandi Samiti (2012) 348 ITR 566 / 79 DTR 142 / 254 CTR 214 / 211 Taxman 32 (SC)

S. 11 : Property held for charitable purposes - Donation - Cheque - Handing over date - Payment by post-dated cheque relates back to date of handing over of cheque and there is no violation [S. 12, 13(2)(h)]

In the year ended 31.3.2002, the assessee, a charitable trust eligible for exemption under section 11, received a post-dated cheque dated 22.4.2002 from Apollo Tyres Ltd. for which it issued a receipt. The Assessing Officer held that the post-dated cheque had been accepted by the assessee to do undue favour to Apollo Tyres, whose directors were trustees of the assessee and that there was a violation of section 13(2)(d)(h), and that section 11 exemption had to be denied. This was reversed by the Tribunal and the High Court on the ground that as the post dated cheque was given before 31.3.2002 and was duly honoured in April, 2002 when it was presented before the bank, the date of payment of the cheque should be treated as the date on which the cheque was received by the assessee. On appeal by the department to the Supreme Court, held dismissing the appeal:

Though the assessee trust issued a receipt in March, 2002 when it received the cheque dated 22.4.2002, it was clearly stated in its record that the amount of donation was receivable in future and it was shown as donation receivable in the balance sheet as on 31.3.2002. Also Apollo Tyres Ltd did not avail any advantage of the said donation during the F.Y. 2001-02. When a post-dated cheque is issued, it will have to be presumed that the amount was paid on the date on which the cheque was given to the assessee and, therefore, it cannot be said that any undue favour was done by the assessee to Apollo Tyres Ltd. A cheque, unless dishonoured, is payment. The Court also observed that Trustees and Directors of donor company is realted is not material, there is no violation of the provisions of section 13(2)(b) or (h). [CIT v. Ogale Glass Works Ltd. (1954) 25 ITR 529 (SC) followed] (A.Y. 2002-03)

CIT v. Raunaq Education Foundation (2013) 350 ITR 420 / 81 DTR 377 / 255 CTR 337 / 213 Taxman 19 / (2013) 2 SCC 62 (SC) / AIR (2013) SC 647

S. 11 : Property held for charitable purposes - Local Act - Fund received under section 33C of the local Act is not an income under section 2(24), hence the trust is entitled to exemption [S. 2(24), 12]

The assessee is a statutory body in terms of the Bihar Agricultural Produce Markets Act, 1960. The Assessing Officer rejected the claim for exemption beyond 15 percent of its receipts under the provisions of section 12 of the Act. The Commissioner(Appeals) and Tribunal up held the order of Assessing Officer. On appeal to High Court, the Court held that, the assessee is not engaged in the any commercial activity and no part of its activity was inspired by profit motive. The Court also held that Board's fund received under section 33C of Local Act of was not an income under section 2(24). Accordingly the order of Tribunal set aside and assessee claim for exemption was allowed.

Bihar Agricultural Produce Marketing Board v. CIT (2012) 205 Taxman 378 / 75 DTR 282 (Patna)(HC)

S. 11 : Property held for charitable purposes - Members club - Providing cultural and educational activities for its members does not detract from the position that it advances a general public utility [S.2(15)]

The assessee is a trust registered under the Bombay Public Trusts Act, 1950, and also registered under section 12 of the Income-tax Act. The Assessing Officer held that the assessee being mutual association computed the income as not charitable. In appeal the Commissioner(Appeals) confirmed the view of Assessing Officer. Tribunal reversed the finding of Commissioner(Appeals) and held that

the activities of the club being to encourage or promote and to advance games, sports, athletic activities and cultural activities of the assessee which are of general public utility hence, the requirement of section 2(15) is met and entitled to exemption. On appeal by the revenue the High Court also confirmed the order of Tribunal and held that the fact that the assessee provides services to its members does not detract from the position that it advances a general public utility. (A.Y. 1996-97)

DIT v. Chembur Gymkhana (2012) 346 ITR 86 / 70 DTR 163 / 251 CTR 145 (Bom.)(HC)

S. 11 : Property held for charitable purposes - Sports club - Denial of exemption held to be not valid [S. 2(15), 12A]

The assessee sports club was registered under the Bombay Public Trust Act, 1950 and under section 12A. The main object of the assessee was to promote sports and athletic activities. The Assessing Officer treated the assessee as a mutual concern and denied exemption under section 11. In appeal the Commissioner(Appeals) and Tribunal held that the assessee had acquired land from the State Government which utilized for facilities such as providing an Olympic size swimming pool which was open to the general public on annual membership basis without restriction as to caste, creed ,religion or profession hence eligible for registration. On appeal by revenue, the Court affirmed the view of Tribunal and dismissed the appeal of revenue. (A.Y.2003-04)

DIT (Exemption) v. Goregaon Sports Club (2012) 347 ITR 338 / 207 Taxman 240 (Bom.)(HC)

S.11 : Property held for charitable purposes - Application of income - Commercial principles - Payment of taxes under VDIS - Annual subscription - One time admission fess - Accumulation of income - Provision for doubtful debts - Taxes paid was treated as application of income - Amount spent in Germany could not be considered as application of income of the Trust in India for charitable purposes. Annual subscription fee paid to keep the membership alive cannot be assessable as business income. One time admission fee paid by members is corpus donation hence not assessable as income. Option to accumulate the income has to be applied before expiry of time allowed under section 139(1) there is no provision to condone the delay [S. 28(iii), 36(i)(vii), 36(2)(i), 139(1)]

The assessee is a trust registered under section 12A of the Act. Assessee had filed declaration on income and paid the taxes under Voluntary Disclosure of Income Scheme, 1997. The assessee claimed the payment of taxes as application of income. The assessee also incurred the expenses outside India (Hanover, Germany), the assessee claimed the said expenses as application of income. The Assessing Officer held that the expenditure incurred outside India cannot be considered as application of income in India for charitable purpose. The view of Assessing Officer was confirmed by the Commissioner of Income-tax(Appeals). On appeal to the Tribunal, the Tribunal held that, the payment of taxes under VDIS should be treated as application of income of the trust. As regards the expenditure incurred in Germany is concerned, the Tribunal was of the view that the words "is applied to such purpose in India" appearing in section 11(1)(a) of the Act only mean that the purpose of the Trust should be in India and that application of the Trust need not be in India. The Tribunal has accepted the contention of assessee. On appeal by revenue, the court after referring the Circular No. 5 dated June 19, 1968 held that taxes paid under the VDIS 1997 was to be deducted before arriving at the commercial income of the Trust available for application of income. As regards the amount spent at Germany the Court held that the requirement of provision is that the income of the trust should be applied not only to charitable purposes, but also applied in India to such purposes. Therefore, on a proper interpretation of section 11(1)(a) of the Act, the amount spent by assessee-trust in Germany could not be considered as application of income of the Trust for charitable purpose.

As regards the option to accumulate the income for future application to charitable purpose has to be exercised by the trust in writing before the expiry of the time allowed under section 139(1) for furnishing the return of income, as provided in Explanation (iib) below section 11(1) of the Act. In

respect all years under consideration the time has expired and there was no provision to condone the delay. As the assessee has not made the application with in time the assessee could not be granted time to make good the shortfall in the application of the income of the trust by permitting the assessee to apply for accumulation of the amount in shortfall for future application.

As regards the receipt of annual subscription fees, the assessee trust had not been shown to have performed any specific services to the members. Whereas the annual subscription fee were recurring receipt, receivable by the assessee-trust by mere efflux of time irrespective of whether any services were rendered or not to the members, what is contemplated in section 28(iii) is the receipt of fees from particular members to whom specific services have been rendered by trust. The annual subscription fee was paid merely to keep the membership alive on yearly basis. The distinction between the two being clear, and in the absence of any evidence to show that the assessee received fees from members as "quid pro quo" for specific services rendered to them, the tribunal was right in holding that the annual subscriptions fees were not assessable under the section.

As regards the one-time admission fee paid by members they were aware that it could be spent by the assessee only for the purpose of acquiring a capital asset therefore the amount must be held to be a corpus donation, not taxable as income. Income of the trust available for application to charitable purposes in India should be computed not in accordance with the strict provisions of the Act but should be computed in accordance with commercial principles. Under commercial principle it has always been recognised that a provision reasonably made for a loss or an outgoing, can be deducted from the income if there is apprehension that the debt might became bad. As there was nothing on record to show that the provision was not made bonafide. Therefore, while computing the income available to the trust for application to charitable purpose in India in accordance with section 11(1)(a) the provision for doubtful debts must be deducted. Payment of taxes under the VDIS is to be deducted before arriving at the commercial income of the assessee-trust that is available for application to charitable purposes. (A.Y. 1988-89, 2002-03 to 2006-07)

DIT v. National Association of Software and Services Companies (2012) 345 ITR 362 / 208 Taxman 178 / 253 CTR 33 (Delhi)(HC)

Editorial: SLP granted . DIT(Exemption) v.National Association of Software and Srvices .(CC no 21048 of 2012 dt 3-12- 2012(2013) 216 Taxman 204 (Mag.)(SC)

S. 11 : Property held for charitable purposes - Depreciation - Capital expenditure - Depreciation is allowable even when entire capital expenditure was allowed as application of income [S. 32]

The assessee is a charitable trust and claimed depreciation on assets. The assessee had also claimed expenses incurred on assets as 'application of income' for charitable purposes. The revenue claimed that no depreciation was allowable since the same would amount to granting 'double deduction'. The Court up held the claim of assessee for allowance of depreciation and held that there was no double deduction; under normal commercial accounting principles, there is authority to the proposition that depreciation is a necessary charge in computing the net income and ratio of Supreme Court in Escorts Ltd. v. UOI (1993) 199 ITR 43 (SC) is not applicable for the claim of depreciation. Appeal of revenue was dismissed. (ITA No. 140 of 2012 dated 29-3-2012) (A.Y. 2006-2007)

DIT v. Vishwa Jagriti Mission (2012) 73 DTR 195 / (2012) Income Tax Review-Sept.-P. 83 (Delhi)(HC)

S. 11 : Property held for charitable purposes - Capital expenditure - Depreciation - After writing off the expenditure incurred for acquisition of capital assets as application of income the trust cannot claim the depreciation on said assets on notional basis this will be violation of section 11(1)(a)

The assessee a charitable institution running hospital, acquired medical equipment with surplus funds available. It treated expenditure incurred for acquisition of capital assets as application of income

under section 11(1)(a). It was held that after writing off the full value of the capital expenditure on acquisition of assets as application of income for charitable purposes and when assessee again claimed the same amount in the form of depreciation, such notional claim became cash surplus available with the assessee, which was outside the books of account of the trust unless it was written back which was not done by the assessee. It was thus held that it was not permissible for a charitable institution to generate income outside the books in this fashion and there would be violation of section 11(1)(a). (A.Y. 2005-06)

Lissie Medical Institutions v. CIT (2012) 348 ITR 344 / 76 DTR 377 / (2013) 255 CTR 324 (Ker.)(HC)

Editorial:SLP granted no 27235 of 2012 dt 2-07-2013 (2013) 217 Taxman 154(Mag.)(SC)

S. 11 : Property held for charitable purposes - Absence of charitable activities the assessee is not entitled to exemption [S. 2(15), 12A]

An assessee that engages itself only or predominantly in activities relating to its ancillary or incidental objects which are not related to any charitable purpose and does not carry on any activity relating to its main object of charitable nature is not entitled to exemption under section 11; assessee institution having never carried out any scientific research, and applied a very insignificant portion of its income towards research and development activities, it is not entitled to exemption under section 11; claim for exemption under section 11 is also not sustainable in view of cl. (b) of sub-section (4A) thereof as the leasing business carried on by the assessee was not wholly for the charitable purposes. (A.Y. 1989-90, 1990-91)

M. Visvesvaraya Industrial Research and Development Centre v. CIT (2012) 79 DTR 387 / (2013) 255 CTR 6 / 213 Taxman 213 (Bom.)(HC)

S. 11 : Property held for charitable purposes - Application of income - Depreciation - Adjustment of expenditure of earlier year against income of current year, amounts to application of income for charitable purpose and Trust entitled to exemption. Entitled to depreciation [S. 32]

As per section 11(1)(a) of the Act when the income of the trust is used or put to use to meet charitable or religious purposes, it is applied for charitable purposes and the application of the income for charitable or religious purposes takes place in the year in which the income is adjusted to meet the expenses incurred for charitable or religious purposes. Thus, even if the expenses for charitable and religious purposes have been incurred in the earlier year and the expenses are adjusted against the income of a subsequent year, the income of that year can be said to have been applied for charitable and religious purposes in the year in which expenses incurred for charitable and religious purposes had been adjusted. There are no words of limitation in section 11(1)(a) of the Act explaining that the income should have been applied for charitable or religious purposes only in the year in which the income had arisen. Charitable trust is held to be entitled depreciation. (A.Y. 2004-05 to 2006-07)

CIT v. Gujrati Samaj (Regd.) (2012) 349 ITR 559 / (2011) 64 DTR 76 (MP)(HC)

S. 11 : Property held for charitable purposes - Development Authority engaged in charitable activities is entitled to exemption if books of accounts are maintained for construction business [S.12AA]

The grant of registration under section 12AA is not an empty formality as it has to be granted after satisfying that the objects are charitable in nature. The assessee, development authority is engaged on charitable activities and construction business of the assessee is merely incidental to the main object of town planning and therefore is entitled to exemption under section 11 if separate books have been maintained for construction business in accordance with the stipulation in section 11(4A). (A.Y. 2007-08)

ITO v. Moradabad Development Authority (2012) 145 TTJ 746 / 69 DTR 329 (Delhi)(Trib.)

S. 11 : Property held for charitable purposes - Principal objects was promotion of vegetarianism and distribution of Prasad - Preparing and selling vegetarian food held to be incidental to object of assessee trust

Assessee was a charitable trust and its principal objects included promotion of vegetarianism and distribution of Prasad. The Assessing Officer finding that assessee was in business of running an eating house/restaurant, took a view that entire character and focus of assessee had become totally commercial. Since the promotion of vegetarianism is undoubtedly a charitable activity, business of preparing vegetarian food items and selling same was very much incidental to object of assessee trust and such business could be conducted by a charitable trust as per provisions of section 11(4). Thus, assessee's claim for exemption was to be allowed. (A.Y. 2008-09)

ADIT (Exemption) v. Sri Sri Radha Damodar Charitable Trust (2012) 52 SOT 622 (Mum)(Trib.)

S. 11 : Property held for charitable purposes - Medical relief through ayurvedic system - Since medical relief through allopathic treatment did not fall within ambit of objects mentioned in trust deed, surplus from said activity could not form subject matter of exemption under section 11 therefore the exemption was denied to the assessee

The assessee trust was formed with object of providing medical relief through ayurvedic system of medicine. However, with passage of time, medical relief through auyrvedic medicines and research was relegated to background and activities mainly constituted of providing medical relief through allopathic system of medicines. The Assessing Officer thus rejected assessee's claim for exemption under section 11 of the Act. Upholding the order of the Assessing Officer the Hon'ble Tribunal held that since medical relief through allopathic treatment did not fall within ambit of objects mentioned in trust deed, surplus from said activity could not form subject matter of exemption under section 11 whether, therefore the exemption was denied to the assessee trust. (A.Y. 2006-07)

Dy. DIT (Exemption) v. Mool Chand Kharaiti Ram Trust (2012) 52 SOT 429 (URO) / 70 DTR 132R (Delhi)(Trib.)

S. 11 : Property held for charitable purposes - Donation - Corpus fund - Donation for establishment of a technical education centre in a village, amount constituted 'corpus fund' of society and not taxable under section 11

Assessee education society had received donation for establishment and development of a technical education centre in a village. It had produced its books of account along with names and complete address of donors. Donors too certified to have donated towards corpus fund of assessee. It was held that amount in question constituted 'corpus fund' of society and would be out of purview of taxation as per section. 11. (A.Y. 2000-01)

ITO v. Sardar Vallabhbhai Education Society (2012) 138 ITD 245 / 79 DTR 115 / 150 TTJ 265 (TM)(Ahd.)(Trib.)

S. 11 : Property held for charitable purposes - Capital gain applied for charitable purpose - Not by acquiring a new asset but for other charitable purpose - Claim for exemption is allowed

If capital gain is applied for charitable purpose of assessee not by acquiring a new asset but for other charitable purpose, then there is no reason why it should not be considered as application of income for charitable purpose enabling assessee to claim exemption under section 11(1). (A.Y. 2006-07)

Al Ameen Education Society v. DIT (Ex) (2012) 139 ITD 245/(2013) 156 TTJ 119 (Bang.)(Trib.)

S. 11 : Property held for charitable purposes - Accumulation of income for specific purpose - Held accumulation for purpose of trust, hence allowable

Assessee-society was running educational institute. It was held that where assessee-society had accumulated income for specific purpose as per objects of trust and accumulated funds had been used accordingly in subsequent years, disallowance of accumulation was not justified. (A.Y. 2007-08)
ACIT v. Jamia Urdu (2012) 139 ITD 590 / 150 TTJ 59 (UO)(Agra)(Trib.)

S. 11 : Property held for charitable purposes - Corpus donation - Received shares as corpus and subsequent sale there is no violation the assessee is eligible for exemption [S. 11(1)(d), 13(d)]
Assessee trust received 11,47,110 equity shares of M. Ltd. and 2,01,500 equity shares of S. Ltd. from another trust towards corpus donation. There is no restriction on accepting shares by a charitable institution. However, cl.(iia) of the proviso to section 13(1)(d)(iii) entitles an assessee trust to hold the shares for a maximum period of one year before which they have to be converted into the modes of investment as prescribed in section 11(5). Contention of the Dept. Representative that the assessee has violated the provisions of section 11(1)(d) by selling the shares suffers from the basic fallacy in not recognizing that the assessee has merely converted one form of investment into another viz. Money by selling the shares. The corpus donations received by the assessee could not be considered as general donations merely on the ground of its utilization in the subsequent year for giving corpus donations to other charitable institutions. (A.Y. 2006-07, 2007-08)
Sera Foundation v. ITO (2012) 79 DTR 210 / 150 TTJ 537 / (2013) 55 SOT 303 (Delhi)(Trib.)

S. 11 : Property held for charitable purposes - Person - Exemption of income from property [S. 2(15), 2(31), 12, 13]
Definition of 'person' under section 2(31) includes legal authority but not Government itself. Assessing Officer withdrew from assessee society benefit under section 11 on ground that main donor of assessee society was State Government of Andhra Pradesh and application of receipts included expenses towards supply of equipments to Government hospitals. Government could not be said to have been benefited by machines out of its own grant and benefit actually accrued to general public at a large, entitling assessee to benefit of section 11. Exemption under section 11 could not be denied to assessee merely because it was not registered under A.P. Charitable & Hindu Religious Institutions and Endowments Act, 1987 since provisions of sections 2(15), 11 to 13 nowhere refer that charitable institution to be eligible for exemption under section 11 should also be registered under any other Act for time being. (A.Y. 2004-05)
Dy. CIT v. Andhra Pradesh Right to Sight Society (2012) 53 SOT 480 (Hyd.)(Trib.)

S. 11 : Property held for charitable purposes - Exemption of income from property held - Application of income should be in India
Requirement of section 11(1)(a) is that income of trust should be applied for charitable purposes, and it should be applied in India. Amounts spent by assessee-trust outside India for participating in a fair held in Germany could not be treated as application of income of trust for purpose of section 11(1)(a) and were rightly disallowed. (A.Y. 2007-08)
India Brand Equity Foundation v. ACIT (2012) 53 SOT 506 (Delhi)(Trib.)

S. 11 : Property held for charitable purposes - Income from management development programme, hiring premises is eligible for exemption
(i) Income from management development programme earned by educational institute considered as eligible for exemption;
(ii) Income from hiring premises and advertisement rights since applied for educational activities eligible for exemption;
(iii) Claim for depreciation on fixed assets, the cost of which was allowed as application of income, allowed. The tribunal observed that the assessee was not claiming double deduction on account of depreciation as has been held by the Assessing Officer. According to it, the income of the

assessee being exempt, the assessee was only claiming that depreciation should be recued from the income for determining the percentage of funds which have to be applied for the purpose of Trust. Thus, there was no double deduction claimed by the assessee. (A.Y. 2008-09)(ITAT, ITA No. 7106/Mum/2011, Dt. 05-10-2012)

ADIT v. Shri Vile Parle Kelvani Mandal, Mumbai (2012) BCAJ Pg. 26, Vol. 44-B Part 2, November, 2012 (Mum.)(Trib.)

S. 11 : Property held for charitable purposes - Depreciation is treated as application of income - Receipt of loan does not invite denial of exemption - Repayment of loan will amount application of income

(i) Claim for depreciation on fixed assets is treated as application of income;

(ii) Receipt of loan in violation of the Bombay Public Trust Act does not invite denial of exemption under section 11;

(iii) Repayment of loan originally taken for the objects of the trust will amount to an application of income. (A.Y. 2007-08)(ITA No.8210/Mum/2010, Dt. 10-08-2012)

Dy. DIT v. G.K.R. Charities, Mumbai (2012) BCAJ Pg. 26, Vol. 44-B Part 3, December, 2012 (Mum.)(Trib.)

Editorial:- Bombay High Court affirmed the view of Tribunal, DIT v. G. K. R. Charities (2013) 214 Taxman 555(Bom.)(HC)

S. 11 : Property held for charitable purposes - Capital asset - Assessee entitled to exemption even if the income is applied to acquire capital asset to be used for object of the Trust

The assessee entitled to exemption even if the expenditure has been incurred for acquiring capital asset to be used for object of the Trust. Application of income for charitable purpose not to be distinguished on the basis of application for revenue purposes and capital purposes. (A.Y. 2000-01 to 2006-07)

Gagan Education Society v. Addl. CIT (2012) 145 TTJ 230 / (2011) 56 DTR 199 / 131 ITD 442 (Agra)(Trib.)

S. 12 : Voluntary contributions - Trust or institutions - Amount utilized towards object of trust, held to be corpus fund, exempt

The assessee is a trust engaged in the field of education. It collected amounts from students at the time of admission towards building fund, education research fund, education infrastructure fund, etc. The Assessing Officer held that the said funds were not donation but payment for admissions and that receipts could not be treated as donation / corpus donation. It was held that the contribution was made with the clear understanding that it was towards corpus funds and that trust deed also stipulated that the voluntary contribution given by parents for furtherance of objects of Trust were exclusive property of trust which was to be utilized towards the object of trust. Thus, the contribution was held to be in the nature of corpus fund and exempt under section 12. (A.Y. 2008-09)

DIT (Exemption) v. Shri N. H. Kapadia Education Trust (2012) 136 ITD 111 / 148 TTJ 37 / 76 DTR 233 (Ahd.)(Trib.)

S. 12A : Registration - Trust or institution - Leasing of business is not charitable purpose hence not entitled to exemption - Registration under section 12A does not automatically entitled to exemption to trust or institution, it has to comply with other provisions of section 2(15) read with section 11 [S. 2(15), 11]

An assessee-institution having never carried out any scientific research, and applied a very insignificant portion of its income towards research and development activities, is not entitled exemption under section 11. The assessees claim for exemption under section 11 is also not sustainable in view of clause (b) of sub section (4A) thereof as the leasing business carried on by the

assessee was not wholly for the charitable purposes. Compliance with the provisions of section 12A is not the only requirement for the applicability of section 11. Compliance with the provisions of section 12A only indicates that the assessee is a trust or institution entitled to benefit of sections 11 and 12. It is entitled to benefit only if it complies with the other requirements of sections 11. (A.Y. 1989-90, 1990-91)

M. Visvesvaraya Industrial Research and Development Centre v. CIT (2012) 79 DTR 387 / (2013) 255 CTR 6 / 213 Taxman 213 (Bom.)(HC)

S. 12A : Registration - Trust or institution - Cancellation by Commissioner

Once the certificate of registration is granted after examination of the object of Trust and due compliance of necessary formalities, the same cannot be cancelled later on by the CIT and once it is found that the trust carried out its activity as per its object, it cannot be treated as not formed in accordance with the object on which the registration was earlier granted. Therefore, the action of CIT is unwarranted. Registration granted under section 12A of the Act can be cancelled only in the event the Commissioner is satisfied that the activities of the trust are not genuine or are not being carried out in accordance with the object of the trust. Merely because assessee was earning income from the activities of publication and sale of literature and propagation of Gandhian ideologies, the activities of the trust cannot be held non charitable.

CIT v. Sarvodaya Ilakkiya Pannai (2012) 72 DTR 36 / 250 CTR 332 (Mad.)(HC)

S. 12A : Registration - Trust or institution - Irregularities cannot be the ground for denial of registration

Where there were certain irregularities on the part of the education society in the manner of functioning, these irregularities themselves cannot be put at par with lack of genuineness of the society or its activities, so that the registration under section 12A of the Act be denied to the society. (A.Y. 1997-98)

DIT (E) v. Venkatesha Education Society (2012) 75 DTR 51 (Karn.)(HC)

S. 12A : Registration - Trust or institution - Objects and activity, Director is not required to examine whether the Trust has actually carried on charitable activities [S. 12AA]

Statute does not prohibit or enjoin the CIT from registering trust solely based on its objects, without any activity, in the case of a newly registered trust. Statute does not prescribe a waiting period, for a trust to qualify itself for registration. Tribunal was therefore right in holding that while examining the application under section 12AA(1)(b) r.w.s. 12A, the CIT/Director is not required to examine the question whether the trust has actually commenced and has, in fact, carried on charitable activities.

DIT v. Foundation of Opthalmic and Optometry Research Education Centre (2012) 79 DTR 178 / 254 CTR 133 / 210 Taxman 36 /(2013) 355 ITR 361(Delhi)(HC)

S. 12A : Registration - Trust or institution-Refusal of registration was held to be not justified when the particular object was not acted upon. [S. 2(15),12AA]

Assessee engaged in educational activities. One of the objects permitted assessee to export computed and other similar activities. The said object was never acted upon by the assessee. The Commissioner rejected the registration. On appeal to Tribunal the Tribunal held that the CIT was not justified in rejecting registration application of the trust only on the ground that the Trust had the object of export of computer, which was not acted upon. The Tribunal referred the Circular No. 11/2008 dated 19-12-2008.

Baba Amarnath Educational Society v. CIT (2012) 69 DTR 307 / 149 TTJ 373 (Chd.)(Trib.)
ACE Educational & Charitable Society v. CIT (2012) 69 DTR 307 / 149 TTJ 373 (Chd.)(Trib.)

S. 12A : Registration - Trust or institution - Rejection of registration by Assessing Officer is without jurisdiction

Once the registration is granted under section 12A by the Commissioner, the Assessing Officer as subordinate authority cannot cancel the registration. The commissioner can cancel the registration on satisfaction of conditions laid down in Section 12AA(3). Thus, cancellation of registration under section 12A and completion of assessment under Assessing Officer by the Assessing Officer is without jurisdiction. (A.Y. 2005-06)

Dy. DIT v. Kuttukaran Foundation (2012) 51 SOT 175 / 31 CCH 139 (Cochin)(Trib.)

S. 12A : Registration - Trust or institution - Merely a surplus in one year over gross receipts not a ground for rejecting registration

The assessee's application under section 12AA for grant of registration under section 12A was rejected on the ground that assessee had shown a surplus over gross receipts in a particular year; that aims and objectives were not in charitable nature. Therefore, merely a surplus in one year cannot be a consideration for rejecting an application for grant of registration under section 12A.

Make the Future of Country Education Society v. Dy. CIT (2012) 51 SOT 98 (Delhi)(Trib.)

S. 12A : Registration - Trust or institution - Significant or material change in object clause of MOA by voluntary act of the assessee - Changes to be vetted by revenue authorities before granting the benefit under section 11 and 13 of the Act [S. 11, 13]

The assessee is a society registered under section 12A of the Act whose main object is to promote the game of cricket. There was a significant or material change in the object clause of MOA of the assessee's society made by the assessee voluntarily. It was held that in case of such significant change in the object clause, the revenue authorities have a right to examine the question as to whether these changes in the memorandum, rules and regulations are in consonance with the provisions of the Act so as to enable assessee to avail benefit as charitable institution under section 11, 12 and 13.

Board of Control Cricket in India v. ITO (2012) 136 ITD 301 / 19 ITR 91 (Mum.)(Trib.)

S. 12A : Registration - Trust or institution - TDS deducted on donation made, by the donor - Held the assessee eligible for registration as mere deduction of TDS does not change the nature of donation to commercial receipt. [S. 2(15)]

The assessee was a Trust created with the object of carrying out research in the field of medicines. The assessee received donations from the donors which was utilized in holding conference for doctors in hotels. The said donors had deducted TDS on the said donations. It was held that merely because donors are pharmaceutical companies and they deducted TDS, it would not convert a donation into a commercial receipt on the basis of presumptive inference as long as assessee had credited amount as donations and also issued donation receipts. Thus, the assessee was eligible for grant of registration.

Heart Care Management v. DIT (IT) (2012) 52 SOT 277 (Delhi)(Trib.)

S. 12A : Registration - Trust or institution - Promoting networking facilities is eligible for exemption

Assessee Company was incorporated under section 25 of the Companies Act, 1956. The main object of the Assessee was to promote networking facilities to the CEOs for improving the quality and profitability of their enterprises, by providing a platform for CEOs for exchange of ideas and promotion of entrepreneurship through shared experience in India. The prosperity would also be shared by those who engaged in the trade, commerce and industry, but on that account, the purpose is not rendered any less an object of general public utility. The Tribunal held that reasons assigned by the DIT for rejecting the assessee's application for registration cannot be sustained. (ITA No. 3503/M/2011, dt. 13.06.2012)

CEO Clubs India v. DIT (Exemption) (2012) BCAJ Pg. 27, Vol. 44-B Part 1, October, 2012 (Mum.)(Trib.)

S. 12A : Registration - Trust or institution - Charitable purpose - Tribunal satisfied about charitable purpose of goshala run by trust in earlier appeal - Registration cannot be denied in remand proceedings [S. 2(15)]

The application filed by the assessee seeking registration as a charitable trust under section 12A of the Income-tax Act, 1961 was denied by the Commissioner. On appeal, the Tribunal was of the view that though the assessee had 100 milch cows, it was also maintaining and supporting 250 livestocks which were of little commercial use and required substantial cost to look after and therefore, it was a genuine goshala; that sale of milk, gobar, khattu and male calf, etc., did not relate to the carrying out the activities of general public utility and were incidental to carrying out the main object of trust i.e., maintaining a "goshala"; that while considering the application for granting registration under section 12A of the Act, the scope of enquiry of the Commissioner was limited to satisfying himself about the charitable nature of objects of the trust and about the genuineness of the activities of the trust ; and that the assessee ought to be granted registration under section 12A of the Act. It remanded the matter to the Commissioner for granting the registration under section 12A of the Act in accordance with law after giving proper opportunity of being heard to the assessee. The Commissioner considered the issue and again denied registration on the ground that maintenance of livestock did not come under the definition of "charitable purpose" or within the meaning of any other objectives of general public utility as regular business of selling of milk for maintenance of "goshala" was being carried on by the assessee. On appeal by the assessee, Tribunal allowing the appeal, held that the Commissioner was to have limited himself to being satisfied about the charitable nature of the objects of the trust and the genuineness of the activities of the trust. It was immaterial that the trust had been formed on the basis of transferring of the assets of the proprietorship concern which according to the trust deed had been given free of cost to the trust as part of the charity by the trustees themselves. The Tribunal in the earlier appeal by the assessee had satisfied itself on the basis of legal pronouncements as well as on the basis of the charitable activities carried out. The Commissioner was directed to grant registration to the assessee.

Sri Gomandir Seva Trust v. CIT (2012) 20 ITR 608 / 150 TTJ 48 (UO) / (2013) 141 ITD 472 (Cuttack)(Trib.)

S. 12A : Registration - Trust or Institution - Charitable purpose - Technical education and medical relief is charitable purpose registration directed to be allowed [S. 2(15), 12AA]

Assessee society being engaged in providing technical education and medical relief, its objects are covered by the definition of 'charitable purpose' given in section 2(15) and first proviso to section 2(15) not being applicable to it, mere earning of surplus income in carrying out the aforesaid charitable activities did not render the activities of the assessee society non genuine and non charitable; assessee society having fulfilled the statutory conditions for grant of registration under section 12A r.w.s. 12AA, CIT is directed to grant registration.

PIMS Medical & Education Charitable Society v. CIT (2012) 80 DTR 383 / 150 TTJ 891 (Chd.)(Trib.)

S. 12A : Registration - Trust or Institution - Scope on remand - Judicial discipline - Commissioner is bound to follow the direction of Tribunal [S. 12AA, 254(1)]

Tribunal in the original proceedings held that the objects of the assessee trust were to run a school and it is entitled to registration under section 12A from the date of filing of the application for registration as the activities of purchasing the land and constructing building for setting up the school amounted to application of income for charitable purpose and remitted the matter to the CIT for limited purpose of following the ratio laid down in the case of Pinegrove International Charitable Trust v. UOI &

Ors. (2010) 37 DTR 105 (P&H)(HC). However, the Commissioner refused registration once again on the ground that the assessee trust has not undertaken any charitable activity during the relevant year and in subsequent year. The Tribunal held that the assessee trust is entitled to registration. The Tribunal also held that Appellate Authorities are to follow judicial discipline and there is a need to give effect to the orders of the higher appellate authorities which are binding on them.
Sandhya Educational Trust v. CIT (2012) 80 DTR 369 / 150 TTJ 877 (Chd.)(Trib.)

S. 12A : Registration - Trust or Institution - Rectification of mistake - Rejection of application held to be justified [S. 11]
Where Commissioner had granted registration to assessee, i.e. State Tourism Promotion Board from A.Y. 2009-10 instead of A.Y. 2007-08 as sought by assessee, in consonance with factual situation and provisions of section 12A(2), read with second proviso to section 12A(1) and its sub-clause (aa), same needed no rectification under section 154. Rejection of 154 application by the Commissioner was held to be justified. (A.Y. 2007-08, 2008-09)
Punjab Heritage & Tourism Promotion Board v. ITO (2012) 54 SOT 433 (Chd.)(Trib.)

S. 12AA : Procedure for registration - Trust or institution - As the activities of the trust being genuine the trust is entitled for registration
For granting registration the object of the trust must be charitable and activities must be genuine. On the facts of the assessee both the conditions were satisfied and Tribunal was justified in holding that the trust was entitled for registration. (A.Y. 2003-04)
CIT v. Lucknow Educational and Social Welfare Society (2012) 340 ITR 86 (All.)(HC)(Luck.)

S. 12AA : Procedure for registration - Trust or Institution - Constitutional validity - Amendment of section 12AA(3) is held to be valid
The Commissioner issued the notice under section 12AA(3) on 31st July, 2007 for cancellation of the registration granted to the petitioner for the A.Y. 1999-2000 on the ground that the petitioner is charging capitation fee and donations in respect of admissions and diverting them in respect of personal gain of trustees. The proceedings were initiated and order was passed cancelling the registration. The said order was challenged before the Tribunal. The Tribunal allowed the appeal of assessee on the ground that the registration was granted under section 12A, which cannot be invoked by section 12AA(3), which were brought on the statute book w.e.f. 1st October, 2004. The appeal against the order of Tribunal is admitted and pending for final disposal before the High Court. Section 12AA(3) has been amended by the Finance Act of 2010 w.e.f. June, 2010 giving the power to cancel the registration under section 12A. The Commissioner issued fresh showcause notice on 11th March, 2011 for cancellation of registration for reasons mentioned in his order dated 9th October, 2007. The assessee challenged the constitutional validity of provision of sub-section (3) of the section 12AA as amended by the Finance Act of 2010 w.e.f. 1st June, 2010 to the extent they provide for revocation of a registration granted under section 12A. The Court held that the amendment of section 12AAA(3) by the Finance Act, 2010 is not arbitrary and it does not take away vested right nor does it create new obligation in respect of past actions and cannot be said to be retrospective in operation; even if construed to be retrospective, it cannot be held to be violate of Article 14. Accordingly the petition was dismissed. (A.Y. 1999-2000)
Sinhagad Technical Education Society v. CIT (2012) 343 ITR 23 / 249 CTR 45 / 206 Taxman 314 / 68 DTR 99 (Bom.)(HC)

S. 12AA : Procedure for registration - Trust or institution - Object clause [S. 11]
While granting registration under section 12AA of the Act the Commissioner has to satisfy himself only about the objects of the trust and the genuineness of its activities. The fact that there is

misapplication of property and funds of the trust is to be looked into only for granting exemption under section 11 and not at the time of registration.

CIT v. A. S. Kupparaju Brothers Charitable Foundation Trust (2012) 69 DTR 315 / 205 Taxman 9 (Karn.)(HC)

S. 12AA : Procedure for registration - Trust or Institution - Non-filing of returns - Registration cannot be refused

The assessee-trust was registered under the Societies Registration Act, 1860 on 15-12-1978. It applied for grant of registration under section 12AA on 5-4-2007. The Commissioner rejected the application of the assessee on the grounds that: (i) no reasons had been given as to why after more than 29 years it had made application for grant of registration, and (ii) it had not complied with query regarding furnishing of the information of filing the income-tax returns and providing proof for the last several years. The Tribunal held that not providing information for the returns since inception was not fatal, because only inquiry which the Commissioner could make while granting registration was regarding genuineness of the trust and as to whether the objects as mentioned in the Trust Deed were for charitable purpose or not. It remanded the matter to the Commissioner to grant registration to the assessee under section 12AA. On appeal to High Court confirmed the order of Tribunal and the appeal of revenue was dismissed.

CIT v. Shri Advait Ashram Society (2012) 211 Taxman 311 (All.)(HC)

S. 12AA : Procedure for registration - Trust or institution - Assessee entitled to registration under Section 12AA of the Act, even if the assessee sells certain property

The object of the business of the assessee was to planning and development of the city including preparation of master plan and zonal development plan which are in the nature of public utility. It was held that assessee would be entitled to registration under Section 12AA of the Act, even if the assessee sells certain property as the said activity is incidental to the object of the assessee.

Jodhpur Development Authority v. CIT (2012) 145 TTJ 221 / 73 DTR 90 (Jodh.)(Trib.)

S. 12AA : Procedure for registration - Trust or institution - Charitable purposes - Education rendered on commercial lines, charity must subserve the essential requirements of the needy and the destitute hence cancellation of registration held to be justified [S. 2(15), 11, 80G]

In the instant case, assessee is running coaching centres recognized by Universities to cater their distance education programme. The assessee collects fees from the students and same is shared between the assessee and the Universities on commercial lines. It was held that the education per se will not be considered charitable unless carried out as charitable endeavour. The litmus of charitable institution is that the activity must be conducted with charitable dedication i.e. it should subserve the essential requirements of the needy and the desitude. Thus held that rendering of education to millionaire is not charity.

Professional Education & Research Foundation (2012) 51 SOT 351 (Chennai)(Trib.)

S. 12AA : Procedure for registration - Trust or institution - Object of trust was charitable, no income of the trust was applied for benefit of lineal descendant as both the conditions are satisfied the trust is eligible for registration [S. 2(15)]

Where the dominant purpose of the trust are charitable in nature then mere fact that the poor relatives of settlor would have preference over general public in such charitable objects, would not make trust as non-charitable. Further, Trust deed provided that after death of the settlor, income from the trust property was to be used for charitable purpose, which were covered under section 2(15). It was held that as no amount was applied for the benefit of any lineal descendant, since the objects of the trust, after death of settler were fully charitable and whole income of the trust was utilized for charitable

purposes set out in trust deed both conditions under section 12AA for registration of trust were fully satisfied.

Manockjee Cowasjee Petit Charities v. DIT (Exemption) (2012) 136 ITD 355 / 75 DTR 1 / 148 TTJ 181 (TM)(Mum.)(Trib.)

S. 12AA : Procedure for registration - Trust or institution - Trust constituted with the object clause consisting of charitable as well as religious is entitled exemption [S. 11, 13]

The assessee trust had applied for registration under section 12AA of the Act. Its objects, as per its trust deed, were charitable as well as religious. According to the DIT, since the objects were a mixture of religious as well as non-religious, the registration under section 12AA was denied. According to the Tribunal, the trust, whose objects are religious as well as charitable, would be entitled for grant of registration and also to claim exemption under section 11. It further observed that when the assessee seek exemption under section 11, the same would be allowed subject to provision of section 13(1)(a) and (b) of the Act. (ITA No. 5544/M/09, dated 8-2-12 Bench 'I')

Shri 1008 Parshwanath Digamber Jain Mandir Trust v. DIT (2012) BCAJ Pg. 41, Vol. 44-A Part 1, April 2012 (Mum.)(Trib.)

S. 12AA : Procedure for registration - Trust or institution - Object remained same even after amendment - No cancellation of registration without giving any contrary finding

Mere finding that objects of trust has been altered without consent of department would not be sufficient to exercise power under section 12AA(3) without giving a finding that objects of trust are no longer charitable. Where assessee education-trust was formed with main object of imparting education, mere fact that it amended clause of trust deed to include technical and medical education within its ambit and it paid commission to persons who solicited students for studying in assessee's education, it could not lead to conclusion that assessee was not imparting education. Therefore, Director (Exemption) was not justified in cancelling registration under section 12AA(3).

Krupanidhi Educational Trust v. DIT (IT) (2012) 139 ITD 228 / (2013) 21 ITR 373 (Bang)(Trib.)

S. 12AA : Procedure for registration - Trust or institution - Non commencement of charitable or educational activities refusal of registration was justified [S. 80G(5)]

As per section 12AA, CIT has to satisfy himself about the genuineness of the activities of the trust or institution in consonance with its objects. Thus, CIT has to examine as to whether the assessee actually engaged in the activities which are genuine. In the instant case, assessee trust is established for the purpose of maintaining schools, colleges and institutions for imparting education in different subject. Only construction activities are going on and no actual educational or charitable activities have been carried out by the assessee. Finding of fact recorded by the CIT that the trust intended to promote the business of the family concern and as such it could have a commercial motive has not been rebutted by any explanation or material on record. Thus, sole object of the assessee could not have been considered at this stage for the purpose of granting registration to the assessee. Admittedly, no genuine activities had been carried out for the purpose of achieving the charitable or educational objects of the assessee trust. Therefore, assessee failed to satisfy the requirements of section 12AA and as such the CIT was justified in refusing to grant registration and approval.

Hardayal Charitable & Educational Trust v. CIT (2012) 79 DTR 285 / 150 TTJ 384 (Agra)(Trib.)

S. 12AA : Procedure for registration - Trust or institution - Surplus generated was utilised for the educational activities assessee being educational institution, cancellation of registration was not justified [S. 13]

Surplus being generated is utilized for the purpose of objects of the institution. It is nowhere provided that the trust cannot be constituted by a family and it is also not provided under the Act that trust will not have number of institutions. Education itself is charitable object and if the surplus is utilized for the purpose of charitable activities then it cannot be said that registration is to be disallowed. CCIT has allowed exemption under section 10(23C) on finding that the activities of the assessee are genuine and as per its object. Assessee has explained the reasonableness is respect of the payments made to the persons covered under section 13(3). Reasonableness is actually to be seen by the Assessing Officer and not by the CIT while allowing registration or cancelling the registration. CIT was not justified in cancelling the registration.

Rajasthan Vikas Sansthan v. CIT (2012) 78 DTR 411 (Jodh.)(Trib.)

S. 12AA : Procedure for registration - Trust or institution - Depreciation - Application of income [S. 11]

Depreciation on assets debited in books of account, will be allowable in computing application of income for purpose of granting registration under section 12AA(1). (A.Y. 2004-05, 2005-06)

ITO v. Krishi Upaj Mandi Samiti (2012) 53 SOT 500 (Jaipur)(Trib.)

S. 12AA : Procedure for registration - Trust or institution - Maintenance and development of park [S. 2(15)]

Assessee-society carried on activity of maintenance and development of park, said activity would fall within words 'preservation of environment' under section 2(15) and, thus, assessee was entitled to registration under section 12AA. (A.Y. 2011-12)

New Saibaba Nagar Welfare Association v. DIT (Exemption) (2012) 53 SOT 495 (Mum.)(Trib.)

S. 13 : Denial of exemption - Trust or institution - Investment restrictions - Land used for society belonging to wife of secretary, exemption not be denied when no benefit passed [S. 11, 12AA]

Assessee society registered under section 12AA was functioning from land belonging to wife of secretary of assessee society. It had incurred expenditure on construction of building on said land. It was apparent from records that land was taken on lease for period of 30 years with renewable option and, thus, no benefit was passed to secretary's wife. Moreover, there was an option that in case assessee did not want extension of lease, it could remove superstructure erected on leased land. Thus, it was held that impugned order passed by Assessing Officer denying exemption was not sustainable. (A.Y. 2006-07, 2007-08)

Addl. CIT v. N. L. Education Society (2012) 52 SOT 603 (Agra)(Trib.)

S. 13 : Denial of exemption - Trust or institution - Investment restrictions - Exemption cannot be denied on the ground that high salary was paid to office bearers of management committee unless it was established that it was not open market remuneration [S. 11, 12]

The assessee society was formed with the object to provide education including opening of schools and colleges and to run them according to recognized standard. The assessee declared 'NIL' income. In the course of assessment Assessing Officer took a view that assessee had debited high amount of salary in profit and loss account. However, Assessing Officer had not brought any independent evidence on record which could show how much salary various office bearers of management committee could fetch in open market. Also the 6th pay commission had resulted into a handsome enhancement in salary of employees including Government teaching staff. In view of the aforesaid the CIT(A) deleted the disallowance and the ITAT upheld the order of the CIT(A) as no independent evidence was being led by the Assessing Officer to sustain the said disallowance. (A.Y. 2006-07)

ACIT v. Indicula Trust Society (Regd.) (2012) 52 SOT 1 (Delhi)(Trib.)

S. 13 : Denial of exemption - Trust or institution - Investment restrictions - Diversion of funds for benefit of specified persons was not proved denial of exemption was held to be not justified [S.11, 12]

Assessee charitable trust purchased plots from group concern in an earlier year but sale agreements were not registered. In current year, said agreements were cancelled and entire sale consideration was received back by assessee without any penalty. Assessing Officer opined that unregistered agreements were colourable device and assessee-trust had advanced money without interest for benefit of specified persons. He denied exemption. It was, however, found that group concern had always maintained credit balance. In such a case presumption that group concern clandestinely diverted and used funds of trust by selling plots, could not be drawn and assessee-trust could not be denied exemption. (A.Y. 2006-07 & 2007-08)

Chiranjiv Charitable Trust v. Addl. DIT (2012) 54 SOT 141 (URO)(Delhi)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Non-maintenance of separate accounts - Disallowance of proportionate expenditure relating to tax-free income justified

Expenditure incurred in respect of earning of tax free income for non-maintenance of separate account , prior to 1-4-2007 the disallowance of proportionate expenditure under section 14A of the Income-tax Act, 1961, was justified.

Catholic Syrian Bank Ltd. v. ACIT (2012) 349 ITR 569 / 251 CTR 40 / 74 DTR 19 (Ker.)(HC)

S. 14A : Disallowance of expenditure - Exempt income - Stock in trade - Disallowance under section 14A, does not apply to shares held as stock-in-trade - Disallowance on notional basis is invalid [Rule 8D]

The assessee availed of an interest-free loan of Rs. 14 crores and paid brokerage of Rs. 28 lakhs for purchasing shares. The shares were held as stock-in-trade and the assessee earned dividend of Rs. 46.67 lakhs thereon. The assessee claimed that no expenditure had been incurred to earn the dividend though the Assessing Officer made a disallowance of Rs. 27.34 lakhs under section 14A & Rule 8D. The Tribunal held that the brokerage on the loan, though incidental to the trading of shares, was indirectly incurred to earn dividend and had to be disallowed under section 14A. On appeal by the assessee, Held by the High Court allowing the appeal:

When no expenditure is incurred by the assessee in earning dividend income, notional expenditure cannot be disallowed under section 14A. The assessee had not retained shares with the intention of earning dividend. The dividend income was incidental to the business of sale of shares, which remained unsold by the assessee. It cannot be said that the expenditure incurred in acquiring the shares had to be apportioned to the extent of dividend income and that should be a disallowance under section 14A.

CCI Ltd. v. JCIT (2012) 206 Taxman 563 / 71 DTR 141 / 250 CTR 291 (Karn.)(HC)

S. 14A : Disallowance of expenditure - Exempt income - Remand - In remand, disallowance under section 14A cannot exceed original disallowance

The Assessing Officer has made a disallowance under section 14A of Rs. 45 Lakhs on the ground that the assessee had not been able to segregate expenses relating to earning of dividend income and that borrowed funds had been used to fund the investments. The CIT(A) reduced the quantum of disallowance & the department accepted that. In the assessee's appeal, the Tribunal totally deleted the disallowance. On appeal by the department, Held:

The Assessing Officer should examine & compute the disallowance on the basis of what is laid down in Maxopp Investment Ltd. (2011) 203 TM 364 (Delhi) However, the quantum of disallowance, if any, to be made by the Assessing Officer will not exceed the disallowance which was made in the original assessment order as reduced by the CIT(Appeals). (A.Y. 2001-02)

CIT v. Machino Plastic Ltd. (2012) 348 ITR 523 (Delhi)(HC)

S. 14A : Disallowance of expenditure - Exempt income - Firm - Partner - Interest -Disallowance cannot made if there is no tax-free income [S. 10(2A), 36(I)(iii)]

The assessee, a partner in a firm, borrowed funds and advanced it to the firm on terms that the firm would pay interest if it made a profit. For one year, the firm paid interest which was offered as income by the assessee while for the second year it did not pay interest as it made a loss. The assessee claimed the interest paid on the borrowing as a deduction under section 36(1)(iii). The Assessing Officer disallowed the claim on the ground that as the borrowings had been invested in the firm and the income from the firm was exempt under section 10(2A), the interest expenditure was not allowable under section 14A. This was reversed by the CIT(A). On appeal, the Tribunal upheld the CIT(A) on the ground that as there was no exemption claimed under section 10(2A) by the assessee and there was no tax-free income, section 14A could not apply. The department filed an appeal in the High Court in which it argued that as the profits derived by the assessee from the firm was exempt under section 10(2A), the interest on the borrowed funds used to invest in the firm was disallowable under section 14A. The court dismissing the appeal, held:

In so far as Question (A) is concerned, on facts we find that there is no (tax-free) profit for the relevant assessment year. Hence the question as framed would not arise.

CIT v. Delite Enterprises (Bom.)(HC) www.itatonline.org

S. 14A : Disallowance of expenditure - Exempt income - Deduction under chapter VI-A - No disallowance under section 14A could be made against income which are entitle to deduction under section 80P(2)(d) [S. 80P(2)(d)]

The assessee is a co-operative society which claimed deduction under section 80P(2)(d). The Assessing Officer applied provisions of section 14A and disallowed 1/8 of the employees benefit and remuneration. In appeal the disallowance was deleted by Commissioner(Appeals) and Tribunal. On appeal to the High Court, the court held that deductions which are permissible and allowed under chapter VI-A, do not result in exclusion of the income from the charging section. Chapter VIA is a different from the exclusions / exemptions granted / stated in Chapter III. The Court held that no disallowance under section 14A could therefore be made against the income which was entitled to deduction under section 80P(2)(d). (A.Y. 2006-07)

CIT v. Kribhco (2012) 349 ITR 618 / 75 DTR 265 / 209 Taxman 252 / 252 CTR 374 (Delhi)(HC)

Editorial:- Order of tribunal in ACIT v. Kribhco (2010) 6 ITR 686 (Delhi)(Trib.) is affirmed. SLP of revenue is dismissed (2013) 214 Taxman 24 (SC)(Mag.)

S. 14A : Disallowance of expenditure - Exempt income - Income exempt under section 50 of SIDBI Act, 1989, provisions of section 14A cannot be applied-Question not raised before lower authorities cannot be raised before the High Court in an appeal [S. 260A]

Section 14A does not apply to income of section 50 of SIDBI Act, 1989 because said section only exempts payment of income tax but it does not provide that such income of SIDBI bank will not be a part of total income taxable under Act, therefore the order of Tribunal was confirmed. The Court also observed that the issue which was not raised before the lower authorities cannot be raised first time in appeal before the High Court. (A.Y. 2003-04)

CIT v. Small Industries Development Bank of India (2012) 211 Taxman 341 /(2013) 85 DTR 436 (Bom.)(HC)

S. 14A : Disallowance of expenditure - Exempt income - Assessing Officer has to examine whether disallowance offered by the assessee is itself sufficient - Deletion held to be justified [Rule 8D]

Assessee had incurred some expenditure in relation to earning of exempt income. In return filed for relevant assessment year, assessee itself made a disallowance of certain amount under section 14A

out of total expenditure incurred by it. Assessing Officer without examining merit of assessee's stand applied rule 8D and disallowed expenses which was much more than expenses incurred by assessee. Commissioner (Appeals) held that Rule 8D was applicable from assessment year 2008-09 only and thus, deleted addition made. Before Tribunal revenue was not able to point out any error in computation of disallowance made by assessee. Tribunal, therefore, affirm deletion of addition matter did not require fresh consideration. On appeal to High Court by revenue, the High Court affirmed the view of Tribunal. (A.Y. 2007-08)

CIT v. Consolidated Photo & Finvest Ltd. (2012) 211 Taxman 184 (Delhi)(HC)

S. 14A : Disallowance of expenditure - Exempt income - Management fee - Fund management fee - Key man insurance policy are taxable under section 28(vi) hence expenditure incurred relating to same cannot be disallowed under section 14A

The Tribunal held that the proceeds of Keyman Insurance Policy are fully taxable under section 28(vi) of the Act, therefore, the expenditure relating to the same cannot come within the ambit of section 14A, therefore, disallowance was not justified. Fund management fee paid had no nexus with the earning odd dividend disallowance under section 14A cannot be made. (A.Y. 2005-06)

Dy. CIT v. Noble Enclave & Towers (P) Ltd. (2012) 50 SOT 5 (Kol.)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Rule 8D Disallowance cannot exceed total expenditure[Rule 8D]

In A.Y. 2008-09, the assessee earned tax-free dividend income. Its' total expenditure as per the P&L A/c was Rs. 49 lakhs. The Assessing Officer applied Rule 8D and made a disallowance under section 14A of Rs. 2.37 crores which was reduced by the CIT(A) to Rs. 1.78 crores. Before the Tribunal, the assessee claimed that even assuming that the entire expenditure had been incurred to earn the dividend, the disallowance under section 14A & Rule 8D could not exceed the expenditure incurred. held accepting the plea:

Under section 14A read with Rule 8D, disallowance can be made for the expenditure incurred for earning of exempt income. From the assessee's P&L A/c, it is evident that the total expenditure incurred was Rs. 49 lakhs only which was claimed as a deduction. The disallowance under section 14A & Rule 8D cannot exceed the expenditure actually claimed by the assessee. Accordingly, the action of the Assessing Officer & CIT(A) in making disallowance in excess of total expenditure debited to P&L A/c is unjustified. (A.Y. 2008-09)

Gillette Group India Pvt. Ltd. v. ACIT (2012) 16 ITR 57 / 51 SOT 221 (URO)(Delhi)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Shipping business - Company - Book profit - Tonnage tax - When income is computed as per provisions of Chapter XII - G disallowance under section 14A cannot be made [S. 115VP]

Assessee is a company engaged in the business of hiring and operation of ships opted for assessing the income as per provisions of section 115VP. During the relevant year the assessee received the dividend income was claimed as exempt under section 10(34). Assessing Officer disallowed the expenditure by applying the provisions of section 14A read with Rule 8D. Tribunal held that when the income is computed in accordance with the provisions of Chapter XII-G, no separate disallowance can be made under section 14A. (A.Y. 2008-09)

Varun Shipping Company Ltd. v. Addl. CIT (2012) 134 ITD 339 / 66 DTR 390 / 144 TTJ 286 / 17 ITR 587 (Mum.)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Disallowance of expenditure without showing how assessee's method is wrong is to be deleted [Rule 8D]

In A.Y. 2008-09, the assessee claimed that it had not incurred any expenditure in earning dividend income and no disallowance under section 14A could be made. However, the Assessing Officer

computed disallowance under section 14A & Rule 8D of Rs. 12.81 lakhs. This was upheld by the CIT(A). On appeal to the Tribunal, Held:
Section 14A(2) empowers the Assessing Officer to determine the amount of expenditure incurred in relation to tax-free income if, "having regard to the accounts of the assessee, he is not satisfied with the correctness of the claim of the assessee". The satisfaction of the Assessing Officer as to the incorrect claim made by the assessee is sine qua non for invoking the applicability of Rule 8D. The satisfaction can be reached only when the claim of the assessee is verified. If the assessee proves before the Assessing Officer that it incurred a particular expenditure in respect of earning the exempt income and the Assessing Officer is satisfied, then there is no requirement to proceed with the computation under Rule 8D. The Assessing Officer wrongly proceeded on the premise that Rule 8D is automatic irrespective of the genuineness of the assessee's claim in respect of expenses incurred in relation to exempt income. The correct sequence for making any disallowance under section14A is to, firstly, examine the assessee's claim of having incurred some expenditure or no expenditure in relation to exempt income. If the Assessing Officer is satisfied with the same, then there is no need to compute disallowance as per Rule 8D. It is only when the Assessing Officer is not satisfied with the correctness of the claim of the assessee in respect of such expenditure or no expenditure having been incurred in relation to exempt income, that the mandate of Rule 8D will operate. (A.Y. 2008-09)
Auchtel Products Ltd. v. ACIT (2012) 52 SOT 39 (URO) / 22 taxman.com 99 (Mum.)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Burden - Burden is on Assessing Officer to show expenditure is incurred to earn tax - Free income [Rule 8D]
The assessee earned dividend of Rs. 17 lakhs and LTCG of Rs. 12 crores. The assessee claimed that it had incurred no expense to earn the tax-free income and so no section 14A disallowance was permissible. However, the Assessing Officer disallowed Rs. 2 crores under Rule 8D towards interest and admin expenditure. The CIT(A) accepted that no interest was incurred and deleted that disallowance. He also reduced the admin expenditure disallowance. On appeal to the Tribunal, Held:
(i) The contention of the Revenue that some expenditure, directly or indirectly, is always incurred for earning tax-free income cannot be accepted. The burden is on the Assessing Officer to establish the nexus of the expenditure incurred with the earning of exempt income before making any disallowance under section 14A [CIT v. Hero Cycles Ltd. (2010) 323 ITR 518 (P&H), Jindal Photo followed]
(ii) As regards interest, the Assessing Officer has to show the nexus between the borrowed funds and the tax free investments. If that is not done, disallowance of interest is not permissible (K. Raheja Corporation (Bom.) followed)
(iii) As regards admin expenses, s. 14A disallowance cannot be made on an ad-hoc basis. It is the department's responsibility to bring material on record to show that expenditure was incurred for earning the exempt income. If this is not done, disallowance is not permissible (Wimco Seedlings followed v. Dy. CIT) (A.Y. 2006-07)
ACIT v. SIL Investment Ltd. (2012) 73 DTR 233 / 148 TTJ 213 / 54 SOT 54 (Delhi)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Investment which does not generate any income not forming part of total income disallowance is not warranted
None of the investments made by the assessee has generated any dividend income which has been claimed as not forming part of total income. Thus, once there is no claim of income which does not form part of the total income under Act, there cannot be any disallowance in relation to an such investment. (A.Y. 2006-07)
Siva Industries & Holdings Ltd. v. ACIT (2013) 54 SOT 49 / (2012) 145 TTJ 497 / (2011) 59 DTR 182 (Chennai)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Rule 8D prospective from A.Y. 2008-09

Rule 8D is applicable prospectively w.e.f. A.Y. 2008-09 and therefore, disallowance under section 14A could not be made with reference to Rule 8D in the relevant A.Y. 2004-05; neither the assessee nor the revenue having challenged the estimation of the amount disallowable under section 14A as made by the Assessing Officer @ 1% of the total exempt income, it is not open to the Tribunal to go into question of quantification of said amount disallowable and, therefore, the amount disallowable under section 14A is sustained to that extent. (A.Y. 2004-05)

Dy. CIT v. Philips Carbon Black Ltd. (2012) 146 TTJ 175 / 70 DTR 267 (TM)(Kol.)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Firm - Partner - Depreciation - Disallowance applies to partner's share of profits - Depreciation is not "expenditure" & cannot be disallowed under section 14A [S. 10(2A), 28(v), 32]

The Special Bench had to consider two issues: (i) given that a firm pays tax on its profits, whether the share of profit received by a partner from the firm, which is exempt in his hands under section 10(2A), can be said to be not "tax-free" so as to not attract section 14A & (ii) whether depreciation can be said to be "expenditure" so as to be disallowable under section 14A. Held by the Special Bench:

(i) Though a firm and its partners are not different entities in general law, under the Act, they are treated as separate entities. The salary and interest paid by the firm to the partners is deductible in the hands of the firm and taxable in the hands of the partners under section 28(v). The balance profits are taxed in the hands of the firm and exempt in the hands of the partners under section 10(2A). As section 10(2A) provides that the share of profit of the partner shall not be included in his total income, it is not possible to hold that the share income is not excluded from the total income of the partner because the firm has already been taxed thereon. When section 10(2A) speaks of its exclusion from the total income it means the total income of the person whose case is under consideration i.e. the partner. As the share income is excluded from his total income, section 14A would apply and any expenditure incurred to earn the share income will have to be disallowed (Dhamasingh M. Popat v. ACIT (2010) 127 TTJ 61 (Mum.) approved; Sudhir Kapadia & Hitesh Gajaria reversed);

(ii) However, section 14A applies only to "expenditure" incurred by the assessee. Depreciation under section 32 is an "allowance" and not "expenditure" and so cannot be disallowed under section 14A (Hoshang D. Nanavati approved) (A.Y. 2006-07)

Vishnu Anant Mahajan v. ACIT (2012) 137 ITD 189 / 16 ITR 621 / 72 DTR 217 / 147 TTJ 142 (SB)(Ahd.)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Tax free investments -Disallowance under section 14A cannot be made if the investment had the potential of generating taxable income also in the form of short-term capital gains, etc. - Premium paid to premium note holders could not be disallowed under section 14A

The assessee, an investment company, issued optionally convertible premium notes which entitled the holder thereof to a premium on redemption. The proceeds of the issue was invested by the assessee in acquiring the shares of Reliance Utilities and Power Ltd. ("RUPL"), the income whereof was exempt under section 10(23G). The assessee claimed a deduction of the premium paid to the holders of the notes which was rejected by the Assessing Officer & CIT(A) on the ground the expenditure was incurred in respect of tax-free income and so deduction could not be allowed under section 14A. Before the Tribunal, the assessee argued that section 14A could not apply because (a) though the dividends and LTCG on the shares of RUPL were exempt under section 10(23G), the STCG & stock-lending income were not exempt and (b) the assessee had in fact not received any tax-free income on the shares. Held upholding the assessee's plea:

(i) Though the proceeds of the premium notes on which the redemption premium was paid had been invested in the shares/debentures of RUPL and although the dividend income and LTCG from the said investment was exempt under section 10(23G), the premium cannot be regarded as

expenditure incurred exclusively in relation to earning of exempt income so as to invoke section 14A because the said investment had the potential of generating taxable income in the form of STCG etc;
(ii) Further, as no taxable income was actually earned by the assessee, disallowance under section 14A was not sustainable. (Delite Enterprises followed). The fact that in Delite Enterprises, the appeal was dismissed on the ground that no Q of law arises does not mean that it is not a decision on merits. Even a dismissal of an appeal on the ground that no Q of law arises results in a merger (Nirma Industries Ltd. v. Dy. CIT (2006) 283 ITR 402 (Guj.)(High Court followed) (A.Y. 2003-04 & 2004-05)
Avshesh Mercantile (P) Ltd. v. Dy. CIT (2012) 148 TTJ 607 / 75 DTR 229 / (2013) 54 SOT 19 (URO)(Mum.)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Stock-in-trade - DTAA - India-USA - Section 14A applies even if the securities are held as stock-in-trade. Article 7(3) limitation applies to all expenditure and not only to section 44C H.O. expenditure [S. 44C, Art. 7(3)]
The Tribunal had to consider two issues (i) Whether the provision in Article 7(3) of the India-USA DTAA that a deduction for expenses, including a reasonable allocation of executive and general administrative expenses, would be allowed "in accordance with, and subject to the limitations of, the taxation laws of India" would apply to all expenses or only to executive & general admin expenses and (ii) whether section 14A applied to tax-free income on securities held as stock-in-trade. Held by the Tribunal:
(i) The qualification in Article 7(3) of the DTAA that the expenses will be allowed "in accordance with the provisions of and subject to the limitations of the taxation laws of that State" applies to all expenditure incurred for the business of the PE and not merely to section 44C alone. The fact that the assessee's interpretation was accepted in earlier year does not mean that it cannot be departed with;
(ii) Section 14A talks of making disallowance of expenses incurred in relation to an income not chargeable to tax. No exception, such as the dividend being main or incidental income, has been carved out in the provision. The relation of expenses for disallowance is with the exempt income irrespective of the source or nature of the exempt income. When the legislature in its wisdom has not spelt out any exception coming in the way of applicability of section 14A, it is wholly impermissible to artificially find any such exception contrary to the language of the provision and the intention of the legislature. Accordingly, section 14A applies even if the securities are held as stock-in-trade (CIT v. Leena Ramachandran (Smt.) (2011) 339 ITR 296 (Ker.) (HC) distinguished). (A.Y. 1997-98)
JCIT v. American Express Bank Ltd. (2012) 138 ITD 288 / 149 TTJ 683 / 19 ITR 650 / 78 DTR 38 (Mum.)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Interest - Proportionate disallowance under section 14A should be limited to only interest liability and not overhead or administrative expenses [Rule 8D]
Proportionate disallowance under section 14A should be limited to only interest liability and not overhead or administrative expenses, which should be considered for disallowance u/r 8D from 2007-08. It was held that following the ratio laid in the case of CIT v. Catholic Syrian Bank Ltd. (2012) 207 Taxman 2 (Ker.)(HC), addition made on the account of administrative expenses was to be deleted. (A.Y. 2005-06)
ACIT v. Torrent Pharmaceutical Ltd. (2012) 137 ITD 301 (Ahd.)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Pro-rata - Interest - Assessing Officer was not justified in estimating interest expense incurred by the assessee in relation to exempt income on pro-rata basis and in making disallowance invoking provisions of section 14A [S. 10(33)]

The assessee earned dividend income in shares of a company and same was claimed as exemption under section 10(33). The assessee claimed that the said investment was made by from its own funds. It was held that Assessing Officer was not justified in estimating interest expense incurred by the assessee in relation to exempt income on pro-rata basis and in making disallowance invoking provisions of section 14A. (A.Y. 2002-03 & 2003-04)

BNP Paribas SA v. Dy. DIT (2012) 137 ITD 322 / 79 DTR 310 / 150 TTJ 395 (Mum.)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Expenditure neither incurred nor claimed in the profit and loss account disallowance cannot be made

For the A.Y. 2008-09 the Assessing Officer made disallowance under section 14A read with Rule 8D of the Income-tax Rules, though neither any expenditure was incurred nor claimed in the profit and loss account. In appeal Commissioner(Appeals) deleted the addition. On appeal by revenue the Tribunal held that as the assessee has not claimed any expenditure in the profit and loss account for earning the exempt income, the appeal of revenue was dismissed. (A.Y. 2008-09)(ITA No. 6310/Mum/2011, Bench 'E' dated 10-8-2012)

ACIT v. Tarun Chandmal Jain (2012) Income Tax Review-Sept. P. 90 (Mum.)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Interest incurred on taxable income also to be excluded to avoid incongruity [Rule 8D]

The Tribunal held that it is not necessary that the Assessing Officer has to record specific finding that the assessee's claim of not incurred any expenditure to earn the tax-free income is not acceptable, but when assessee offers a disallowance the Assessing Officer has to satisfy how the expenditure claimed by the assessee is incorrect. When assessee does not offer any disallowance, Rule 8D can be invoked without any need to express satisfaction. As regards the allocation of expenditure as per Rule 8D(2)(ii), by "expenditure by way of interest…., which is not directly attributable to any particular income or receipt". This refers to interest relatable to tax free income as well as taxable income. However, the definition of variable 'A' embedded in the formula under Rule 8D(2)(ii) refers only to interest expenditure directly related to tax exempt income but not to interest expenditure directly related taxable income. The result is that while Rule 8D(2)(ii) seeks to allocate all interest expenditure, it ends up allocating only interest expenditure relatable to tax free income. This is clearly incongruous. In Godrej & Boycee Mfg. Co. Ltd. v. UOI (2010) 328 ITR 81 (Bom.)(HC), the department took the stand, to defend the constitutional validity of Rule 8D, that both, interest directly attributable to tax exempt income as well as interest directly relatable to taxable income would be excluded from the definition of variable 'A' in the Rule 8D(2)(ii) formula, once the Revenue has taken a particular stand about the applicability of the formula in Rule 8D(ii) based on which constitutional validity of Rule 8D is up held, it is not open to the Revenue to take any other stand on the issue with regard to the actual implementation of the formula in the case of any assessee. Accordingly, the correct application of the formula set out in Rule 8D(2)(ii) is as noted in Godrej and Boyce (supra), that interest expenses directly attributable to taxable income have to be excluded from the computation of common interest expenses to be allocated under Rule 8D(2)(ii). The matter was remitted back to the Assessing Officer for verification and cross objection of assessee was dismissed. (A.Y. 2008-09)

ACIT v. Champion Commercial Co. Ltd. (2012) 139 ITD 108 / (2013) 152 TTJ 241/82 DTR 252 (Kol.)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Stock-in-trade - Disallowance under section 14A cannot be made in respect of dividend on shares held for trading purposes[S.10(33)]

The assessee is a trader in shares. The assessee has claimed exemption under section 10(33) in respect of shares held as stock in trade. The Assessing Officer applied the provisions of section 14A and disallowed the expenses. It was held that disallowance under section 14A cannot be made in respect

of dividend on shares held for trading purposes. (A.Y. 2008-09)(ITA No. 5688/Mum/2011 Bench 'E' dated 29-08-2012)
Esquire Pvt. Ltd. v. Dy. CIT (Mum.)(Trib.) www.itatonline.org

S. 14A : Disallowance of expenditure - Exempt income - Stock-in-trade - Disallowance under section 14A cannot be made in respect of shares held as stock in trade. The view of Mumbai Tribunal which held that section 14A applies to shares held as stock-in-trade was not followed [Rule 8D]
The assessee relying on CIT v. Leena Ramachandran (Smt.) (2011) 339 ITR 296 (Ker.) & CCL Ltd. v. JCIT (2012) 250 CTR 291 (Karn.), claimed that as the shares were held as stock-in-trade, section 14A did not apply. The department opposed this plea by relying on American Express Bank [ITA No. 5904/M/2000 dt. 8/8/2012 (Mum.)(Trib.)] where the view was taken, after considering Leela Ramchandran & Daga Capital Management (2009) 117 ITD 169 (Mum.)(SB), that section 14A applied even to a trader in shares. Held by the Tribunal:
Though in American Express Bank (supra), the Tribunal followed ITO v. Daga Capital Management (P) Ltd. (2009) 117 ITD 169 (SB)(Mum.) & distinguished CIT v. Leena Ramachandran (Smt.) (2011) 339 ITR 296 (Ker.) & held that section 14A applies also to a trader in shares, the Karnataka High Court has held in CCL Ltd. v. JCIT (2012) 250 CTR 291 that disallowance of expenses incurred on borrowings made for purchase of trading shares cannot be made under section 14A. As this is a direct judgment of a High Court on the issue, the same has to be followed in preference to the decision of the Special Bench of the Tribunal in Daga Capital Management (or that in American Express Bank) & it has to be held that disallowance of interest in relation to the dividend received from trading shares cannot be made (Ganjam Trading Co (included in file) & Yatish Trading Co. v. ACIT (2011) 129 ITD 237 followed). (A. Y. 2008-09)
Dy. CIT v. India Advantage Securities Ltd. (Mum.)(Trib.) www.itatonline.org

S. 14A : Disallowance of expenditure - Exempt income - Nexus - Expenditure - Tax free income - Disallowance under section 14A cannot be made in absence of "live nexus" between expenditure & tax-free income
The assessee earned tax-free income from shares and units and claimed that he had not incurred any expenditure on earning the tax-free income and so no disallowance under section 14A was permissible. The Assessing Officer & CIT(A) rejected the claim and disallowed Rs. 2.26 lakhs under section 14A as expenditure incurred to earn the tax-free income. On appeal by the assessee to the Tribunal, it was held that section 14A has within it implicit notion of apportionment in cases where expenditure is incurred for composite / indivisible activities in which taxable and non-taxable income is received. But when it is possible to determine the actual expenditure in relation to exempt income or when no expenditure has been incurred in relation to exempt income, then the principle of apportionment embedded in section 14A has no application. For section 14A to apply, there should be a proximate relationship between the expenditure and the tax-free income. If the assessee claims that no expenditure has been incurred for earning the exempt income, it is for the Assessing Officer to determine as to whether the assessee had incurred any expenditure in relation to the tax-free income and, if so, to quantify the extent of disallowance. In order to disallow the expenditure under section 14A, there must be a live nexus between the expenditure incurred and the income not forming part of total income. No notional expenditure can be apportioned for the purpose of earning exempt income unless there is an actual expenditure in relation to earning the tax-free income. If the expenditure is incurred with a view to earn taxable income and there is apparent dominant and immediate connection between the expenditure incurred and taxable income, then no disallowance can be made under section 14A merely because some tax exempt income is received by the assessee. On facts, from the details of the expenditure, it is clear that the expenditure incurred by the assessee has direct nexus with the professional income of the assessee. It is not the case of the revenue that the assessee

has used his official machinery and establishment for earning the exempt income. The Assessing Officer has not given any finding that any of the expenditure incurred and claimed by the assessee is attributable for earning the exempt income. Consequently, section 14A disallowance is not permissible (Pawan Kumar Parmeshwarlal (ITAT Mumbai) & Auchtel Products (ITAT Mumbai) followed). (A.Y. 2006-07)

Justice Sam P. Bharucha v. ACIT (2012) 53 SOT 192 (URO) / 25 taxman.com 381 (Mum.)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Investment in shares of companies and units of mutual funds out of interest free funds available and not out of borrowed funds, hence, no disallowance under Rule 8D(2)(ii) [Rule 8D]

The assessee had made investment in shares of companies and units of mutual funds out of interest free funds available with it and there was nothing on record to show that said investment was made out of borrowed funds, no disallowance could be made by invoking Rule 8D(2)(ii). (A.Y. 2008-09)

ACIT v. Mohan Exports (P.) Ltd. (2012) 138 ITD 108 / (2013) 82 DTR 110/151 TTJ 667 (Delhi)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Provisions cannot extend to investments made in shares of foreign companies

Provisions of section 14A cannot extend to investments made in shares of foreign companies. It was held that where no interest bearing funds were deployed by assessee company for making investment in shares of domestic companies from which exempt dividend income was earned, no disallowance under section 14A could be made. (A.Y. 2001-02)

ITO v. Strides Arcolab Ltd. (2012) 138 TD 323 / (2013) 85 DTR 128 (Mum.)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Notional expenditure - The assessee had not retained shares with intention of earning dividend income but such income was incidental to business of shares trading, no notional expenditure could be deducted by invoking section 14A

The Assessing Officer found that the assessee had earned dividend income which was exempt and disallowed the expenditure in relation to earning of such income. The Assessing Officer attributed certain expenditure to share trading activity and certain amount in respect of dividend earned from PMS account. In appeal Commissioner (Appeals) deleted the disallowance in respect PMS account and retained the disallowance in respect of share trading account. The Tribunal held that the assessee earned the dividend income as incidental to trading activity hence, no notional expenditure could be deducted by invoking section 14A. The Tribunal followed the ratio of Karnataka High Court in CCI Ltd. v. JCIT (2012) 206 Taxman 563 (Karn.)(HC) (A.Y. 2006-07)

Apoorva Patni v. Addl. CIT (2013) 54 SOT 9 (URO) / 24 Taman.com 223 (Pune)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Interest and indirect expenses (Rule 8D)

The Tribunal held that the Rule 8D is not applicable for the A.Y. 2006-07. The assessee has worked the interest and indirect expenses attributable to investment in shares and mutual fund. The departmental representative has no pointed out any defects in the working provided by assessee hence, the working provided by assessee was confirmed and disallowance made by the Assessing Officer was deleted. (A.Y. 2006-07)

AIA Engineering Ltd. v. Addl. CIT (2012) 50 SOT 134 / 78 DTR 473 / 150 TTJ 170 (Ahd.)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Restriction of disallowance

The assessee despite being given more than sufficient opportunity had not been able to explain the discrepancy in stock. No new document or evidence had been brought nor had the assessee been able to show how the document had been wrongly considered. An addition was made attributable to investments resulting in earning exempt income. It was held that the disallowance was to be restricted to 1% of total exempt income. (A.Y. 2006-07)

Estee Exports P. Ltd. v. ITO (2012) 19 ITR 724 (Kol.)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Stock-in-trade - Section 14A does not apply to shares held as stock-in-trade

The assessee received Rs. 59 lakhs as tax-free dividend. It claimed that no disallowance under section 14A could be made as it was a dealer in shares and the shares were held as stock-in-trade. The Assessing Officer & CIT(A) relied on ITO v. Daga Capital Management (P) Ltd. 119 TTJ 289 (SB)(Mum.) where it was held that section 14A applied also to shares held as stock-in-trade and made a disallowance of Rs. 37 lakhs. On appeal by the assessee to the Tribunal, HELD allowing the appeal: As the assessee is engaged in the business of dealing in shares and the shares were held as stock-in-trade, the intention of the assessee was not to earn dividend income. As the dividend received was incidental to the business of sale of shares, no notional expenditure could be disallowed by invoking section 14A (CCI Ltd. v. JCIT (2012) 71 DTR 141 (Karn.) & Apoorva Patni (Pune)(Trib.) (included in file) followed. (A.Y. 2008-09)

Ethio Plastics Pvt. Ltd v. Dy. CIT (Ahd.)(Trib.) www.itatonline.org

S. 14A : Disallowance of expenditure - Exempt income - Apportionment of expenditure

Assessing Officer estimated Rs. 62.34 crores being proportionate interest on borrowed funds towards earning exempt income and disallowed the same under section 14A. Assessee's own funds are far in excess of the investments made by it which yielded exempt income. Hence, it has to be presumed that the investments had come from the interest free funds available with the assessee and the disallowance under section 14A made by the Assessing Officer in respect of interest cannot be sustained. (A.Y. 2002-03)

Reliance Industries Ltd v. Addl. CIT (2012) 79 DTR 315 / (2013) 55 SOT 8 (URO)(Mum.)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Dividend - Restricting disallowance to Rs. 50,000/- was reasonable

The Assessing Officer disallowed an amount of Rs. 20,53,048/- being 5 per cent of the dividend income of Rs. 4,10,60,955/-. On appeal, the assessee contended that there was no interest expenditure for earning the tax-free dividend / income. Further, it was also the submission of the assessee that only 5 dividend cheques totaling to Rs. 4,10,60,759/- were received and therefore disallowance of 5 per cent of the total income on estimate basis was unjustified. The Commissioner(Appeals) restricted such disallowance to Rs. 50,000/- on the ground that the *ad hoc* disallowance at the rate of 5 per cent of the dividend income was too high. On revenue's appeal, the Tribunal held that restricting disallowance to Rs. 50,000/- was held to be reasonable. (A.Y. 1999-2000)

Kirloskar Oil Engines Ltd. v. Dy. CIT (2012) 54 SOT 201 (Pune)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Reasonable amount to be disallowed [S. 10(34), Rule 8D]

The assessee-company earned dividend income out of which a certain sum was claimed as exem pt under section 10(34) of the Income-tax Act, 1961. In the computation of total income, a disallowance was made by the assessee under section 14A being the expenditure incurred in relation to earning of exempt dividend income. The working furnished by the assessee was not according to Rule 8D of the Income-tax Rules, 1962 which, according to the Assessing Officer, was applicable to the year under

consideration. He, therefore, recomputed the disallowance of expenses to be made under section 14A applying Rule 8D which resulted in additional disallowance under section 14A. The Commissioner(Appeals) deleted the additional disallowance. On appeal Tribunal Confirmed the order of Commissioner (Appeals). (A.Y. 2006-07)

Great Eastern Shipping Co. Ltd. v. Addl. CIT (2012) 20 ITR 351/(2013) 57 SOT 172 (Mum.)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Interest on borrowed capital - Book profit [S. 115JA]

Investment in shares and mutual funds income from which is exempt. For considering the disallowance of interest paid on borrowings, matter to be considered in light of section 14A. Quantum of adjustment for purpose of section 115JA to depend on actual interest disallowed. Hence matter remanded. (A.Y.1999-2000)

KEC International Ltd. v. Dy. CIT (2012) 20 ITR 282 (Mum.)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Computation - Foreign company - No disallowance

The Assessing Officer found that the assessee had made huge investments in its subsidiary companies in the form of equity and preference shares. The Assessing Officer also found that the assessee had taken huge loans for which it was paying interest and, therefore, applying the provisions of section 14A of the Income-tax Act, 1961, he disallowed the interest paid to the sister concerns. The Assessing Officer further observed that the assessee had earned dividend income and against this exempt income, the assessee had not shown any expenditure incurred for earning this exempt income. He apportioned on the ratio of turnover of the assessee-company and allocated at 5.2 per cent of these amounts as incurred relating to earning dividend income and disallowed it. The Commissioner(Appeals) confirmed disallowance of a part of this amount. That with regard to the investment in foreign subsidiaries, no disallowance could be made under section 14A because dividend income from foreign subsidiaries is taxable in India therefore, n**o** disallowance of expenditure from dividends from foreign companies. As regards dividend income from Indian subsidiaries are concerned direction given by the Commissioner(Appeals) to disallow proportionate disallowance was confirmed. (A.Y. 2005-06, 2006-07)

Suzlon Energy Ltd. v. Dy. CIT (2012) 20 ITR 391 / 57 SOT 54 (URO)(Ahd.)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Ad-hoc disallowance is not permissible

Actual expenditure to be disallowed, ad hoc disallowance is not permissible. (A.Y. 2004-05)

Torrent Power Ltd. v. Dy. CIT (2012) 20 ITR 653 / (2013) 58 SOT 6 (URO)(Ahd.)(Trib.)

S. 14A : Disallowance of expenditure - Exempt income - Administrative and managerial services - No disallowance can be made without clear finding [Income-tax Rules, 1962, Rule 8D]

Assessee had investment in shares from which it earned exempt income. It had not disallowed any expenditure relating to administrative and managerial services in respect of earning of said exempt income. Assessing Officer applied Rule 8D and disallowed under section 14A, 0.5 per cent of average investment in shares. Assessing Officer had not specifically pointed out that any direct expense had been incurred for earning exempt income. Tribunal held that disallowance under section 14A requires a clear finding of incurring of expenditure and, hence, in absence of same, no disallowance could be made in instant case. Appeal of assessee was allowed. (A.Y. 2008-09)

Priya Exhibitors (P.) Ltd. v. ACIT (2012) 54 SOT 356 (Delhi)(Trib.)

S. 15 : Salaries - Perquisite - Tax borne by employer is not perquisite - Notional interest on interest free deposit is not perquisite

Assessee was a resident but not ordinarily resident individual and an employee of a foreign company. He earned salary income. He received Rs. 77 lakhs in India on which tax payable at maximum rate of 44.8 per cent came to Rs. 35 lakhs. Assessee had included Rs. 35 lakhs to his salary income of Rs. 77 lakhs and offered Rs. 113 lakhs (round figure) to tax. Total tax liability was Rs. 50 lakhs which assessee paid. Revenue authorities sought to include Rs. 50 lakhs of total tax with salary income of Rs. 77 lakhs to arrive at total income. Tax amounting to Rs. 15 lakhs paid by assessee which was not reimbursed by company, could not be added to income of assessee. Following decision of the High Court in the case of M.E.A. Paes v. CIT (1998) 230 ITR 60 / 98 Taxman 380, notional interest on interest-free deposit made for accommodation was held as not forming part of perquisite of the assessee. Appeal of revenue was dismissed. (A.Y. 1994-95)

CIT v. Jaydev H. Raja (2012) 211 Taxman 188/(2013) 357 ITR 293 (Bom.)(HC)

S. 17(2) : Perquisite - Expenditure on repair of residential accommodation occupied by employee - Cost of repairs and renovation shall be deleted, in the absence of any recital in the lease deed spelling out any obligation on the assessee to carry out repairs and renovations [Rule 3]

Express provision of Rule 3 which elaborates various contingencies in relation to perquisite of rent-free accommodation rules out the intention of the parliament to treat expenses in relation to improvement, repairs or renovations as falling within the meaning of 'perquisite'. Argument of the Revenue that the repairs and renovation expenses constituted an obligation of the employee, which was borne by his employer, is meritless. Lease deed nowhere spells out any obligation on the employee to carry out repairs and renovations. Section 17(2)(iv) cannot be made applicable. If the Assessing Officer had returned a finding that the premises were to be valued at market value (of the rental), in case it increased as a result of the renovations, the only prescribed mode was to ally the method indicated by Rule 3(a)(iii). (A.Y. 1994-95)

Scott R. Bayman v. CIT (2012) 76 DTR 113 / 253 CTR 233 / 210 Taxman 396 (Delhi)(HC)

S. 17(2) : Perquisite - Residential accommodation - Notional interest on deposit paid by employer to land lord cannot be taken in to consideration while computing perquisite [Income-tax Rules, 1962 - Rule 3]

The employer provided with rent free accommodation and monthly rent paid by the employer was Rs.10,000/- per month. The employer had given an interest free deposit of Rs 30 lakhs to the land lord. While computing the perquisite the Assessing officer taken into consideration notional interest at 12% on interest free deposit of Rs. 30 lakhs, which was confirmed in appeal. On appeal to the Tribunal the Tribunal held that as per the amended Rule 3 of the Income-tax Rules, 1962, with retrospective effect from 1-4-2001, the perquisite value of the accommodation computed by the assessee was to be accepted. On appeal by revenue the Court held that in view of Rule 3 of 1962 Rules, perquisite value of residential accommodation provided by employer to its employee is to be computed on basis of actual amount of lease rental paid or payable by employer and not on notional basis, hence, notional interest on deposits paid by employer to land lord cannot be taken in to consideration. Accordingly the appeal of revenue was dismissed. (A.Y. 2001-02)

CIT v. Shankar Krishnan (2012) 349 ITR 685 / 207 Taxman 233 (Bom.)(HC)

S. 17(2) : Perquisite - Tax on salary paid by employer - Rent free accommodation - Tax component of such perquisite value cannot be included in computation of perquisite value of rent free accommodation. [Income-tax Rules, 1962 - Rule 3]

In an appeal before the High Court the revenue raised the question whether the tax paid by the employer (Japan Airlines International Company Ltd.) is a "Perquisite" within the meaning of section 17(2) and therefore, in terms of Rule 3 of the Income-tax Rules 1962, cannot be taken in to consideration for computing the value of the perquisite "rent free accommodation". While dismissing

the appeal of revenue the court held that payment of income-tax by the employer is payment of employee who has taxable income as an assessee is liable to pay tax. His income is chargeable to tax. It is the obligation of the employee as an assessee to pay tax. Its this obligation which is being discharged and paid by the employer. Therefore, it would fall within the ambit of section 17(2)(iv). Thus the tax component paid by the employer towards and as Income-tax, when an employee is entitled to tax free salary, is a perquisite within the meaning of section 17(2) and the monetary value of such tax free salary, that is tax component could not be included in computing the perquisite value of rent free accommodation provided by the employer to the employees. (A.Y. 2006-07)

CIT v. Telsuo Mitera (2012) 345 ITR 256 / 208 Taxman 344/(2013) 92 DTR 57 (Delhi)(HC)
CIT v. Isao Sakai (2012) 345 ITR 256 /(2013)92 DTR 57(Delhi)(HC)
CIT v. Yoshimi Kamano (2012) 345 ITR 256/(2013) 92 DTR 57 (Delhi)(HC)
CIT v. Yuji Horikawa (2012) 345 ITR 256/(2013) 92 DTR 57 (Delhi)(HC)
CIT v. Hidechito Shiga (2012) 345 ITR 269 (Delhi)(HC)

S. 17(2) : Perquisite - Rent free accommodation - Rent free accommodation provided by Indian Company was not perquisite and entitled to exemption under section 10(14) [S. 10(4)]

The Court held that rent free accommodation provided by Indian Company was not perquisite and entitled to exemption under section 10(14). Ratio of CIT v. Morgenstern Werner (2003) 259 ITR 486 (SC) and Moregesntern Werner v. CIT (1998) 233 ITR 751 (All.)(HC) followed.

CIT v. Sakakibara Yutka (2012) 210 Taxman 286 (Delhi)(HC)

S. 17(2) : Perquisite - Tax paid by employer is perquisite - Accommodation [Income-tax Rules, 1962 - Rule 3]

Tax paid by employer on behalf of employee is perquisite under section 17(2) and therefore not includible in salary under Rule 3 of Income-tax Rules 1962, for purpose of computing perquisite value of accommodation supplied by employer to employee. (A.Y. 2006-07)

Isao Sakai v. JCIT (2012) 49 SOT 154 (Delhi)(Trib.)

S. 17(2) : Perquisite - Reimbursement of medical expenses - Reimbursement cannot be considered for the purpose of chapter XII-H

Medical reimbursement is taxable as perquisite in the hands of individual employees and therefore, it cannot be said to be a fringe benefit for the purposes of chapter XII-H. (A.Y.2006-07)

Intervalue (India) Ltd. v. Addl. CIT (2012) 149 TTJ 365 / 77 DTR 113 (Pune)(Trib.)

S. 17(3) : Profits in lieu of salary - Key man insurance policy - Surrender value cannot be taxed as profit in lieu of salary [2(24(xi), 56]

The Assessing Officer treated the difference between the premium paid by the company and the surrender value paid by assessee as the benefit to be taxed in his hands under section 17. In appeal the Commissioner(Appeals) also confirmed the addition made by the Assessing Officer. On further appeal the Tribunal held that amount in question cannot be treated as "Perquisite" under section 17(3). On appeal to the High Court, by revenue the Court referred the Circular No. 762 dated 18th Feb., 1998 and held that on assignment of keyman insurance policy by company to its employee-director against receipt of surrender value from the director, difference between premium paid by company to LIC and surrender value paid by director to company cannot be taxed as "profits in lieu of salary" in the hands of director. The High Court held that neither section 17(3) nor section 56(2)(iv) will be attracted.

CIT v. Rjan Nanda (2012) 349 ITR 8 / 249 CTR 141 / 69 DTR 250 (Delhi)(HC)
CIT v. Naresh Kumar Trehan (2012) 249 CTR 141 / 69 DTR 250 (Delhi)(HC)

S. 22 : Income from house property - Business income - Builder - Property dealer - Stock-in-trade - Unsold flats being house property rental income should be assessed as income from house property and not as business income [S. 28(i)]

The assessee is a property developer and builder, in course of its business activities constructed a building for sale, in which some flats were unsold. During the year the assessee received rental income from letting out of the unsold flats which was shown as stock in trade in the balance sheet. It disclosed the rental income from letting out of the unsold flats as income from house property and claimed the statutory deduction. The Assessing Officer held that in the wealth tax proceedings the assessee had shown the unsold flats a stock-in-trade and not taxable for the purpose of wealth tax. The Assessing Officer assessed the rental income as business income. Commissioner(Appeals) has accepted the contention of assessee. On appeal to the Tribunal by revenue, the Tribunal restored the order of Assessing Officer. The Assessee filed an appeal to the High Court. The High Court held that under the Act the income of an assessee is one and various sections of the Act direct the modes in which the income is to be levied. No one of the sections can be treated as general or specific for the purpose of any one particular source of income. They all specific and deal with various heads in which an item of income, profits and means of an assessee falls. These sections are mutually exclusive and where an item of income falls specifically under one head, it has to be charged under that head and no other. On the facts since unsold flats being house property, rental should be assessed under the head 'income from house property'. Appeal is decided in favour of assessee. (A.Y. 1998-99)

Azimganj Estate (P) Ltd. v. CIT (2012) 206 Taxman 308 / 72 DTR 341 / 251 CTR 48 (Cal.)(HC)

S. 22 : Income from house property - Business income - Owner - Lease of property exceeding twelve years assessable as business income [S. 27(iiib), 28(i), 269UA(f)]

Two consecutive licence agreements for eleven years and ten years being different and not a camouflage to conceal a licence of twenty one years or to circumvent the provisions of section 27(iiib) r/w section 269UA(f) which were not there when the first agreements was entered into, assessee's income in the form of rent and compensation from sub-licencees was therefore assessable as business income and not as income from house property. Appeal of department was dismissed. (A.Y. 2004-05 & 2005-06)

CIT v. Pelican Investments (P) Ltd. (2012) 79 DTR 474 / 254 CTR 351 / 210 Taxman 626 / (2013) 353 ITR 16 (Bom.)(HC)

S. 22 : Income from house property - Rent-Service charges - Assessable as income from house property and not as Income from other sources [S. 56]

During the year, the assessee received rent and service charges in respect of a property owned by it. It claimed both rent income and service charges as 'Income from house property'. The Assessing Officer accepted the rent income as 'Income from house property'. So far as service charges were concerned, he held that these service charges were for ancillary services and, therefore, assessable under the head 'Income from other sources' and not as 'Income from house property'. On appeal, the Commissioner(Appeals) allowed the claim of the assessee. On second appeal, the Tribunal also confirmed the order of Commissioner(Appeals). On appeal to the High Court: the Court held that mere splitting of rent was not decisive and each case had to be examined on its own facts to determine whether the service charges were part of the rent. Therefore, the service charges could not be taxed under the head 'Income from other sources', but had to be taxed along with rent income as 'Income from house property'. Further the service charges received by the assessee were considered by the Assessing Officer to determine the net maintainable rent and fair market value of the property under the provisions of the Wealth-tax Act. Accordingly the High Court up held the order of Tribunal. (A.Y. 2004-05)

CIT v. J. K. Investors (Bom.) Ltd. (2012) 211 Taxman 383 (Bom.)(HC)

S. 22 : Income from house property - Deemed owner - Legal owner - Irrevocable permanent leave and licence to tenants - Tenants will be owner and Income from house property will be assessable in their hands [S. 27, 269UA(f)]

Assessee-company is engaged in the business of real estate development. It entered into an agreement with a Trust wherein the assessee was given permission to demolish existing structure which was existing occupied by tenants and construct a new building. After settling old tenants, assessee with regards to new persons assigned tenancy rights by accepting substantial amount as deposit and entered on to irrevocable permanent leave and licence agreement. Assessing Officer held that assessee was owner of property and assessed income from house property in assessee's hand. Tribunal observed that from the agreement with new persons, it could be seen that assessee had given possession to occupant but also absolute right to transfer or assignment but also right to sub let or grant leave and licence of said premises. Considering various other clauses of agreement the Tribunal held that since the assessee had given irrevocable permanent leave and licence to tenants and virtue of section 27, read with clause (f) to section 269UA, tenants would have became deemed owners of premises income from house property would be taxable in their hands. (A.Y. 2002-03 to 2005-06)

Priyadarshini Properties & Estates (P) Ltd. v. ITO (2012) 134 ITD 290 / 74 DTR 387 / 150 TTJ 851 (Mum.)(Trib.)

S. 22 : Income from house property - Terrace - Society - Rent for letting out portion of terrace of its building is assessable as income from house and not as income from other sources [S. 56]

The Assessee is a co-operative housing society, it has received the rent from Reliance Telecom to use of portion of the terrace. It has shown the income from house property and claimed the deduction under section 24 of the income-tax Act. The assessing officer assessed the income as income from other sources. On appeal the Commissioner(Appeals) also confirmed the assessment as income from other sources. On appeal to the Tribunal. The Tribunal followed the order of Tribunal in Sharda Chamber Premises v. ITO ITA No. 1234/Mum/2008 dt. 1st Sept., 2009 (A.Y. 2003-04), ITO v. Cuffe Parade Sainara Premises Co-Operative Society Ltd. ITA No. 7225/Mum/2005 dt. 28th April, 2008 (A.Y. 2002-03), S. Sohan Singh v. ITO (1986) 16 ITD 272 (Delhi)(Trib.), and held that rent is assessable as income from house property and assessee is entitled to deduction under section 24 of the Income-tax Act. (A.Y. 2004-05)

Matru Ashish Co-Operative Society Ltd. v. ITO (2012) 144 TTJ 446 (Mum.)(Trib.)

S. 22 : Income from house property - Business income - Tests on when rental income is assessable as "house property income" v. "business profits" - Income held to be assessable as business income [S. 28(1), 56]

Under section 22, income from the rental of building or land appurtenant thereto is assessable as "Income from house property". However, where complex and varied services are provided and huge investment in the nature of plant and machinery is made, the income is assessable as "Profits & gains of business". On facts, the assessee had conducted systematic activity and rendered extensive and specialized services which could only be utilised by the IT/Software/BPOs businesses to be located in the I.T. Park. Such income cannot be treated as forming part of income from house property but is a constitution of organized structure for carrying out business activities to earn profit and accordingly the income is assessable as income from business. (A.Y. 2007-08)

Dy. CIT v. Mangarpatta Township Development & Construction Co. (2012) 79 DTR 150 / 150 TTJ 590 (Pune)(Trib.)

Mangarpatta Township Development & Construction Co. v. Dy. CIT (2012) 79 DTR 150 / 150 TTJ 590 (Pune)(Trib.)

S. 23 : Annual value - Income from house property - Surcharge collected from tenants

Assessee being the lessor and/or landlord and/or owner is under obligation to pay the consolidated rates of taxes on the land and buildings. Under the conjoint reading of the provisions of the KMC Act the owner is enjoined with statutory right to recover commercial surcharge from occupants and on recovery of the same it is his obligation to pay to the corporation authorities. It is not correct to contend that the surcharge does not have any correlation with the rate. Thus, assessees contention that the payability of the surcharge by the tenant should be kept outside the purview of the rental income from house property as it is not really appropriate or retained by the owner as ultimately it has to be paid or it has to be worked out otherwise by way of agreement is not sustainable. Consequently the moment the commercial surcharge is recovered irrespective of the provisions of the agreement entered into by and between the landlord and tenant it immediately becomes exigible to tax as rental income from house property for agreement binds the parties thereto and it becomes irrelevant the moment it is found to be in conflict with legal provision on the subject. (A.Y. 1997-98)
Poddar Projects Ltd. v. CIT (2012) 77 DTR 464 / 211 Taxman 493 (Cal.)(HC)

S. 23 : Annual value - Income from house property - On facts of the case maintenance charges cannot be assessed as income of assessee
Assessee constructed a multi-storied building and let out same on rent to various tenants. Tenants were also paying maintenance charges to a company 'DLS' for services rendered by it in respect of maintenance of common areas and facilities in building. The Assessing Officer took the view that as owner of the building it was the responsibility of the assessee to maintain the same. He also opined that the amount paid by the tenants to DLS was nothing but a part of the rent and added the maintenance charges paid to DLS to the income of the assessee declared under the head 'Income from house property'. The Commissioner(Appeals) upheld the order of the Assessing Officer. The Tribunal held that the assessee did not have any domain over the recovery of maintenance charges nor did it have any role to play in the business activities of DLS and deleted the impugned addition made by the Assessing Officer. On appeal to High Court the Court held that Assessee had no domain over recovery of maintenance charges nor had any role to play in business activities of DLS. Court held that maintenance charges paid to DLS could not be treated a part of rent taxable in hands of assessee. Appeal of revenue was dismissed. (A.Y. 2004-05)
CIT v. DLF Office Developers (2012) 211 Taxman 190 (Delhi)(HC)

S. 23 : Annual value - Income from house property - Option - Option of choosing property for claiming exemption is with assessee, Assessing Officer cannot thrust his choice on assessee
The Assessee was in occupation of three properties, which were situated at Palam, Vihar, Greater Kailash and Malviya Nagar. In the return of income the assessee mentioned address of Malviya Nagar property as self occupied property. During assessment proceedings the assessee stated that Greater Kailash Property was self occupied property. The Assessing Officer held that property at Greater Kailash was lying vacant for so many months hence he estimated the rent at Rs. 50000/- per month and estimated the annual value at Rs. 6 lakh. In Appeal the Commissioner(Appeals), confirmed the order of Assessing Officer. On appeal to the Tribunal, the Tribunal held that provisions of section 23(4), provide option to assessee to chose any one property mentioned in sub-section (2) of section 23 as self occupied property and no restrictions can be put on such option. The Assessing Officer cannot thrust upon his choice on assessee. (A.Y. 2007-08)
Deepak Kapoor v. ITO (2012) 49 SOT 701 (Delhi)(Trib.)

S. 23 : Annual value - Income from house property - Notional Interest - Not to be added as the rent received by the assessee more than the reasonable expected value, the actual rent received should be the annual value of the property under section 23(1)(b)
The assessee had shown the actual rent received, which was far more than the municipal ratable value. As the rent received by the assessee was far more than the sum for which property might

reasonably be expected to let from year to year, the actual rent received should be the annual value of the property under section 23(1)(b). Notional interest on interest free security deposit / rent received in advance should not be added to the same in view of the decision of Bombay High Court in case of J. K. Investors (2001) 248 ITR 723 (Bom.) (A.Y.2004-05)

ACIT v. Monisha R. Jaisingh (2012) 51 SOT 182 (Mum.)(Trib.)

S. 23 : Annual value - Income from house property - Property is not let out at all during previous year - No vacancy allowance can be given [S. 23(1)(c)]

Vacancy allowance to be given only when property is let and vacant for part of the year and thus, in a case, where property is not let out at all during previous year, no vacancy allowance can be given under section 23(1)(c). (A.Y. 2006-07)

Indra S. Jain (Smt.) v. ITO (2012) 52 SOT 270 (Mum.)(Trib.)

S. 23 : Annual value - Income from house property - Property not let out - When assessee not established that the property was not intended to be let out annual value could not be taken as nil

The assessee had declared annual value of his property at nil by applying the provisions of section 23(1)(c). The Assessing Officer computed the income adopting annual value on basis of fair rent. The Commissioner(Appeals) deleted the addition. On appeal by revenue the Tribunal held that before availing the benefit of section 23(1)(c), assessee has to establish that property was intended to be let but remained to be vacant in absence of tenant. On the facts the Assessing Officer gave a specific finding that no efforts have been made to let out property which was not controverted by assessee hence annual value of property could not be taken at Nil. (A.Y. 2006-07)

Addl. CIT v. Apoorva Patni (2013) 54 SOT 9 (URO) / 24 taxman.com 223 (Pune.)(Trib.)

S. 23 : Annual value - Income from house property - Interest free deposit - Notional interest on deposit not includible in annual letting value

The assessee let out its property on a monthly rent of Rs.1 per sq. ft. It also received Rs. 78 crores as an interest-free deposit. The assessee claimed that as the municipal ratable value of the said Property was higher than the actual rent received the said municipal ratable value had to be taken as the ALV. The Assessing Officer held that notional interest at the rate of 18% p.a. on the said deposits had to be added to the actual rent received so as to determine the ALV. The CIT(A) held that while the Assessing Officer was wrong in adding the notional interest on the security deposit, the assessee was also wrong in insisting on the municipal rateable value to be the ALV. He held that the ALV had to be decided as per the rent fetched by similar properties located in the same vicinity. On cross appeals by both parties, held by the Tribunal:

As per Circular No. 204 dated 24.7.1976 (1977) 110 ITR 21 (St), issued by the CBDT the expression "the sum for which the property might reasonably be expected to let from year to year" used in section 23(1)(a) means the municipal valuation of the property. In Reclamation Reality, the Tribunal held, after considering the entire law on the subject, including the said Circular & M. V. Sonavala v. CIT (1989) 177 ITR 246 (Bom.) that the ALV had to be determined on the basis of either the Municipal rateable value [23(1)(a)] or the actual rent received [23(1)(b)], whichever is the higher. There is no scope for adding the notional interest on the security deposit to the ALV. Judicial propriety and judicial discipline require that this view be followed (CIT v. Moni Kumar Subba (2011) 333 ITR 38 (Del) (FB) noted). (A.Y. 2006-07)

Gagan Trading Co. Ltd v. ACIT (2013) 54 SOT 608 (Mum.)(Trib.)

S. 23 : Annual value - Income from house property - Annual Letting Value has to be determined as per market rent & not municipal rateable value if property is not subject to "bona fide" rent control

The assessee let out two flats, one to its director and the other to its shareholder, for an aggregate rent of Rs. 4.52 lakhs. The assessee claimed that the rental income was assessable as business profits as the properties were held as a business asset. In the alternative, it was claimed that as the property was subject to rent control law, the rent received from the tenants had to be treated as the Annual Letting Value (ALV) and not the market rent of the properties. The Assessing Officer & CIT(A) rejected the claim and held that the market rent of the properties, which was computed at Rs. 78 lakhs, was the ALV assessable as "Income from house property". The Tribunal had to consider (i) whether the rent was assessable as "business profits" or as "Income from house property" and (ii) whether for purposes of section 23(1)(a), the Assessing Officer was entitled to treat the market rent as the ALV or he had to confine himself to the standard rent/ municipal valuation of the property. Held by the Tribunal:

(i) Rental income has to be assessed as "Income from house property" even if the business of the assessee is to let out property. However, property let out to the director for her residence has to be treated as business user of the property and the rental income from such user has to be treated as business income (East India Housing & land Development trust Ltd. (1961) 42 ITR 49 (SC), CIT v. Vazir Sultan Tobacco Co. Ltd. (1988) 173 ITR 290 (AP) & CIT v. New India Maritime Agencies (P.) Ltd. (2002) 253 ITR 732 (Mad.) followed);

(ii) As regards the determination of ALV in respect of income assessable as house property, it has been held by the Third Member in ITO v. Baker Technical Services (P) Ltd. (2009) 126 TTJ 455 (Mum.)(TM) that the ALV in respect of property which is not covered by the Rent Control Act has to be determined on the basis of the market rent. The municipal rateable value determined under the municipal law is not binding on the Assessing Officer if he is able to show that the said rateable value does not represent the correct fair rent. In Reclamation Reality, the view of the Third Member in Baker Technical Services was not followed on the ground that it was contrary to the judgement of the Bombay High Court in M. V. Sonavala v. CIT (1989) 177 ITR 246 and it was held that the municipal ratable value has to be considered as the ALV. The decision of the Third Member has the same binding force as that of the Special Bench and was required to be followed by the Division Bench in Reclamation Reality. It wrongly relied on M.V. Sonavala, which was a case dealing with property covered under the Rent Control Act. Also, the issue as to whether, if the Municipal Rateable Value does not give the correct fair rent, should still be taken as the ALV for properties not covered under the Rent Control Act was not an issue in M. V. Sonavala. This aspect has been considered in Baker Technical Services & CIT v. Moni Kumar Subba (2011) 333 ITR 38 (Delhi)(FB) and it was held that if the municipal rateable value was not the fair rent, it was not binding on the Assessing Officer;

(iii) The assessee's argument that the property, having been let out to an individual, is subject to rent control law is not acceptable because the tenant is the daughter of a director and substantial shareholder of the assessee. The Rent Control Act applies only to bona fide letting out of properties and not to a colourable transaction which is only an arrangement to reduce tax liability. Accordingly the ALV has to be determined based on the fair rent in the market charged in comparable cases. (A.Y. 2007-08)

Woodland Associates Pvt. Ltd v. ITO (2013) 56 SOT 56 (Mum.)(Trib.)

S. 23 : Annual value - Income from house property - Property consists of more than one house - Annual value thereof shall be determined under section 23(1), as if such property had been let

Assessee owned three properties, viz., R-1, R-2 and M-Assessee declared nil income from house property on ground that R-2 was self occupied for residence and other two remained vacant throughout year which were earlier let out to PSUs. It was held that provisions of section 23(4)(b) are very clear that where property consists of more than one house, annual value thereof shall be determined under section 23(1), as if such property had been let. (A.Y. 2004-05)

ACIT v. Prabha Sanghi (Dr.) (2012) 139 ITD 504 (Delhi)(Trib.)

S. 23 : Annual value - Income from house property - Exemption - A HUF is "owner" occupying house for own residence hence exemption is available

The assessee, a Hindu Undivided Family (HUF), claimed deduction under section 23(2). The Assessing Officer & CIT(A) took the view that as section 23(2) applied to "a house or part of a house in the occupation of the owner for the purposes of his own residence", a HUF was not eligible. The Tribunal took a contrary view and allowed the assessee's claim. In view of the apparent conflict amongst various High Courts, the matter was referred to a Full Bench: section 23(2) confers benefit "Where the property consists of a house or part of a house which (a) is in the occupation of the owner for the purposes of his own residence…". A Hindu Undivided Family is not a fictional entity. It is nothing but a group of individuals related to each other by blood relations, or in a certain manner. A Hindu Undivided Family can be seen as a family of a group of natural persons. There is no dispute that the said family can reside in the house, which belongs to Hindu Undivided Family. A family cannot consist of artificial persons. Under section 13 of the General Clauses Act, the words in masculine gender shall be taken to include females and words in singular shall include plural and vice versa. Therefore, the word 'owner' would include 'owners' and the words 'his own' would include 'their own'. There is nothing, therefore, in the words used in section 23(2), which excludes application of such provision to HUF, which is a group of individuals related to each other.

CIT v. Hariprasad Bhojnagarwala (2012) 342 ITR 69 / 70 DTR 252 / 250 CTR 108 / 206 Taxman 471 / Vol. 42 Tax LR 103 (FB)(Guj.)(HC)

S. 24 : Deductions - Income from house property - Interest - Interest paid on borrowing for acquiring house is deductible under section 24(b) and as cost of acquisition under section 48

The assessee borrowed funds for purchasing a house. The interest paid on the said loan was claimed as a deduction under section 24(b). When the house was sold, the interest paid on the said loan was treated as "cost of acquisition" and claimed as a deduction under section 48 in computing the capital gains. The Assessing Officer held that as the interest had been allowed as a deduction under section 24(b), it could not allowed again in computing capital gains. The CIT(A) allowed the claim. On appeal by the department to the Tribunal, held dismissing the appeal:

Deduction under section 24(b) and computation of capital gains under section 48 are altogether covered by different heads of income i.e., income from 'house property' and 'capital gains'. Neither of them excludes the other. A deduction under section 24(b) is claimed when the assessee computes income from 'house property', whereas, the cost of the same asset is taken into consideration when it is sold and capital gains are computed under section 48. There is no doubt that the interest in question is an expenditure in acquiring the asset. Since both provisions are altogether different, the assessee is entitled to include the interest at the time of computing capital gains under section 48. (A.Y. 2007-08)

ACIT v. C. Ramabrahmam (2013) 57 SOT 130 (Chennai)(Trib.)

S. 24 : Deductions - Income from house property - Interest on borrowed funds - Lease rent - Interest paid on borrowed amount for paying no refundable premium for acquiring lease right is allowable as deduction - Lease rent is not allowable

The assessee acquired lease rights in a property by paying non-refundable premium of sum and lease also monthly lease rent. The lease premium was paid by taking the interest bearing loan. The interest was claimed as deduction. The Assessing Officer has disallowed the interest which was also confirmed in appeal by Commissioner(Appeals). On appeal to Tribunal the Tribunal held that as the premium is not refundable and the borrowed fund has been utilized for paying premium, the interest paid or payable on such borrowed capital is allowable under section 24(b). As regards the lease rent expenses is concerned the Tribunal held that since there is no provision for allowing any other claim of expenditure other than standard deduction of 30%, the said expenditure cannot be allowed. (A.Y. 2001-02 to 2006-07)

Radio Components & Transistors Co. Ltd. v. ITO (2012) 50 SOT 237 (Mum.)(Trib.)

S. 24 : Deductions - Income from house property - Interest on loan raised by partners allowable as deduction

The assessee demonstrated utilization of the borrowed funds for the purpose of construction. The Tribunal held that the Assessing Officer cannot presume that the borrowed money must have been used for some other purposes. Tribunal directed the Assessing Officer to allow the deduction under section 24(b) of the Act. (A.Y. 2002-03, 2004-05, 2005-06)

Delhi Industries & Enterprises v. ACIT (2012) 80 DTR 252 / 150 TTJ 756 (Delhi)(Trib.)

S. 26 : Co-owners - Income from house property - Income from other sources - Rent received from letting out plinths and not house property is assessable as income from other sources [S. 2(31), 22, 56]

The court held that the rent received from letting out the plinths was assessable under section 56 of the Income-tax Act, 1961, and, therefore, the provisions of section 26 have no applicability. (A.Y. 2004-05)

Sudhir Nagpal v. ITO (2012) 349 ITR 636 (P&H)(HC)

S. 27 : Deemed owner - Income from house property - Lease - Lease period was for ten years with option of further renewal, assessee will be treated as deemed owner

The assessee acquired the lease rights by paying a premium for a period ten years, with the option to renewal further. The Assessing Officer treated the assessee as deemed owner and assessed the income as income from house property as against the said income was shown as income from other sources. In appeal the Commissioner(Appeals) confirmed the view of Assessing Officer. On appeal to the Tribunal, the Tribunal held that, the lease period was for 10 years with option of further renewal. The assessee has let out the said premises for a period of five years with option of renewal. Since the assessee was in possession of property with full transferrable rights and had been receiving rent from sub-tenant in his own capacity being owner of property, assessee will be deemed owner under section 27(iiib) and the income was rightly assessed as income from house property. (A.Y. 2001-02 to 2006-07)

Radio Components & Transistors Co. Ltd. v. ITO (2012) 50 SOT 237 (Mum.)(Trib.)

S. 28(i) : Business income - Long term lease - Amount received for transfer of indefeasible right of connectivity for 20 years is assessable over the period of 20 years as business income [S. 28(i)]

RI Ltd. in terms of the agreement, had only the right to use the network during the tenure of the 20 years agreement. Further, the agreement was liable to be terminated at the sole discretion of RI Ltd. and consequently, the amount received as advance for 20 years lease period would have to be returned on such termination for the balance unutilized period. Tribunal also held that the agreement dated 30th April 2003 was only in the nature/form of a lease agreement. Therefore, the assessee had in terms of AS-19 correctly spread the entire fee of Rs. 3,037 crores over the period of 20 years and to pay tax thereon over the entire period. Entire amount was not assessable during the relevant year. (A.Y. 2004-05)

CIT v. Reliance Communication Infrastructure Ltd. (2012) 79 DTR 198 / 254 CTR 251 / (2013) 212 Taxman 177 (Bom.)(HC)

S. 28(i) : Business Income - Contingent deposits - Contingent deposits received from leasing / hire purchase customers with a view to protect from potential sales tax liability, which is credited to turnover is assessable to income-tax

The Assessee is engaged in the business of hire purchase, financing equipment, leasing and allied activities. The assessee has been collecting certain sum as 'contingent deposit' from the leasing hire purchase customers, with a view to protect them from sales tax liability. The collection was on ad hoc

basis. The assessee has shown this amount as contingent deposit. The assessee contended that the deposit was collected in the anticipation of sale tax liability. Apex court negated the submission and held that contingent deposits received from leasing / hire purchase customers with a view to protect from potential sales tax liability, which is credited to turnover, is assessable to income-tax. (A.Y. 1998-99)

Sundaram Finance Ltd. v. ACIT (2012) 349 ITR 356 / 252 CTR 353 / 76 DTR 417 / 210 Taxman 280 / 10 SCC 430 (SC)

Editorial:- Refer Sundaram Finance Ltd. v. ACIT (2009) 318 ITR 452 (Mad.)(HC)

S. 28(i) : Business income - Capital gains - Purchase and sales of shares - Frequency - Magnitude - Volume - Assessable as business income - Capital asset [S. 2(14), 45, 111A]

Assessee filed the return of income showing the income from sale of shares as capital gains. The Tribunal held that the voluminous share transactions were in the ordinary line of the appellants' business, purchase and sale of shares was not for the purpose of earning dividend but with the dominant intention of resale in order to earn profits; the profit made by them is not of mere enhancement of value of the shares, but is a profit made in the carrying on of a business scheme of profit making; huge volume of shares transactions, the repetition and continuity of the transactions, give them a flavour of "trade"; the magnitude, frequency and ratio of sales to purchases on the total holdings is evidence that the assessee had not purchased with the intention to trade in such scripts. The High Court confirmed the order of Tribunal which held that profit on sale of shares as business income. (A.Y. 2005-06, 2006-07)

P. V. S. Raju v. Addl. CIT (2012) 340 ITR 75 / 67 DTR 272 / 247 CTR 546 / Vol. 42 Jan. TLR 76 / (2013) 213 Taxman 13 (Mag.)(AP)(HC)

P. Rajyalakshmi v. Addl. CIT (2012) 340 ITR 75 / 67 DTR 272 / 247 CTR 546 (AP)(HC)

S. 28(i) : Business income - Trading receipt - Collection of contingency deposit - Collection of contingency deposit by assessee against sales tax would form part of income

The Court followed the judgment in CIT v. Southern Explosive Co. (2000) 242 ITR 107 (Mad.)(HC) and held that Collection of 'contingency deposit' by the assessee against the payment of sales tax would form part of income. (A.Y. 1996-97 & 1997-98)

CIT v. Sundaram Finance Ltd. (2012) 205 Taxman 37 / 67 DTR 117 (Mad.)(HC)

S. 28(i) : Business Income - Capital gains - Sale of agricultural land - Assessable as business income [S. 45]

Profit on sale of agricultural land by dividing and sub-dividing it into small plot of land immediately after acquiring it was assessable under the head business income and not exempt as sale of agricultural land. (A.Y. 2005-06)

E.V. Mathai & Sons v. CIT (2012) 72 DTR 163 (Ker.)(HC)

S. 28(i) : Business income - Interest on security deposit-Income from other sources - Interest on NSCs and fixed deposit which was kept for securing contract is assessable as business income [S. 56, 145(3)]

The assessee is a civil contractor firm derived its income from contract work for Government departments .The assessing Officer rejected the books of account and estimated the income. In appeal the Commissioner (Appeals) held that interest of Rs 3,11,956 had to be assessed as income from other sources. On appeal to the Tribunal, the Tribunal disallowed the interest and depreciation. On appeal by the assessee to the High Court the Court held that the Tribunal as well as the authorities below had erred in holding that interest accrued on security deposits to the extent used for the purpose of securing contract work would be assessable as income from other sources. The interest income is to be assessed as business income. (A.Y. 2003-04)

Shyam Bihari v. CIT (2012) 345 ITR 283 / 251 CTR 155 / 73 DTR 41 (Patna)(HC)

S. 28(i) : Business income - One time settlement - Principal and interest - In an one time settlement of principal and interest, it cannot be assumed that assessee has paid the interest due
The appellant had availed a term loan from SICOM. The appellant entered into a one-time-settlement (OTS). The assessee has not produced any evidence regarding the apportionment of interest and principal amount. The Tribunal has granted the relief in respect of Rs. 19 lakhs. The assessee claimed that deduction of interest on a proportionate basis should be Rs.46,31,658/-. As the assessee has not produced any evidence the order of Tribunal was upheld and appeal of assessee was rejected as no substantial question of law arose, the Court held that in an one time settlement of principal and interest, it cannot be assumed that assessee has paid the interest due.
(A.Y. 1999-2000)(ITA No. 5481 of 2010 dated 5-9-2012)
Akay Organics Ltd. v. ITO (Bom.)(HC) www.itatonline.org

S. 28(i) : Business income - Capital gains - Long-term and short-term gains from PMS transactions taxable as business profits [S. 10(38), 28(i)]
The assessee offered LTCG & STCG on sale of shares which had arisen through a Portfolio Management Scheme of Kotak and Reliance. The investments were shown under the head "investments" in the accounts and were made out of surplus funds. Delivery of the shares was taken. The Assessing Officer & CIT(A) held that as the transactions by the PMS manager were frequent and the holding period was short, the LTCG & STCG were assessable as business profits. On appeal by the assessee, held dismissing the appeal:
(a) In a Portfolio Management Scheme, the choice of securities and its period of holding is left to the portfolio manager and the assessee has no control. Only the portfolio manager can deal with the Demat account of the assessee. (b) It is at the end of the year the shares available in the DEMAT account can be entered. Therefore, at the time of deposit of amount, the intention of the assessee was to maximize the profit. (c) As the purchase and sale of shares under PMS is not in the control of the assessee at all, it cannot be said that the assessee had invested money under PMS with intention to hold shares as investment. (d) The portfolio manager carried out trading in shares on behalf of his clients to maximize the profits. Therefore, it cannot be said that shares were held by the assessee as investment. (e) There is, however, a difference between investment in a mutual fund and PMS.
Radials International v. ACIT (2012) 49 SOT 567 (Delhi)(Trib.)
Editorial:- Refer, ARA Trading & Investment Pvt. Ltd. (2011) 47 SOT 172 (Pune)(Trib.), ITO v. RadhaBirju Patel ITA No. 5382/M/2009 Bench 'D' dt. 30th November, 2010 (Mum.)(Trib.) www.iatonline.org, Nalini Navin Bhagwati (Mrs.) v. ITO ITA No. 53/M/2010 Bench 'B' A.Y. 2006-07 dt. 5-8-2011 (Mum.)(Trib.)(Unreported)

S. 28(i) : Business income - Capital gains - Investment in shares - Assessee had intention to trade therefore assessable as business income [S. 45]
Assessing Officer treated the share transaction as business income. On appeal the Tribunal upheld the assessment as business income by considering the following factors (1) Company has passed the resolution to open account with depository participant for trading in shares of various companies under DEMAT segment. (2) Company by its resolution authorised its three directors to deal in purchase and sale and securities to tune of Rs. 100.00 crore. (3) Assessee had appointed asset management company as its portfolio manager to provide portfolio management and other related services. On the facts, it was apparent that assessee company had intention to do trading in shares with a profit motive and thus, income arising from share transactions was rightly brought to tax as business income. (A.Y. 2006-07)
Mafatlal Fabrics (P) Ltd. v. Dy. CIT (2012) 49 SOT 303 (Mum.)(Trib.)

S. 28(i) : Business income - Export - DEPB credit - Not assessable as income till it is sold
In the profit and loss account the assessee has shown the export benefit was receivable (DEPB). In schedule 9 to the balance sheet, DEPB credit was shown under the head "Other income". The DEPB credit was not sold during the year. The Tribunal held that DEPB credit not sold during the relevant year cannot be assessable as income. (A.Y. 2007-08)
ITO v. Binayak Hi-Tech Engineering Ltd. (2012) 13 ITR 369 / 144 TTJ 53 (UO)(Kol.)(Trib.)

S. 28(i) : Business income - Income from house property - Technology park - Development of technology park and providing various facilities and amenities, income derived from lessees is assessable as business income and not as income from house property [S. 22]
Assessee had developed a technology park, and let out its building along with other amenities and facilities. Since the assessee is carrying on a commercial complex activity of setting up software technology park with various facilities and amenities the income derived from lessees is to be taxed as business income and not as income from house property. (A.Y. 1999-2000 to 2004-05)
ITO v. Information Technology Park Ltd. (2012) 49 SOT 491/(2013) 24 ITR 218 (Bang.)(Trib.)

S. 28(i) : Business income - Setting up of business - Participating in tender - Participating in tender construed as setting up of business and interest income was assessed as business income [S. 56]
Assessee company was incorporated to carry on business of real estate development. It filed the return of income declaring the loss return. Assessee raised interest bearing loan for participating in tender and deposited the amount as security deposit. The tender was not materialized and the amount was returned with interest. The Assessing Officer treated the interest received as income from other sources and did not allow the interest paid. The Tribunal held that participating in the tender is one activity for acquiring the land for development therefore, the business was set up and interest earned has to be assessed as business income after setting of the interest paid. (A.Y. 2006-07)
Dhoomketu Builders & Developers (P) Ltd. v. Addl. CIT (2012) 49 SOT 312 (Delhi)(Trib.)

S. 28(i) : Business income - Amounts received for three agreement for rendering hospitality services are considered as business income and it can be segregated separately [S. 22]
The assessee is engaged in the hospitality business, it entered in to three separate agreements with TCS, i.e. for construction of hostel building, lease of hostel facilities, maintenance of amenities and facilities during the period of lease. The assessee claimed the entire receipts as business receipts. The Assessing Officer held that lease rent of hostel building to be assessed as income from house property. On appeal Commissioner(Appeals) confirmed the order of assessing officer. In an appeal to Tribunal, the Tribunal held that the three agreements had to be considered as part of one agreement undertaken by assessee with TCS for provision of hostel facilities, therefore entire receipt to be considered as business income. (A.Y. 2004-05, 2006-07)
Kenton Leisure Services (P) Ltd. v. Dy. CIT (2012) 135 ITD 10 / 146 TTJ 589 / 71 DTR 329 (Cochin)(Trib.)

S. 28(i) : Business Income - Rent - Leased property - As the property was let out as a reason of commercial viability of project, lease rent is held as business income [S. 22]
Assessee firm constructed a market complex and leased it out to various commercial organisations. Assessee showed lease rent received as business income. The issue was as to whether the rent from the lease be considered as income from house property or business income. It was held by the Tribunal that the said income be considered as business income as the assessee received the loan because of the commercial viability of the project. As also, apart from letting out building assessee also provided other incidental services like electrician, plumber, sweeper, water and ward, etc. (A.Y. 2005-06)

Narayan Market Complex v. ITO (2012) 51 SOT 387 (Cuttack)(Trib.)

S. 28(i) : Business Income - Income from undisclosed source - Unexplained sales and expenditure - No addition where no independent evidence brought on record to show assessee suppressed production and made sale of unaccounted production

The assessee was engaged in the manufacture of ingots from iron scrap and its trading. On the basis of information regarding the show-cause notice issued by the Central Excise Department, the Assessing Officer worked out the unaccounted profit earned by the assessee and added it to the income of the assessee. It was held that there was no merit in any addition being made in the hands of the assessee on the account of the alleged suppression in production and also alleged investment in the purchase of raw materials as there was no independent evidence brought on record to establish that assessee had suppressed its production and made sale of its unaccounted production, outside the books of accounts. (A.Y. 2004-05)

ACIT v. A. K. Alloys (2012) 17 ITR 424 / 148 TTJ 1 (UO)(Chd.)(Trib)

S. 28(i) : Business income - Settlement money to competitor to end legal dispute - Not payment for loss of source of income or for entering into negative covenants - No transfer of right, hence revenue was a business income

The assessee was a company carrying on business in joint venture with foreign company. A foreign company incorporated a wholly owned subsidiary company in India to carry on competing business of manufacturing electric equipments. The assessee entered into settlement to settle all legal disputes between parties. It was held that it was not payment for loss of source of income or for entering into negative covenants. There was no transfer of right, hence, revenue was a business income. (A.Y. 2004-05)

Control and Switchgear Contractors Ltd. v. Dy.CIT (2012) 18 ITR 520 (Delhi)(Trib.)

S. 28(i) : Business income - voluntary payment by holding company to subsidiary is assessable as business income [S. 2(24)]

Company BMIL received a payment of Rs. 29.26 crores from its holding company BMG before its amalgamation with the assessee. In its letter addressed to BMIL, BMG had clearly explained that the payment is in recognition of the services rendered by BMIL to BMG. It is not a payment to enable BMIL to recoup its losses nor a payment without business consideration. Fact that it was voluntary or unconditional payment did not make it a capital receipt. Apart from the fact that BMIL was a subsidiary of BMG, there was business relationship between them. Impugned payment was made by BMG only because of such relationship and for the help rendered by BMIL in protecting and promoting the interest of BMG in the wake of adverse publicity suffered by the BMG Group following the release of a contaminated batch of a pharmaceutical product in the market. Therefore, it was a payment connected with the business of BMIL and is liable to be taxed under section 28(i) / r.w.s. 2(24). (A.Y. 1997-98)

Addl. CIT v. Nicholas Piramal India Ltd. (2012) 78 DTR 369 / 150 TTJ 1 / (2013) 57 SOT 41 (URO) (Mum.)(Trib.)

S. 28(i) : Business income - Sale Proceeds of TDR - Project completion method

In case of assessee following project completion method, sale proceeds of TDR allotted consequent to development of road need to be reduced from WIP. (A.Y. 2006-07)(ITA No. 7796/M/2010, dt. 31-08-2012)

ITO v. DKP Engineers & Construction P. Ltd., (2012) BCAJ Pg. 28, Vol. 44-B Part 2, November, 2012 (Mum.)(Trib.)

S. 28(i) : Business income - Capital gains - Investment in shares - Considering the magnitude frequency - Income on sale of shares was held as business income and not as capital gains [S. 45]

Profit from sale of shares is to be assessed as business income or as income from capital gain, most important test is whether initial acquisition of shares was with intention of dealing in shares or it was made as an investment. Assessee had opening investment of Rs. 1 crore in shares. During year under consideration, shares worth Rs. 4.10 crores had been sold while shares of Rs. 4.9 crores were purchased. Assessee earned only a meager amount of dividend. The Tribunal held that the magnitude frequency and ratio of sales and purchases of shares on total holdings was evidence that assessee had not purchased shares as an investment, but with intention to trade in such scripts therefore, income arising from sale of shares was assessable as business income. (A.Y. 2007-08)

ACIT v. Manoj Kumar Samdaria (2012) 54 SOT 331 / 20 ITR 13 (Delhi)(Trib.)

S. 28(i) : Business income - Business profits - DTAA - India-UAE - Amount held under trust cannot be assessed as income of assessee [Art. 5, 7]

Assessee had received certain payments from a UAE based company on account of advertisement and business promotion of said concern. Assessing Officer treated assessee as permanent establishment of said foreign company and held that since assessee had not furnished any agreement with foreign company for providing services in respect of advertisement and business promotion and how much commission should be charged against services, estimated profit at 5 per cent of receipt and made addition. However, right from beginning it was case of assessee that said amount was placed with it in 'trust' and it had been submitting accounts of same to said party which did not have any objection upon such spending and in account also no commission had been charged by assessee. Tribunal held that addition made by Assessing Officer could be said to be made on basis of presumption and, hence, it could not be sustained. Advertisement and business promotion expenses held in trust was not income. Addition in respect of donation and expenditure in cash was to be deleted. (A.Y. 2000-01 to 2002-03 & 2005-06)

S. H. A. M. K. International (P.) Ltd. v. ITO (2012) 54 SOT 120 (URO)(Mum.)(Trib.)

S. 28(i) : Business income - Capital gains - Share transactions - Matter remanded for verification [S. 45]

Assessee is engaged in business of investment and dealing in securities. It treated shares as investment in books of account. It declared income arising from sale of shares as capital gain. Lower authorities treated impugned income as income from business. if assessee is an ordinary investor, income arising out of sale of shares is capital gain and, on other hand, if he trades in shares in regular manner, it is income from business. Tribunal held that treatment given by assessee in books of account could not be conclusive, therefore, assessee was to be directed to furnish details of shares held as investment and as stock-in-trade and on furnishing entire data, Assessing Officer had to redetermine income relating to each category of shares as business income or income from capital gains, as the case may be matter remanded. (A.Y. 2006-07 to 2008-09)

Swarnim Multiventures (P.) Ltd. v. Dy. CIT (2012) 54 SOT 347 (Hyd.)(Trib.)

S. 28(i) : Business income - Capital or revenue - Subsidy - Octroi subsidy is revenue in nature

Assessee received octroi subsidy amounting to Rs. 20.51 crores. Assessee treated such receipt as capital receipt and did not offer same to tax. Assessing Officer, however, rejected claim of assessee and treated octroi subsidy as revenue receipt and charged same to tax. Since major portion of octroi subsidy was granted after setting up of new industries and after commencement of production by assessee, undisputedly said subsidies were revenue receipts, therefore, instant issue was to be decided against assessee. Character of receipt of a subsidy in hands of an assessee has to be determined with respect to purpose for which subsidy is granted and if purpose is to enable assessee to run business

more profitably, then receipt is on revenue account and if purpose is to enable assessee to set up a new unit or to expand existing unit then subsidy would be on capital account. (A.Y. 2006-07)
Mahindra & Mahindra Ltd. v. Dy. CIT (2012) 54 SOT 146 (URO)(Mum.)(Trib.)

S. 28(i) : Business loss - Amalgamation - Advances to employees - Security deposit - Advances to employees by amalgamating company which could not be recovered allowable as business loss - Security deposit for obtaining lease of business premises is not allowable as a business loss
The assessee company was amalgamated with Gangeshwar Ltd. As per approved scheme the assessee wrote off unrecoverable advances paid to employees and security deposits given to land lords for lease of premises. The Assessing Officer disallowed the expenses written off. In appeal the Commissioner(Appeals) allowed the amount written off as business loss under section 28 of the Income-tax, which was confirmed by the Tribunal. On appeal to the High Court by revenue the Court held that, advances were given to the persons who had been employed by the assessee company and if they became irrecoverable, it would clearly be treated as business loss. As regards the security deposits were not given in the ordinary course of business. These were given for securing the premises on rent, albeit for the purpose of carrying on business therein, hence the amount written off was not a revenue loss and hence not allowable as deduction. (A.Y. 2000-01)
CIT v. Triveni Engineering and Industries Ltd. (2012) 343 ITR 245 / 250 CTR 277 (Delhi)(HC)

S. 28(i) : Business loss - Bad debt - Even if the deduction was not allowable as a bad debt the same could be allowable as business loss under section 28(1) [S. 36(2)]
The assessee was a stock and share broker. He wrote off an amount of Rs. 47.58 lakhs as bad debts due to breach committed by three of Bombay Stock Exchange. The Assessing Officer held that the assessee has not satisfied the conditions precedent as provided under section 36(2) of the Act, which required that the amount must be offered to tax in the earlier previous year .The Commissioner(Appeals) allowed for part of amount as business loss. On further appeal the Tribunal held that this was not correct. On appeal the following question of law was raised before the High Court "whether , on the facts and in the circumstances of the case , the 'vastv kasar' of Rs. 44,98,210, which was held to be not deductible as bad debt in view of the provisions of section 36(2) could be considered as an allowable business loss". The Hon'ble High Court held that even if the deduction was not allowable as a bad debt, the Tribunal ought to have considered the assessee's claim for deduction as a business loss. For arriving the conclusion the High Court referred the ratio of Apex court in Badridas Daga v. CIT (1958) 34 ITR 10 (SC) and Bombay High court judgment in CIT v. R. B. Rungta and Co. (1963) 50 ITR 233 (Bom.)(HC). Accordingly the appeal of assessee was allowed. (A.Y. 1991-92)
Harsad J. Choksi v. CIT (2012) 349 ITR 250 / 80 DTR 20 / 254 CTR 499 (Bom.)(HC)
Editorial:- Judgment in Harshad J. Choksi (1995) 52 ITD 511 (Mum.)(Trib.) is reversed.

S. 28(i) : Business loss - Foreign exchange - Foreign currency assets - Loss is assessable as business loss
The assessee converted the foreign currency assets and liabilities into rupee terms at the exchange rate prevalent at the last date of financial year i.e. the date on which the balance sheet of the assessee was drawn and this was reflected in the profit and loss account regularly from year to year. In the current year it was loss while in the immediate preceding year there was gain. The loss is allowable as business loss. (A.Y. 2004-05, 2005-06, 2006-07)
Dy. CIT v. Cosmo Films Ltd. (2012) 13 ITR 340 / 139 ITD 628 (Delhi)(Trib.)

S. 28(i) : Business loss - Loss on sale of properties - Loss on purchase and sale of properties is allowable as business loss

The Tribunal held that the purchase and sale of land and flat are necessarily parts of the regular business carried on by the assessee, the loss arising out of sale of those assets should be considered as the loss incurred on its regular business, hence, allowable as business loss. (A.Y. 2007-08).

ACIT v. Madeena Constructions (2012) 134 ITD 67 / 67 DTR 1 / 14 ITR 25 / 144 TTJ 137 (TM)(Chennai)((Trib.)

S. 28(i) : Business loss - Construction business - Project completion - Method of accounting - Estimated expenditure for entire project cannot be accepted [S. 145]

Assessee is in the business of slum rehabilitation projects approved by Slum Rehabilitation Authority (SRA). The assessee was required to construct and provide free of cost tenements of size 225 sq.ft. to all slum dwellers and in consideration was entitled to TDR or right to construct additional area over and above normal permissible which the assessee could sell in open market. All the projects were at initial stages of construction. The assessee estimated total revenue from entire project to be completed in future and also cost involved in the completion of project, including the contingencies, etc. The resultant loss was claimed as deduction as per Accounting Standard -7. The Assessing Officer did not accept the claim of assessee. He allowed the losses only attributable to the WIP at the end of the year and not losses of the entire projects which were yet to be completed. On appeal Commissioner(Appeals) also confirmed the order of Assessing Officer. On appeal to the Tribunal the Tribunal held that there is no special provisions for computing of income for purpose taxation therefore the income of rehabilitation projects were required to be computed under normal provisions of Act. Income from current year accrue only on account of TDR released and sold or in respect of any additional space constructed for which the agreement for sale had been entered in to and only in respect of such accrued income if any expenditure had to be incurred in future , assessee would incur liability in current year itsself. The Tribunal held that since no agreement for sale had been entered into by assessee, method followed by assessee to show estimated income and expenses in respect of entire project most of which was yet to be executed could not be accepted as proper method to compute income under provisions of Act. Accordingly the assessee would be allowed losses only proportionate to work in progress at end of relevant year and claim of assessee for entire anticipated losses from entire project could not be accepted. The Tribunal confirmed the view of Assessing Officer. (A.Y. 2000-01 to 2003-04)

Shivshahi Punarvasan Prakalp Ltd. v. ITO (2012) 135 ITD 51 / 145 TTJ 457 / 69 DTR 1 (Mum.)(Trib.)

S. 28(i) : Business loss - Speculation - Shares - Loss on sale of share purchased on behalf of client, subsequently disowned is not covered by provisions of section 73 - Loss is held to be allowable as business loss [S. 73]

Losses incurred by assessee (sub-broker of shares) on account of sale of shares which were purchased on behalf of the client and subsequently disowned by respective client must be allowed as business losses and not be covered under provisions of Explanation to Section 73 of the Act. Explanation to section 73 is attracted only when a part of the business of the assessee company consists of purchase and sale of shares of other companies. Transaction in shares undertaken by share broker as its own under compulsion after certain clients disowned part of such transactions, did not constitute business of the assessee in share dealing. (A.Y. 2001-02)

ITO v. Rajvi Securities (P.) Ltd. (2012) 50 SOT 592 (Ahd.)(Trib.)

S. 28(i) : Business loss - Government securities - Investment - Securities were not treated as stock-in-trade, but investment hence loss on sale of securities not to be treated as business loss

The assessee was a cooperative bank. The assessee incurred certain loss on sale of government securities. It was held that where the assessee had been consistently treating the said government

securities as its investments and not as the stock-in-trade, the loss could not be considered as business loss. (A.Y. 2007-08)

Dy. CIT v. Cooperative Bank of Mehsana Ltd. (2012) 136 ITD 334/(2013) 86 DTR 247/154 TTJ 522 (Ahd.)(Trib.)

S. 28(i) : Business loss - deduction - Purchase of goods, showed as closing stock - Disallowance deleted

The assessee imported insulated craft paper. The same were available in bonded warehouse. The assessee recorded purchase of goods and showed it in closing stock. The Assessing Officer disallowed the deduction claimed on the ground that assessee had neither taken physical delivery of purchased goods nor it furnished any evidence to support that the same had been included in closing stock or sales. On appeal, the addition was deleted as the details of raw material showed that sum pertaining to insulated paper had been included in imported stock. The assessee further informed that the concerned stock was accounted for in closing stock. (A.Y. 2006-07)

ITO v. Shakti Insulated Wires (P.) Ltd. (2012) 53 SOT 64 (Mum.)(Trib.)

S. 28(i) : Business loss - Housing loan to employees - Bad debt - Housing loan given to emoloyees written off during the year neither allowable as business loss or bad debt [S. 36(1)(vii), 36(2)]

On the facts the Tribunal held that housing loan given to an employee since he has became untreaceable has nether allowed as business loss nor as bad debt as the assessee has not brought any evidence to show that the loss as a result of the loan given to an employee became irrecoverable was actually incurred in the year under consideration. (A.Y. 2003-04, 2004-05)

RBS Equities (India) Ltd. v. ACIT (2012) 79 DTR 51 / (2013) 151 TTJ 165 / 55 SOT 20 (URO)(Mum.)(Trib.)

S. 28(i) : Business loss - Over valuation of investments in earlier year allowable as deduction in the year of reversal of entry in the books as per regular method of accounting

The assessee Bank purchased zero coupon bonds in the accounting year 1994-95, however, due to mistake it valued the same at market value. It realized the mistake in the year ending 31st March, 1998. Similarly, it purchased the HUDCO Bonds in the accounting period 31st March 1996 and valued at market value. The assessee reversed the entry in the A.Y. 1998-99. The Assessing Officer has not allowed the loss. The Tribunal held that the loss is allowable as business loss once the said amount has been reversed as per its regular method of accounting. (A.Y. 1998-99)

Abu Dhabi Commercial Bank Ltd. v. ADIT (IT) (2012) 138 ITD 83 / 78 DTR 234 / 150 TTJ 85 (Mum.)(Trib.)

S. 28(i) : Business loss - Confiscation of stock of silver allowable as business loss

Assessee is dealing in gold and silver items and has accounted for all the purchases in question. Silver was acquired as stock in the course of business. Following a search at the assessee's premises by the DRI, it seized the entire silver on the ground that the assessee did not prove that it was a legal purchase. CEGAT upheld the order of confiscation passed by the customs authorities. In the appeal before the High Court the assessee inadvertently raised the question only pertaining to the legality of the purchases made from one DH and the Court accepted the genuineness of the said purchases and directed release of 194.25 kgs. of silver. As regards the remaining silver which was purchased from NRIs, the High Court did not entertain the assessee's plea for amending the question in appeal. Supreme Court upheld the order of the High Court. Accordingly, confiscation of silver purchased by the assessee from 18 NRIs has attained finality. Business losses occurring in the course of assessee's business are allowable as deduction. Seized silver was admittedly stock-in-trade for the assessee. Hence, confiscation thereof is a business loss and the amount written off on account of confiscation of stock of silver is allowable as business loss. Business loss on account of confiscation can be claimed

and allowed in the year in which the assessee prima facie losses hope of recovery o the goods. In this case, assessee received CEGAT's order dated 19th March 1996, in April, 1996, and thus the issue of loss stood crystallized in the A.Y. 1997-98 under consideration. Therefore, assessee has rightly claimed the loss in this year. (A.Y. 1997-98)

Rajmal Lakhichand v. ACIT (2012) 78 DTR 355 / 150 TTJ 111 / (2013) 57 SOT 50 (URO) (Pune)(Trib.)

S. 28(i) : Business loss - Not deductible absence of details

The assessee has not furnished the details regarding loss. Tribunal held loss is not deductible. (A.Y. 1990-91)

Siltex India v. ITO (2012) 20 ITR 300/(2013)58 SOT 82(URO) (Mum.)(Trib.)

S. 28(i) : Business loss - Foreign exchange fluctuation loss - Held to be allowable

The assessee claimed foreign exchange fluctuation loss for the A.Y. 2002-03 and 2003-04 in respect of foreign currency loans. The Assessing Officer observed that the loss claimed by the assessee on restatement of foreign exchange liability on account of loan on the balance-sheet date was only notional loss as actual loss would arise only in the year of repayment of loan. It was held that in the income-tax assessment only actual expenses could be allowed and not notional expenses. Therefore, according to the Assessing Officer loss could be allowed only in the year when the loans were settled. The Assessing Officer accordingly disallowed the claim of loss. This was upheld by the Commissioner(Appeals). On appeal to Tribunal, the Tribunal held that foreign currency fluctuation loss is allowable as deduction if the foreign currency is held on revenue account or as trading asset or as part of circulating capital employed in the business. The claim was allowable. The claim had to be allowed on the basis of restatement of the liability on the balance-sheet date. (A.Y. 2002-03, 2003-04)

Mettler Toledo India P. Ltd. v. ITO (2012) 20 ITR 461 (Mum.)(Trib.)

S. 28(i) : Business loss - Obsolescence - Meters

Assessee carrying out business of generation and transmission of electricity, Loss on account of obsolete meters is held deductible. (A.Y. 2004-05)

Torrent Power Ltd. v. Dy. CIT (2012) 20 ITR 653 / (2013) 58 SOT 6 (URO)(Ahd.)(Trib.)

S. 28(i) : Business loss - Discontinuation of software - Held to be business loss

Tribunal held that in view of decision in B. Nagi Reddy v. CIT (1993) 199 ITR 451 (Mad.) expenditure incurred by the assessee for installation of software system (ERP) which was discontinued due to commercial expediency as going on ahead with such system may not be in line with the company requirement was allowed as business loss. (A.Y. 2007-08)

R. R. Kabel Ltd. v. Add. CIT (2012) 54 SOT 374 (Mum.)(Trib.)

S. 28(i) : Business loss - Foreign currency exchange loss - Working capital held to be revenue expenditure

Tribunal held that in view of decisions in CIT v. Woodward Governor India (P.) Ltd. (2009) 312 ITR 254 / 179 Taxman 326 (SC) and Oil & Natural Gas Corpn. Ltd. v. CIT (2010) 322 ITR 180 / 189 Taxman 292 (SC), foreign currency exchange loss relating to the working capital loan was held to be allowable as business expenditure under section 37(1). (A.Y. 2007-08)

R. R. Kabel Ltd. v Add. CIT (2012) 54 SOT 374 (Mum.)(Trib.)

S. 28(iv) : Business income –Waiver of loan- Value of benefit arising from exercise of business or profession –Cessation of liability being in respect of loan taken for purchase of a capital asset nether section 41(1) did not apply nor section 28(iv) did not apply where assessee's liability to pay loan towards purchase of a car taken over by holding company.[S. 41(1)]

The issue arising in this case stand covered by the decision of the High Court in the matter of Mahindra & Mahindra Ltd. (supra). The alternative submission that the amount of loan written off would be taxable under section 28(iv) also came up for consideration before the Court and it was held that section 28(iv) would apply only when a benefit or perquisite is received in kind and has no application where benefit is received in cash or money. In view of above, no substantial question of law arose for consideration. Cessation of liability to repay a loan taken to purchase a capital asset does not result in a revenue receipt and it is not taxable under section 28(iv). (A.Y. 2004-05)
CIT v. Xylon Holdings (P.) Ltd. (2012) 211 Taxman 108 (Mag.)/(2013) 90 DTR 205(Bom.)(HC)
Editorial:- Solid Containers Ltd. v. Dy. CIT (2009) 308 ITR 417 / 178 Taxman 192 distinguished, Mahindra & Mahindra Ltd. v. CIT (2003) 261 ITR 501 / 128 Taxman 394 (Bom.) followed.

S. 28(iv) : Business income - Perquisite - Amalgamation - Excess fair value cannot be assessed as any benefit or perquisite arising from business or profession
During relevant assessment year, a company, SIFL, got amalgamated with assessee-company. Pursuant to amalgamation, assets and liabilities and rights and obligations of SIFL vested with assessee-company and those items had been recorded at their fair values. Excess of fair value of net assets taken over by assessee-company over paid-up value of allotted equity shares worked out to Rs. 2,899.68 lakhs and the said surplus amount was transferred by assessee to its General Revenue Account. Held that the sum of Rs. 2,899.68 lakhs was only a balancing figure arising out of entries passed in books of account as a result of amalgamation and same could not be treated as income taxable under section 28(iv). (A.Y. 2002-03)
Spencer & Co. Ltd. v. ACIT (2012) 137 ITD 141 / 75 DTR 311 / 148 TTJ 421 (TM)(Chennai)(Trib.)

S. 28(iv) : Business income - Goodwill - Date of Merger - Excess of cost of acquisition over the carrying value of net assets appearing in accounts of amalgamated company, not income.
Amount of goodwill representing the excess of cost of acquisition over the carrying value of net assets as on the date of merger appearing in the accounts of the amalgamated company cannot be treated as income taxable under section 28(iv). (A.Y. 2002-03, 2003-04, 2006-07 & 2007-08)
Quintegra Solutions P. Ltd. v. ITO (2012) 148 TTJ 471 / 75 DTR 302 (Chennai)(Trib.)

S. 28(va) : Business income - Cash or kind - Capital or revenue receipt - Non-compete fee - Relinquishment of right to manufacture - Capital receipt - Law before April 1, 2003 - A.Y. prior to 2003-04 [S. 55(2)(a)]
In A.Y. 2000-01, the assessee received Rs. 11 crores pursuant to a non-compete agreement which was for 5 years. The Assessing Officer held that there was a "transfer" by way of relinquishment of the assessee's "right to manufacture" and that the same was chargeable to capital gains by taking Nil cost under section 55(2)(a). This was reversed by the CIT(A) on the ground that the personal skills of the assessee were placed under restraint and as the said personal skills were not a "capital asset", capital gains was not chargeable. On appeal to the Tribunal, the matter was referred to the Special bench it was held by the Special Bench:
(i) The taxability of a non-compete fee depends on the purpose for which it is paid. A non-compete fee can be divided into two categories: (a) consideration received by the transferor of a business for agreeing not to carry on the same business; (b) consideration received by other persons associated with the transferor to ensure that they do not indulge in competing business. For A.Y. 2003-04 & onwards, non-compete fee received by the transferor of a business is taxable as a capital gains in view of section 55(2)(a) which provides that the cost of a "right to carry on business" shall be Nil. Though section 55(2)(a) as amended by the FA 1997 w.e.f. 1.4.1998 referred to a "right to manufacture, produce or process any article or thing", that would not cover a non-compete covenant. For A.Y. 2003-04 & onwards, a non-compete fee received by a person associated with the transferor is taxable

as "business profits" under section 28(va)(a) as being a payment for "not carrying out any activity in relation to any business". A non-compete fee received in an earlier year is not chargeable to tax in view of Guffic Chem. P. Ltd. v. CIT (2011) 322 ITR 602 (SC);
(ii) On facts, the consideration of Rs. 11 crores received by the assessee was not for sale of any business nor was it for not carrying on any business which he was carrying on, which he had transferred. It was also not a payment for a "right to manufacture, produce or process any article or thing". The sum was not paid for transfer of any intangible right in respect of manufacture, production or process of cement. Accordingly, the capital gains provisions were not attracted. The amount was paid for "not carrying out any activity in relation to any business" and would fall within the ambit of section 28(va)(a). However, as section 28(va) came into effect in A.Y. 2003-04, the receipts was not chargeable to tax in A.Y. 2000-01. (A.Y. 2000-01)
ACIT v. B. V. Raju (Dr.) (2012) 135 ITD 1 / 67 DTR 361 / 14 ITR 387 / 144 TTJ 537 (SB)(Hyd.)(Trib.)

S. 28(va) : Business income - Non-compete fee - Amount in question received by assessee was for a negative contract covered by section 28(va), therefore, order of Assessing Officer was to be upheld [S. 55]
Assessee sold its rights in LCV business to its subsidiary and consented not to do business of LCV received Rs. 10.5 crores as non-compete fee. Assessee considered it as capital receipt under section 55(2). Assessing Officer, however, rejected assessee's claim and charged said receipt to tax as business receipt under section 28(va) being non-compute fees. If terms and conditions of an agreement prevents an assessee from an activity that he was doing earlier, resultant receipt becomes a revenue receipt taxable under section 28(va); and if under terms and conditions of an agreement assessee allows someone else to do same business activity as assessee did, fees received for same would be capital receipt. Since in instant case assessee was specifically prevented from carrying on business of manufacturing of trucks (LCV), amount in question received by assessee was for a negative contract covered by section 28(va), therefore, order of Assessing Officer was to be upheld. (A.Y. 2006-07)
Mahindra & Mahindra Ltd. v. Dy. CIT (2012) 54 SOT 146 (URO)(Mum.)(Trib.)

S. 30 : Rent, rates, taxes, repairs and insurance for buildings - Tenanted premises -Revenue expenditure - Cost of repairs of tenanted premises is allowable as revenue expenditure
The assessee company is a tenant in a building occupying 5000 sq.ft . The building was declared by the municipal corporation to be unsafe for occupation. Under the terms of tenancy assessee assumed an obligation to contribute a sum of Rs. 1.50 crores for the work of repairs and restoration of the structure. The Assessing Officer held that the assessee had secured rights for an area of 5000 sq.ft. on payment of sum of Rs. 1.50 crores and the assessee became deemed owner of the premises hence the expenditure is capital in nature. On appeal Commissioner(Appeals) reversed the view of Assessing Officer, which was confirmed by the Tribunal. On appeal by revenue the Court held that the assessee obtained a commercial advantage of securing tenancy of an equivalent area of premises on the same rent as before. Since there was no acquisition of a capital asset and the occupation of the assessee continued in the character of a tenancy, the expenditure could not be regarded as being of a capital in nature. Accordingly the decision of Tribunal was confirmed and appeal of revenue was dismissed. (A.Y. 2003-04)
CIT v. Talathi and Panthaky Associated (P) Ltd. (2012) 343 ITR 309 / 205 Taxman 309 (Bom.)(HC)

S. 31 : Repairs - Machinery - Current repairs or revenue expenditure - Accounting Practice - Nature of expenditure [S. 37]

Each machine in a textile mill is an independent entity. Replacement of old machinery with new machinery is not current repairs but capital expenditure. Replacement of such an old machine with a new one bringing into existence a new asset giving enduring benefit which is capital in expenditure.
Accounting practices may not be the best guide in determining the nature of expenditure but are indicative of nature of transaction and intention of the assessee. (A.Y. 1995-96)
CIT v. Sri Mangayarkarsi Mills Pvt. Ltd. (2011) 11 SCC 656 (SC)

S. 31 : Repairs - Current repairs - Replacement of machinery cannot be considered as current repairs
In view of decision in CIT v. Saravana Spg. Mills (P.) Ltd. (2007) 293 ITR 201 / 163 Taxman 201 (SC), expenditure incurred by assessee during accounting year towards cost of replacement of machinery could not be regarded as an amount paid on account of current repairs allowable under section 31.
CIT v. Sree Ayyanar Spinning & Weaving Mills Ltd. (2012) 211 Taxman 534 (SC)

S. 32 : Depreciation - Goodwill - Intangible - Stock exchange card - "Goodwill" is an intangible asset eligible for depreciation - Stock exchange membership cards are assets eligible for depreciation
Pursuant to an amalgamation of another company with the assessee, the difference between the consideration paid by the assessee and the net value of assets of the amalgamating company was treated by the assessee as "goodwill" and depreciation of Rs. 54 lakhs was claimed thereon under section 32(1)(ii). The Assessing Officer rejected the claim on the ground that (i) "goodwill" was not an "intangible asset" as defined in Explanation 3 to section 32(1) and (ii) the assessee had not paid anything for the same. The Tribunal and High Court upheld the assessee's claim. On appeal by the department to the Supreme Court, Held dismissing the appeal:
Explanation 3 to section 32 states that the expression "asset" shall mean an intangible asset, being know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature. The words "any other business or commercial rights of similar nature" in clause (b) of Explanation 3 indicates that goodwill would fall under the expression "any other business or commercial right of a similar nature". The principle of ejusdem generis would strictly apply while interpreting the said expression which finds place in Explanation 3(b). Consequently, "Goodwill" is an asset under Explanation 3(b) to section 32(1) & eligible for depreciation. Though the Assessing Officer held that the assessee had not "paid" anything for the goodwill, this cannot be accepted because (a) the CIT(A) & Tribunal (correctly) held that that the difference between the cost of an asset and the amount paid in the process of amalgamation constituted "goodwill" and (b) this aspect was not challenged by the department before the High Court. The Court also held that the stock exchange cards are assets eligible for depreciation. (A.Y. 2003-04)
CIT v. Smifs Securities Ltd. (2012) 348 ITR 302 / 75 DTR 417 / 252 CTR 233 / 210 Taxman 428 (SC)

S. 32 : Depreciation - Leasing truck - Not entitled to higher rate of depreciation - Income-tax Rules, 1962, Appendix I, Entry III, Clause (2)(ii)
The assessee purchased a Truck and gave it on lease. The assessee claimed the higher rate of depreciation of 50 percent on the ground that the truck was run on hire by the lessee. The Tribunal allowed the appeal. On appeal by revenue, the Court held that as the assessee was not carrying on the business of hiring of the vehicle, then not entitled to higher rate of depreciation. (A.Y. 1991-92)
CIT v. Pradip N. Desai (HUF) (2012) 341 ITR 277 (Guj.)(HC)

S. 32 : Depreciation - Ownership of asset - Vehicle registered in the name of company - Company entitled to depreciation - Vehicle given on lease - Not entitled higher rate of depreciation

Vehicles though registered in the names of the directors were used for the purpose of business of the company, company entitled to claim depreciation. The Court held that the assessee is not entitled to higher rate of depreciation when the assessee had given vehicles on lease.

CIT v. Aravali Finlease Ltd. (2012) 341 ITR 282 (Guj.)(HC)

S. 32 : Depreciation - Genuineness of assets - Lease - When the assessee has not established the genuineness of purchase of assets, no depreciation can be allowed, though the assets were leased to third parties

The assessee claimed the depreciation in respect of two flameless furnaces purchased by the assessee company and which was leased to third parties. On enquiry conducted by Joint Director (Inv.), it was revealed that the alleged supplier of machinery has no capacity to manufacture such assets and the partner of the firm disowned the invoices produced by the assessee in support of purchase of said assets. The Tribunal has allowed the depreciation. On appeal by the revenue the Court held that as the genuineness of purchase has not been established, merely because the assessee has leased out the said assets to third parties, depreciation cannot be allowed. (A.Y. 1996-97)

CIT v. S & S Power Switchgear Ltd. (2012) 67 DTR 59 / 247 CTR 604 (Mad.)(HC)

S. 32 : Depreciation - Block of assets - Passive user - Asset forming part of block of assets depreciation is allowable even if not used for the relevant year - Unit remained closed for six years depreciation is not allowable

Depreciation is allowable to block of assets, irrespective of fact that a particular asset is used or not, Revenue cannot segregate a particular asset there from on the ground that it was not put to use. The individual assets have lost their identity when a particular asset is part of block of assets. Once it is established that a particular unit was used for the purpose of business, the depreciation is allowable to entire block. The Court also held that if the Unit is closed for six years and if there is no sign of unit becoming functional the concept of 'passive user' could not be extended to absurd limits, otherwise, the words "used for the purpose of business" would lose their total sanctity. However the Tribunal was right in allowing depreciation based on "block of assets". (A.Y. 1998-99)

CIT v. Oswal Agro Mills Ltd. (2012) 341 ITR 467 / (2011) 238 CTR 113 / 197 Taxman 25 / 50 DTR 305 (Delhi)(HC)

CIT v. Oswal Chemicals and Fertilizers Ltd. (2012) 341 ITR 467 / (2011) 238 CTR 113 / 197 Taxman 25 / 50 DTR 305 (Delhi)(HC)

S. 32 : Depreciation - Lease of assets - Put to use - When assets are leased and installed at a place of lessee the assessee is entitled for depreciation irrespective of put to use

For the relevant assessment year 1997-98, the assessee claimed depreciation on the boiler given on lease, stating that the said boiler had been installed in the factory in the month of Feb., 1997 and the boiler was put to use on 26-3-1997. The Assessing Officer disallowed the depreciation on the ground that the said boiler was put to use only on 6-5-1997. On appeal by the revenue the High Court held that, as and when leased assets are installed at place of lessee, it could be presumed for purpose of depreciation that they had been used by lessee, hence, for allowability of depreciation actual date on which such assets were put to use by lessee has no relevance. The Court answered the question in favour of assessee. (A.Y. 1996-97, 1997-98)

CIT v. Sundaram Finance Ltd. (2012) 205 Taxman 37 / 67 DTR 117 (Mad.)(HC)

S. 32 : Depreciation - Intangible assets - Business information - Business information, contracts, records etc are "intangible assets" and eligible for depreciation

The assessee, vide slump sale agreement, acquired a transmission and distribution business as a going concern for a lump sum consideration of Rs. 44.7 crores. The net tangible assets were valued at Rs.28.11 crores and the balance Rs. 16.58 crores was allocated by the transferee towards acquisition of bundle of "business and commercial rights" being business information; business records; contracts; employees etc, compendiously termed as "goodwill". The assessee claimed that the said "business and commercial rights" were an "intangible asset" and eligible for depreciation under section 32(1)(ii). The assessee's claim was rejected by the Assessing Officer, CIT(A) & Tribunal on the ground that depreciation was not allowable on "goodwill". On appeal by the assessee, Held reversing the lower authorities:

Section 32(1)(ii) allows depreciation on "intangible assets" which are defined to mean "know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature". Applying the principle of ejusdem generis, the expression "business or commercial rights of similar nature" need not answer the description of "knowhow, patents, trademarks, licenses or franchises" but must be of similar nature as the specified assets. The specified intangible assets are not of the same kind and are clearly distinct from one another. The nature of "business or commercial rights" cannot be restricted to only the aforesaid six categories of assets but can be of the same genus in which all the aforesaid six assets fall and form part of the tool of trade of an assessee facilitating smooth carrying on of the business. The intangible assets, viz., business claims; business information; business records; contracts; employees; and knowhow, are all assets, which are invaluable and result in carrying on the transmission and distribution business by the assessee without any interruption. These intangible assets are comparable to a license to carry out the existing transmission and distribution business of the transferor. In the absence of the aforesaid intangible assets, the assessee would have had to commence business from scratch and go through the gestation period whereas by acquiring the aforesaid business rights along with the tangible assets, the assessee got an up and running business. Accordingly, the intangible assets acquired under slump sale agreement were in the nature of "business or commercial rights of similar nature" and eligible for depreciation under section 32(1)(ii) (Techno Shares 327 ITR 323 (SC) followed) (Q whether goodwill per se is eligible for depreciation under section 32(1)(ii) left open). (A.Y. 2002-03, 2005-06)

Areva T&D India Ltd v. Dy. CIT (2012) 345 ITR 421 / 70 DTR 233 / 208 Taxman 252 (Delhi)(High Court)

CIT v. Jai Parabolic Springs Ltd. (2012) 345 ITR 421 / 70 DTR 233 / 250 CTR 151 (Delhi) (HC)

S. 32 : Depreciation - Discarded Machinery - Machineries discarded due to obsolescence and which have not been used in manufacturing of product depreciation is not allowable

The assessee had been claiming depreciation on block of assets. The Assessing Officer held that two machineries had been discarded and that once the assets had been discarded treating them as obsolete, the same should have been considered for reduction of the block for computing the depreciation on the same. The Assessing Officer has added back the depreciation in the total income. On appeal the Commissioner(Appeals) conformed the order of Assessing Officer. On appeal to the Tribunal, the Tribunal allowed the claim of assessee. On appeal by revenue the Court held that depreciation is not allowable in respect of machineries which have been discarded due to obsolescence and which have not been used in manufacturing of product. Order of tribunal reversed. (A.Y. 1997-98)

CIT v. Luwa India Ltd. (2012) 205 Taxman 342 / 75 DTR 367 (Karn.)(HC)

S. 32 : Depreciation - Sale and lease back - Sale & lease back transactions are not "sham" transactions [S. 147, 148]

The assessee purchased an igni-fluid boiler from its sister concern and on the same day leased it back. The Assessing Officer & CIT(A) relied on McDowell & Co. Ltd. v. CTO (1985) 154 ITR 148 and held the sale and lease back arrangement to be a sham & camouflage for a loan by the assessee to the sister concern and rejected the assessee's claim for depreciation. However, the Tribunal allowed the

claim on the ground that the transaction was not a "sham". On appeal by the department, held dismissing the appeal:
(i) Though the machinery was embedded and was in possession of the seller, the assessee took constructive delivery of the machinery. As the law recognises constructive delivery as an acceptable mode of delivery and possession, physical possession is not necessary. Thus there is no material on record to show that the sale was a sham transaction and so its genuineness cannot be questioned. As regards the lease, the fact that some part of the funding came from Wipro Finance & that the lessee paid directly to Wipro in satisfaction of the assessee's obligation does not make the agreement a sham because it is a matter of pure commercial understanding between the parties as to the modalities of lease rental payment. Given the freedom to enter into agreements with parties and guided by commercial considerations, even to invoke the theory of tax evasion, the Revenue must have sufficient material to draw an inference of what had been shown as an understanding on an agreement between the parties, is not, in fact, so.
(ii) In Vodafone International Holdings (2012) 341 ITR 1 (SC), McDowell was considered extensively and it was held that there is no conflict between McDowell & Co. Ltd. vs. Commercial Tax Officer (1985) 154 ITR 148 (SC); UOI v. Azadi Bachao Andolan & Anr. (2003) 263 ITR 706 (SC) & Mathuram Agarwal 8 SCC 667. It was pointed out that the task of the Revenue / Court is to ascertain the legal nature of the transaction and while doing so, it has to look at the entire transaction as a whole and not to adopt a dissecting approach. It was pointed out that "the Revenue cannot start with the question as to whether the impugned transaction is a tax deferment / saving device but that it should apply the "look at" test to ascertain its true legal nature. Genuine strategic tax planning has not been abandoned by any decision of the English courts till date." It was held that while colourable devices cannot be a part of tax planning, it cannot be said that all tax planning is illegal / impermissible. Applying this ratio, the mere fact that what had been purchased had been leased out to the vendor or that vendor had undertaken to pay the hire charges on behalf of the assessee to the hire purchase company does not per se lead to a conclusion that the transaction is a sham one. Reassessment was quashed for the assessment year 1995-96 and decided on merits for the A.Y. 1995-96 to 1997-98) (A.Y. 1995-96, 1996-97)
CIT v. High Energy Batteries (India) Ltd. (2012) 348 ITR 574 / 74 DTR 9 / 208 Taxman 213 (Mad.)(HC)

S. 32 : Depreciation - Tippers - Road transport vehicle - Tippers used by assessee in its construction work is entitled to depreciation at 40%

Assessee is in the business of civil construction and contract work. The assessee claimed depreciation on Tippers, vibrator and vibrator soil compactor at 40% because the said vehicles are registered under Motor Vehicles Act, 1988 as road transport vehicles. The Assessing Officer allowed the depreciation at 15% as applicable to plant and machinery. In appeal Commissioner (Appeals) and Tribunal accepted the contention of the assessee. On appeal by the revenue, the Court held that Tippers, vibrator and vibrator soil compactor registered as road transport vehicles under the Motor Vehicles Act, 1988 are commercial vehicles entitled to depreciation @ 40 percent and not @ 15 percent applicable to plant and machinery. (A.Y. 2006 -07, 2007-08)
CIT v. Rakesh Jain (2012) 70 DTR 1 / 250 CTR 381 / (2013) 350 ITR 230 (P&H)(HC)

S. 32 : Depreciation - Lease - merely because the vehicles were used by the lessee in their business, the assessee cannot be denied the depreciation

Assessee engaged in the business of leasing, producing bills showing consideration paid by him for acquiring vehicles as also lease agreement was owner of vehicles entitled to depreciation; merely because the vehicles were used by the lessee in their business, the assessee cannot be denied the depreciation. (A.Y. 1996-97)
Prakash Leasing Ltd. v. Dy. CIT (2012) 71 DTR 156 / 208 Taxman 204/(2013) 356 ITR 179 (Karn.)(HC)

S. 32 : Depreciation - Computer system - Cost below 5000 - 100% depreciation - Difference between "Finance Lease" & "Operational Lease", matter set aside - Tribunal to decide afresh

The assessee bought 1614 items of computer systems for Rs .40 lacs from HCL Hewlett Packard Ltd. and leased back to the same company. The assessee claimed 100% depreciation on the ground that the cost of each item was less than Rs. 5,000. The Assessing Officer & CIT(A) held that the lease was not a bona fide transaction and that the transaction was a finance transaction. It was held that the assessee had advanced Rs. 40 lacs to HCL Hewlett Packard Ltd. and agreed to receive back this amount along with the interest over six years. However, the Tribunal upheld the claim on the ground that the conditions of a valid lease were satisfied. On appeal by the department to the High Court, Held:

The question whether an agreement is a finance agreement or an operating lease cannot be decided by merely looking at the title of the agreement or the nomenclature given to the said agreement. The terms and conditions mentioned in the agreement may be relevant but the surrounding circumstances & type and nature of the asset have also to be considered. There is a difference between a finance lease and an operational lease. A finance lease is one where the lessee uses the asset for substantially the whole of its useful life and the lease payments are calculated to cover the full cost together with interest charges. It is thus a disguised way of purchasing the asset with the help of a loan. An operating lease is any other type of lease where the asset is not wholly amortised during the non-cancellable period, if any, of the lease and where the lessor does not rely for his profit on the rentals in the non-cancellable period. This distinction has been explained in Asea Brown Boveri Ltd. v. IFCI (2004) 12 SCC 570, Association of Leasing and Financial Service Companies v. UOI (2011) 2 SCC 352 & Sundaram Finance Ltd. v. Kerala AIR 1966 SC 1178. As the Tribunal has not considered the issue from the right perspective, matter remanded.

CIT v. The Instalment Supply Ltd. (2012) 207 Taxman 19 (Delhi)(HC)

S. 32 : Depreciation - User of assets - Block of assets - It is not necessary that all the assets which falling within the block of assets must be used simultaneously to allow the depreciation [S. 2(11)]

The court approving the judgment of Tribunal held that, once the factory building is put to use it is not possible to restrict the depreciation on the said building by stating that only a portion there of has been put to use. Similarly in relation to block of assets, it is not possible to segregate items falling with in block for the purposes of granting depreciation or restricting the claim thereof. Once it is found that assets are used for business, it is not necessary that all the items falling with in plant and machinery have to be simultaneously used for being entitled to depreciation. The appeal of revenue was dismissed. (A.Y. 1991-92)

ACIT v. S. K. Patel Family Trust (2012) 251 CTR 427 / 74 DTR 317 (Guj.)(HC)

S. 32 : Depreciation - First stock exchange card membership - Intangible assets - Revenue has allowed the depreciation in earlier years the depreciation cannot be disallowed in later years

The assessee has purchased the first stock exchange card in the financial year 1995-96 and claimed the depreciation. The depreciation was allowed and which has became final. During the year, question was raised by the revenue stating that the depreciation can be allowed on intangible assets which are acquired on or after 1st April, 1998. The Court held as the revenue has accepted the decision for the A.Y. 2005-06 the substantial question cannot be raised in late years hence the appeal of revenue was dismissed. (A.Y. 2002-03)

CIT v. Kotak Securities Ltd. (No. 1) (2012) 346 ITR 349 (Bom.)(HC)
CIT v. Kotak Securities Ltd. (No. 2) (2012) 346 ITR 352 (Bom.)(HC)

S. 32 : Depreciation - Rate - Motor cars - Commercial vehicles - Light motor vehicles - Depreciation at 50%

As per note 6 below part A of Appendix I, cards are light motor vehicles and thus commercial vehicles, Assessee was therefore entitled to 50 per cent depreciation on motor cars and not 20 per cent as allowed by Assessing Officer. (A.Y. 2003-04)

CIT v. Birla Global Asset Finance Ltd. (2012) 76 DTR 342 (Bom.)(HC)

S. 32 : Depreciation - Intangible asset - Non-compete right - Goodwill - A "non-compete right" is not an "intangible asset" though "goodwill" is, therefore non-compete right is not eligible for depreciation. To be an "intangible asset" under section 32(1)(ii), the rights must be "in rem" and transferable

The assessee, a joint venture of Sharp Corp., Japan, and L&T Ltd., paid Rs. 3 crores to L&T as consideration for the latter not competing with the assessee for 7 years. The assessee claimed that the non-compete fee was revenue in nature. It also claimed, in the alternative, that the rights under the non-compete agreement were an "intangible asset" under section 32(1)(ii) eligible for depreciation. The Assessing Officer, CIT(A) & Tribunal rejected the assessee's claim. On further appeal by the assessee before the High Court held dismissing the appeal: (i) The advantage derived by the assessee from the non-compete agreement entered into with L&T is for a substantial period of 7 years and ensures a certain position in the market by keeping out L&T. The advantage cannot be regarded as being merely for facilitation of business and ensuring greater efficiency & profitability. The advantage falls in the capital field

(ii) The non-compete rights cannot be treated as an "intangible asset" under section 32(1)(ii) because (a) the nature of the rights mentioned in the definition of "intangible asset" spell out an element of exclusivity which enures to the assessee as a sequel to the ownership. But for the ownership of the intellectual property or know-how or license or franchise, it would be unable to assert the right "in rem", as against the world. In the case of a non-competition agreement, it is a right "in personam" where the advantage is restricted & does not confer an exclusive right to carry-on the primary business activity. (b) Another way of looking at the issue is whether such rights can be treated or transferred. Every species of right spelt-out such as know-how, franchise, license, etc. and even those considered by Courts, such as goodwill, can be said to be alienable. Such is not the case with an agreement not to compete which is purely personal. (A.Y. 2001-02)

Sharp Business System v. CIT (2012) 254 CTR 233 / 79 DTR 329 / 211 Taxman 576 (Delhi)(HC)

S. 32 : Depreciation - Building - Plant - Cold storage - Entitled to depreciation at a higher rate as plant - Amendment in section 43(3) is clarificatory in nature [S. 43(3)]

Cold storage unit the building is required to be constructed for cooling chambers in a specific process and manner and without such specific process and manner a chamber cannot be commissioned, for which a licence is also required to be obtained. Without thermocole a chamber cannot function independently and at the same time without the building the thermocole cannot have a separate existence. Both these are integral parts of each other. The cold storage has special facilities for refrigeration. Just as a refrigerator cannot be divided into two parts, namely, the cooling system behind or under the refrigerator and the cabinet in front, or on top thereof, the plant of cold storage also cannot be separated in a manner that the special chambers may have separate existence and be treated as building, sans the cooling plant for providing a different rate of depreciation. The amendment in section 43(3) with effect from April 1, 2004, is only clarificatory in nature, and it excludes livestock or buildings or furniture and fittings from plant. What was excluded in the context was building or furniture and fittings and not building of a special nature, which does not have existence independent from the plant. Held accordingly, that the assessee was entitled to depreciation on the cooling chambers of the cold storage unit treating it as plant at the rate of twenty five per cent. (A.Y. 2004-05)

Shyam Enterprises v. CIT (2012) 349 ITR 418 (All.)(HC)

S. 32 : Depreciation - Ownership - lease of asset - Arrangement being sale of property the assessee entitled to depreciation - Lease rent not allowable as deduction [S. 37(1)]

The arrangement between the lessor and the assessee was, in effect, an agreement of sale of the property by the lessor to the assessee and therefore, the assessee is owner of the property entitle to depreciation. Lease rental was not allowable as business expenditure. (A.Y. 1983-84)

Mather & Platt (I) Ltd. v. CIT (2012) 210 Taxman 509 / 79 DTR 12 (Bom.)(HC)

S. 32 : Depreciation - Charitable purposes or religious purpose - A charitable trust is entitled to depreciation [S. 11]

Depreciation is nothing but decrease in the value of property through wear, deterioration or obsolescence and allowance is made for this purpose in book keeping, accountancy, etc. It is the exhaustion of the effective life of a fixed asset owing to "use" or obsolescence. It may be computed as that part of the cost of the asset which will not be recovered when the asset is finally put out of use. The object of providing for depreciation is to spread the expenditure, incurred in acquiring the asset, over its effective lifetime ; the amount of the provision, made in respect of an accounting period, is intended to represent the proportion of such expenditure, which has expired during that period. If depreciation is not allowed as a necessary deduction in computing the income of a charitable trust, then there would be no way to preserve the corpus of the trust. A charitable trust is, therefore, entitled to depreciation in respect of the assets owned by it. (A.Y. 2004-05 to 2006-07)

CIT v. Gujrati Samaj (Regd.) (2012) 349 ITR 559 / (2011) 64 DTR 76 (MP)(HC)

S. 32 : Deprecation - Toll Bridge - Assessee is entitled to depreciation

Assessee constructed toll bridge on a land provided by Government for a long lease on BOOT (Build, Own, Operate and Transfer) basis, exercised full ownership right on the road which include charging of tolls, was held to be entitled for deprecation on the toll road. (A.Y. 2005-06)

CIT v. Noida Toll Bridge Co. Ltd. (2012) 80 DTR 387 / (2013) 255 CTR 88 / 213 Taxman 333 (All.)(HC)

S. 32 : Depreciation - Owner - Possession - Registration deed - Depreciation is allowable [Transfer of Property Act, 1882 - S. 53A]

The assessee was in possession of the property and had acquired interest in the said property as per section 53A of the Transfer of Property Act, 1882, depreciation on the said property cannot be denied to the assessee merely because registered sale deed was not executed in favour of assessee. (A.Y. 1993-94, 1995-96 to 1998-99 & 2001-02 to 2004-05)

CIT v. Indian Sugar & General Industry Export Import (2012) 80 DTR 300 / 349 ITR 38 (Delhi)(HC)

S. 32 : Depreciation - User of assets –Power plants- Equipment which was kept ready for use is entitled for depreciation.[S. 56(2)]

Assessee is entitled to depreciation in respect of capital construction equipments which were not used by contractors but were kept ready for use by contractor. (A.Y. 1979-80, 1980-81)

National Thermal Power Corporation. Ltd. v. CIT (2012) 211 Taxman 505/(2013) 357 ITR 253 (Delhi)(HC)

S. 32 : Depreciation - Investments - Banking company - Matter remanded

Assessee claimed deduction on account of depreciation on 'investments'. Assessee's case was that being an authorized bank, it was governed by Banking Regulation Act and balance sheet was required to be maintained in statutory format. According to assessee, current investments were shown in balance sheet as 'investments', whereas these were in nature of 'stock-in-trade'. Tribunal rejected assesssee's claim taking a view that securities in question were in nature of permanent investment and

not stock-in-trade and, thus, depreciation could not be allowed on said securities. On facts, matter was to be remanded back to Assessing Officer to determine as to whether securities in question were 'investment' or 'stock-in-trade' in light of order passed by Supreme Court in case of United Commercial Bank v. CIT (1999) 240 ITR 355 / 106 Taxman 601. (A.Y. 1996-97, 1997-98)
Punjab & Sind Bank v. CIT (2012) 211 Taxman 194 (Delhi)(HC)

S. 32 : Depreciation - Slump sale - Goodwill - Valuation Report filed - Matter Remanded - Tribunal to follow earlier year order - Ensure consistency [S. 254]
Assessee purchased a catering business which included tangible and intangible assets. For A.Y. 2003-04, on basis of a valuation report regarding apportionment of consideration, assessee had claimed depreciation on goodwill .Assessing Officer disallowed claim. Before Tribunal, assessee produced another report which showed that said sum also included value of intangible assets other than goodwill. Tribunal remanded proceedings in respect of A.Y. 2003-04 to Assessing Officer to ascertain correctness of bifurcation furnished by valuation reports relied upon by assessee. For A.Y. in question, assessee produced same valuation reports, but assessee's claim was disallowed by both Assessing Officer and Tribunal. On appeal to High Court the court held that to ensure consistency it was proper for Tribunal to follow same course for A.Y. in question as had been adopted in respect of A.Y. 2003-04 proceedings, instead of disallowing assessee's claim. Accordingly the order of Tribunal was set aside. (A.Y. 2006-07)
Taj Sats Air Catering Ltd. v. CIT (2012) 211 Taxman 84 (Mag.)(Bom.)(HC)
Editorial:- Taj Start Air Catering Ltd. v. Dy. CIT (2012) 53 SOT 102 (URO)(Mum.)(Trib)) reversed.

S. 32 : Depreciation - Rate - Purchase of property by sale consideration of tenancy rights, eligible depreciation
Assessee entered into an agreement with its landlord for surrender of tenancy and vacating its premises at Lucknow in lieu of consideration. It was agreed that consideration for surrender of tenancy rights instead of its being given to assessee, would be paid to construction company towards consideration for purchase of property by assessee. Assessee claimed depreciation on same. Assessee would be entitled to depreciation on property obtained. (A.Y. 1995-96, 1996-97 and 1997-98)
CIT v. Areva T & D India Ltd. (2012) 211 Taxman 106 (Mag.)(Mad.)(HC)

S. 32 : Depreciation - Owner - Car parking space - Eligible depreciation
Even in absence of registered sale deed in respect of car parking space, assessee is entitled to claim depreciation on same. (A.Y. 2005-06)
CIT v. Indian Sugar Exim. Corpn. Ltd. (2012) 211 Taxman 107 (Mag.)(Delhi)(HC)

S. 32 : Depreciation - Additional depreciation - Assets acquired after 30-9-2004 - Statutory stipulation that restriction to 50 per cent of amount allowable under section 32(1)(iia) - Assessing Officer restricting depreciation to 50 per cent held to be proper
Clause (iia) was inserted by the Finance Act, 2002, with effect from April 1, 2003, in the second proviso to section 32(1) of the Income-tax Act, 1961. Therefore, it was imperative that on and after April 1, 2003, the claim of the assessee made under section 32(1)(iia) had to be necessarily allowable by applying the second proviso to section 32(1). Held accordingly, dismissing the appeal, (i) that when there was statutory stipulation providing for restriction to 50 per cent of the amount allowable under section 32(1)(iia) no fault could be found with the assessing authority applying the second proviso to section 32(1) to restrict the allowability of the depreciation to 50 per cent of the amount permissible under section 32(1)(iia) as well as that of the first appellate authority and the Tribunal in having affirmed the action of the assessing authority. (A.Y. 2005-06)
M. M. Forgings Ltd. v. Addl. CIT (2012) 349 ITR 673 (Mad.)(HC)

S. 32 : Depreciation - Finance lease - Operating lease - Lessee can be treated as owner in case of a finance lease and lessee who is entitled to depreciation and not the lessor

The assessee, a bank, purchased a boiler and gave it on lease to Indo-Gulf Fertilisers. The assessee claimed depreciation on the said boiler on the basis that it was the "owner" thereof. The Assessing Officer & CIT(A) disallowed the claim for depreciation on the basis that the transaction was a "finance lease" which was akin to a loan given by the assessee and that the assessee was not the "owner". On a reference to the Special Bench held:

(i) The distinction between a "Finance lease" and an "operating lease" is set out in the Guidance Note on Accounting for Leases and Accounting Standard (AS) 19. It is also set out in the judgement of the Supreme Court in Asea Brown Boveri Ltd. v. Industrial Finance Corporation of India (IFCI) (2006) 154 Taxman 512 (SC) & Association of Leasing & Financial Services Companies v. UOI (2010) 235 CTR 521 (SC). In a finance lease, the lessee selects the equipment & the lessor provides the funds, acquires the title to the equipment and allows the lessee to use it for its expected life. A finance lease is for a fixed period & non-cancellable. There is a fixed obligation on the lessee for payment of lease money & in case of premature termination, the lessor is entitled to recover his investment with expected interest. In substance, finance lease is a loan from the lessor to the lessee. In an operating lease, the lessor bears the risk of loss, the period is cancellable and lease rentals are not synchronized with the economic life of the asset. On facts, the assessee's lease agreement had all the characteristics of a finance lease;

(ii) The assessee's argument that even in the case of a finance lease, depreciation should be allowed to the lessor is not acceptable because all risks & rewards incidental to ownership are borne by the lessee and the lessor's "ownership" is nominal & symbolic & serves no purpose other than as security for the recoupment of the investment with interest in the form of lease rentals. It is the lessee who is the actual and real owner of the asset (CIT v. Podar Cement (P) Ltd. (1997) 226 ITR 625 (SC) & Mysore Minerals Ltd. (1999) 239 ITR 775 (SC) applied), MCorp Global (P) Ltd. (2009) 309 ITR 434 (SC) distinguished).

(iii) On facts, the assessee had already advanced a loan to Indo-Gulf to purchase the boiler much prior to the entering into of the lease agreement. The lease agreement was entered into subsequently with the sole purpose of enabling the assessee to artificially fulfill the twin requirements of ownership and user of the asset so as to claim depreciation, to which it was not otherwise entitled as per law and thereby reduce its income in a mala fide manner. The agreement was consequently a "sham". The assessee's argument that the issue of depreciation is tax neutral because the tax rates on the lessor & lessee is the same is not correct because while the assessee had huge income, the lessee had a loss. The lease agreement was thus a "dubious way" to mitigate the assessee's tax liability. (A.Y. 1998-99, 1999-2000).

IndusInd Bank Ltd. v. ACIT (2012) 135 ITD 165 / 15 ITR 89 / 69 DTR 27 / 145 TTJ 409 (SB)(Mum.)((Trib.)

S. 32 : Depreciation - Additional depreciation - Manufacture - Raw grounded blades purchased from market and made ready to use in commercial market amounted manufacture and entitled additional depreciation

Assessee company which is engaged in the business of exporting safety razor blades and twin track shaving system. It purchased semi finished ground blades not suitable for shaving. Unfinished blades were processed in the factory of assessee from grinding till the final packing. The Assessee has claimed additional depreciation under section 32(1)(iia) at 20 percent on actual cost of machinery and plant which was acquired and installed after 31-3-2005. Assessing Officer held that the processing does not amount to manufacture and the assessee is not entitled additional depreciation. The Tribunal held that the final product manufactured by assessee is commercially new and different article having distinctive name, character and use, hence, the assessee is manufacturer and is entitled for additional depreciation. (A.Y. 2006-07)

Dy. CIT v. N. V. Exports (P) Ltd. (2012) 49 SOT 534 (Kol.)(Trib.)

S. 32 : Depreciation - Machinery - Put to use - Assessee installed the machinery prior to 31-3-2005 hence depreciation cannot be denied

Assessee has claimed the depreciation in respect of a gunsun sorter machine. The Assessing Officer has denied the depreciation on the ground that the machinery was not put to use. The Tribunal held that the machinery was purchased on 14-3-2005 and installation like electric fittings had been done prior to 31-3-2005, hence, the disallowance of depreciation was not justified. (A.Y. 2005-06).

ACIT v. Nayan L. Mepani (2012) 49 SOT 641 (Mum.)(Trib.)

S. 32 : Depreciation - Computer - Accessories - Computer Accessories are integral part of computer system and is entitled to depreciation at 60%

Computer accessories are integral part of computer system and depreciation against these are liable to be allowed at 60 percent. (A.Y. 2004-05, 2005-06, 2006-07)

Dy. CIT v. Cosmo Films Ltd. (2012) 13 ITR 340 / 139 ITD 628 (Delhi)(Trib.)

S. 32 : Depreciation - Membership card of BSE - Commercial right - Similar nature - Scheme of Corporatisation and Demutualization - Right to conduct business acquired hence depreciation is not allowable

Assessee company purchased a membership card in cash segment and derivative segment from Bombay stock exchange. i.e. 'BSE' for a total consideration of Rs. 2.50 crores and claimed depreciation on same which was allowed. Subsequently, BSE under scheme of 'Corporatisation' and 'Demutualisation' was succeeded by a company incorporated under Companies Act, 1956, under the name and style "Bombay Stock Exchange Ltd.". Assessee, consequent to demutualization had acquired two separate rights in new Company i.e. (i) ownership rights and (ii) trading rights. Ownership rights were given by issuing 10000 shares of BSEL in the name of assessee, whereas, trading rights were subject to deposit of certain amount by assessee with BSEL. In the course of original assessment proceedings the Assessing officer held that no part of original cost of BSE card could be attributable to right to conduct trading and hence, assessee would not be entitled to claim depreciation. Since ownership right gave assessee a right to participate in ownership of assets and management of BSEL, it was not a business and commercial right of similar nature under section 32(1)(ii) and thus assessee could not be allowed depreciation in respect of said right. As regards trading right, even though said right was a commercial right, yet in fact the value of said right was equal to refundable deposit to be made by assessee with BSEL, it could be depreciated when its value in reality did not come down. The Tribunal confirmed the view of Assessing Officer. (A.Y. 2006-07)

Sino Securities (P) Ltd. v. ITO (2012) 134 ITD 321 / 15 ITR 137 / 72 DTR 57 / 147 TTJ 16 (Mum.)(Trib.)

S. 32 : Depreciation - BSE Card - Corporatization and demutualization - Commercial rights - Depreciation is not allowable as the cost of acquisition of such right was taken as nil hence no cost on acquisition

The Assessing Officer disallowed the depreciation on BSE card and Foreign Exchange Dealers Association of India (FEDAI). On appeal the Commissioner (Appeals) allowed the depreciation following the judgment of Supreme Court in Techno Shares & Stocks Ltd. (2010) 327 ITR 323 (SC). The Tribunal held that after corporatization of the Bombay Stock Exchange membership is no more in existence and the Card holders has been issued 10000 shares of BSE of face value of Rs. 1 each. As per the scheme of de-mutualisation, the card ceased to exist and in lieu of membership, the card holder has been issued 10000 shares of BSEL. As per section 55(2)(ab), the cost of the shares allotted to the card holders of a recognized stock exchange under a scheme of demutualization shall be the cost of acquisition of his original membership of exchange. As per the proviso to the said clause, the

cost of the capital asset being trading or clearing rights of the recognized Stock Exchange acquired buy as a shareholder on allotment of equity or under the scheme of demutualisation or corporatization shall be deemed to be nil. Since the shares are not a depreciable asset and also independent from rights to trade, no depreciation is allowable. When the membership card ceased to exist and in lieu of card, new capital asset came in to existence being 1000 shares as well as right to trade and clearing in the Stock Exchange and the acquisition cost of trade and clearing has been explicitly provided as nil by the statute then the entire cost of Membership as stands in the books of account of the assessee would be treated as cost of acquisition of 10000 shares which is not depreciable asset. As per clause (3) Explanation 5 to section 32(2) if any shortfall of amount between the value realized and written down value of a particular asset, the same is allowable. On the facts the assessee received the shares in lieu of BSE Membership Card then whatever written down value was standing in the books of account of the assessee has been received by assessee by way of shares and therefore, no shortfall arises to be claimed as depreciation. Hence, depreciation is not allowable. The Tribunal followed the ratio of Sino Securities (P) Ltd. v. ITO (2012) 134 ITD 321 (Mum.)(Trib.). As regard the FEDAI, no facts are allowable, the matter was set aside to the Assessing Officer. (A.Y. 2006-07)

Sunidi Consultancy Services Ltd. v. Dy. CIT (2012) 50 SOT 223 (Mum.)(Trib.)

S. 32 : Depreciation - Non compete fee - Intangible asset - Depreciation is allowable in respect of non compete fee - Stools, tables stainless steel racks, trolley, etc, which were required for laboratory purpose are considered as plant and machinery and eligible for depreciation as plant and machinery

The assessee has paid the non-compete fee and claimed the said expenses as revenue in nature. The claim was disallowed by the Assessing Officer and confirmed by Commissioner(Appeals). In appeal before the Tribunal, the Tribunal held that the expenditure on non-compete fee being capital in nature, it being intangible asset, the assessee will be eligible for depreciation. The assessee is engaged in manufacturing of chemical and vaccines and for the purpose of assessees laboratory, it purchased stools, tables, stainless steel racks trolley etc and claimed the depreciation as part of plant and machinery. The Assessing Officer treated the said assets as furniture and allowed depreciation as applicable to furniture which was confirmed by Commissioner(Appeals) . On appeal to Tribunal, the Tribunal held that since said stools, tables, stainless steel racks, etc were required for laboratory purpose i.e. for purpose of production or processing of chemical tests, in laboratory premises leading to production of stock they must be categorized as plant and machinery and entitled to depreciation accordingly. (A.Y. 2001-02)

Serum Institute of India Ltd. v. Addl. CIT (2012) 135 ITD 69 / 147 TTJ 594 / 72 DTR 89 (Pune)(Trib.)

S. 32 : Depreciation - Wind mill - Additional depreciation - Device of Wind Mill and foundation, civil works, electrical installation, development expenses, held to be wind mill and entitled to additional depreciation on entire device and cannot be bifurcated as several parts

Depreciation was claimed on device of windmill and additional depreciation was claimed on foundation, civil works, electrical installation, development expenses and other machinery. It was held by the Tribunal that the depreciation is allowable on renewable energy which includes windmill also. Where depreciation is claimed on entire device which is capable of generating energy using wind energy, and cannot be bifurcated, into several parts, the depreciation is held to be allowable on entire device. (A.Y. 2007-08)(ITA No. 3317/Ahm/2012, dated 02/3/2012)

ACIT (OSD) v. Parry Engineering & Electronics P. Ltd. (2012) ACAJ Vol. 35 Feb P. 557 (Ahd.)(Trib.)

S. 32 : Depreciation - Books - Capital expenditure - Expenditure incurred on books by the tutorial institutions is held to be capital expenditure and eligible for depreciation [S. 37(1)]

The expenditure incurred by the tutorial institutions on books and preparing students for professional entrance examination is capital expenditure, entitled to depreciation under Section 32(1) irrespective of whether the tutorials are 'profession' or 'business'. (A.Y. 2006-07)

Brilliant Study Centre v. ACIT (2012) 135 ITD 351 / 146 TTJ 742 / 17 ITR 394 / 71 DTR 373 (Cochin)(Trib.)

S. 32 : Depreciation - Intangible - Website - Entitled depreciation at 25% as intangible and not 60% as applicable to software. Website is not a software hence CBDT Notification No. 890(E), dated 26/9/2000 cannot be applied to section 32 hence depreciation is allowable at the rate of 25% as intangible asset

The CBDT Notification No. 890(E), dated 26/9/2000 including website services in software. Notified definition for purpose of sections 10A, 10B and 80HHE is for the specific purpose of those sections and cannot be imported for the purposes of depreciation under section 32 or Old Appendix-I applicable for A.Y. 2003-04 to 2005-06. Thus, website cannot be treated as software. It would fall under the definition of intangible asset on which depreciation at the rate of 25% is allowed. (A.Y. 2004-05)

Makemytrip (India) P. Ltd. v. Dy. CIT (2012) 51 SOT 19 / 72 DTR 466 / 147 TTJ 231 (Delhi)(Trib.)

S. 32 : Depreciation - Non-compete rights - Intangible assets - Non-Compete rights are an "intangible asset" eligible for depreciation

The assessee paid Rs. 4.55 crores to obtain a non-compete covenant from another company for a period of 10 years and claimed that the expenditure had resulted in an "intangible asset" under section 32(1)(ii) on which depreciation was allowable. The Assessing Officer rejected the claim though the CIT(A) allowed it. Before the Tribunal, the department relied on Srivatsan Surveyors (P) Ltd. vs. ITO (2009) 125 TTJ 286 (Chennai) where it was held that a non-compete right is a 'right in persona' and not a 'right in rem' and so depreciation was not allowable. Held by the Tribunal dismissing the appeal:

The Assessing Officer's objection that a non-compete right is not an "intangible asset" under section 32(1)(ii) on the ground that (a) it is not "any other business or commercial right of a similar nature" and (b) it is not capable of transfer like other intangible assets is not acceptable because (i) the right of absence of competition or the 'non-compete right' is an asset which is capable of being transferred and is of a similar nature as the other items referred to. This is shown by the fact that the right was transferred by the assessee at the time of its amalgamation and (ii) the expenditure resulted in the acquisition of an unrivaled and non-competed business territory for 10 years which brought advantages in the capital field. Though in Srivatsan Surveyors v. ITO (2009) 125 TTJ 286 (Chennai), it was held that a restrictive covenant is a "right in persona" and not a "right in rem", a contrary view was taken in ITO v. Medicorp Technologies India Ltd. (2009) 30 SOT 506 (Chennai). When two views are possible, the view favourable to the assessee should be followed held in CIT v. Vegetable Products Ltd. (1973) 88 ITR 192 (SC). (A.Y. 2003-04)

ACIT v. GE Plastics India Ltd. (2012) 137 ITD 309 / 20 ITR 58 (Ahd.)(Trib.)

S. 32 : Depreciation - Financial leased asset - Assessee offered the principal portion of the lease rental also for taxation, depreciation was allowed

The issue in the instant case is regarding the claim of depreciation on Financial leased asset. The assessee claimed depreciation in light of Circular of No. 2 of 2001 issued by CBDT in the matter of capitalization of leased asset. While claiming the depreciation allowance, the assessee offered the principal portion of the lease rental also for taxation. Thus, it was held that depreciation claim was rightly allowed. (A.Y. 2004-05 to 2007-08)

ACIT v. GMAC Financial Services India Ltd. (2012) 16 ITR 422 (Chennai)(Trib.)

S. 32 : Depreciation - Regularization fee - Hospital - Regularization fees paid for construction of hospital is an asset used in carrying business and profession and it was not unlawful, it should be capitalized to form a part of cost of construction and depreciation could be claimed on it

The assessee had constructed a hospital building. While constructing the hospital building, assessee made certain deviation which was in violation of relevant metropolitan regulation. The assessee paid regularization fees as step taken by the state government to regularize such deviation and exonerate defaulters. It was held that since the payment was made directly in connection with construction of hospital building which was an asset used in carrying business and profession and it was not unlawful, it should be capitalized to form a part of cost of construction and depreciation could be claimed on it. (A.Y. 2004-05 to 2006-07)

K. Senthilnathan (Dr.) v. ACIT (2012) 136 ITD 233 / 147 TTJ 297 / 73 DTR 90 (TM) (Chennai) (Trib.)

S. 32 : Depreciation - Intangible - Franchisee - Consideration paid for enhancing network by acquiring rights over infrastructure and other advantages is held to be intangible asset, depreciation allowed

The assessee-company was engaged in the business of dealing in foreign exchange, money transfer and wind power generation. The assessee acquired a franchisee for consideration and claimed depreciation on the same. It was held that since the assessee paid consideration for purpose of enhancing network in the field of money transfer business by acquiring rights over infrastructure and other advantages attached to marketing network, same fell under the category of intangible asset, eligible for depreciation. (A.Y. 2007-08)

Dy. CIT v. Weizmann Forex Ltd. (2012) 51 SOT 525 (Mum.)(Trib.)

S. 32 : Depreciation - Block of assets - User - After the first year existence of individual asset in block of asset itself amounts to use for purpose of business [S. 2(11)]

The requirement of words 'used for the purpose of business' as provided in section 32(1) for the concept of depreciation on block of assets can be summarized, that use of individual asset for the purpose of business can be examined only in the first year the asset is purchased and, in subsequent years when use of block of asset is examined, existence of individual asset in block of asset itself amounts to use for purpose of business. (A.Y. 2001-02 to 2004-05)

Dy. CIT v. Coromandal Bio Tech Industries (I) Ltd. (2012) 51 SOT 333 (Hyd.)(Trib.)

S. 32 : Depreciation - Ownership - Possession of building - Company which acquired the possession of building is entitled to depreciation

The assessee company acquired the possession of the entire building with a right to exercise the necessary control of the property which the assessee was capable of and that being so, evidently, it was the obvious intention of the assessee to exclude others from exercising such control and it was this which showed the element of ownership of the assessee-company over the factory premises acquired. In view of the above CIT(A)'s order upheld and depreciation under section 32 of the Act allowed to the assessee. (A.Y. 2006-07)

Dy. CIT v. Biltech Building Elements Limited (2012) 50 SOT 39 (URO)(Delhi)(Trib.)

S. 32 : Depreciation - Goodwill - Land and building - Primary asset transferred was land hence the depreciation is not allowable on goodwill as there was no good will in the nature of commercial rights

CGEL, a wholly owned subsidiary of the assessee company got amalgamated with the assessee during the year. The subsidiary company earned income by lease of property. It was held that primary asset which was transferred was land and not goodwill. The market value of the primary asset i.e.

land and building thereon, should have been considered. If the assessee had paid more than the fair market value of assets minus fair market value of liabilities, then the company would have a case to claim that certain amounts were incurred for good will. In the absence of such a claim there was no goodwill in the nature of commercial rights purchase by assessee. This being only book entry and it was only another way of disclosing the intrinsic value of the fixed asset of the company. Depreciation was not allowable on goodwill. (A.Y. 2003-04)

Dy. CIT v. Toyo Engineering India Ltd. (2012) 18 ITR 159 (Mum.)(Trib.)

S. 32 : Depreciation - Lease of assets - Lease rent - Lessee started receiving rent from that date, assets in question were put to use for 180 days or more assessee entitled to full rate of depreciation

The assessee dispatched the Gas Cylinders on 27th September, 2003 and claimed 100 depreciation. The Assessing Officer held that the lessee has put to use the assets on 30th September, 2003 hence, entitled only 50% depreciation. On appeal the claim of depreciation was allowed 100%. On appeal by revenue the court held that assessee has demonstrated that it has purchased cylinders on 27th September 2003, dispatched the same to the lessee and started receiving rent from that date, hence the assets in question was put to use for 180 days or more therefore entitled for full rate of depreciation. (A.Y. 2003-04 to 2005-06)

Dy. CIT v. Prakash Chemical Agencies (P) Ltd. (2012) 136 ITD 222 / 75 DTR 91 / 148 TTJ 480 (Ahd.)(Trib.)

S. 32 : Depreciation - Quantification - Applicability of second proviso to S. 32(1)

Second proviso to section 32(1) is applicable only in the year in which the asset is acquired or put to use for the business for the first time and, therefore, assessee's claim for depreciation qua assets acquired and put to use prior to the commencement of the current year is wholly allowable, more so as the assets were in use from 1st April, 2001 to 28th Sept. 2001, i.e. for a period of 181 days in the current year before the suspension of assessee's operations by RBI on 29th Sept. 2011; however, assessee's claim for depreciation to the extent it relates to assets acquired during the current year is subject to second proviso to section 32(1). (A.Y. 2002-03)

Vinayak Local Area Bank Ltd. v. Dy. CIT (2012) 76 DTR 129 / 149 TTJ 261 (Jaipur)(Trib.)

S. 32 : Depreciation - Rate - mistakenly understated - Held rectification letter filed to Assessing Officer rectifying the rate of depreciation was to be allowed

The assessee installed wind-mill and claimed depreciation @ 15% on written down value basis. However, realizing the wrong rate, assessee filed a letter to rectify the rate @ 80%. It was held that since assessee had made a claim for statutory allowance of depreciation on WDV basis, subject to mistake occurred in choosing correct rate, rectification letter filed by it was to be allowed. (A.Y. 2007-08)

ITO v. Sri Balaji Sago & Starch Products (2012) 53 SOT 15 (Chennai)(Trib.)

S. 32 : Depreciation - Additional depreciation - Balance amount of additional depreciation was directed to be allowed

The Assessee has claimed the depreciation at 50% in the A.Y. 2005-06 in respect of plant and machinery installed since the machinery had been put to use less than 180 days in that year. During the relevant A.Y. the assessee claimed the balance 50% of additional depreciation. The Assessing Officer has not allowed the additional depreciation. In appeal Commissioner(Appeals) has directed the Assessing Officer to verify the claim and allow the additional depreciation. On appeal by revenue the Tribunal confirmed the order of the Commissioner (Appeals). (A.Y. 2006-07)

ACIT v. SIL Investment Ltd. (2012) 73 DTR 233 / 148 TTJ 213 / 54 SOT 54 (Delhi)(Trib.)

S. 32 : Depreciation - Explanation 5 - Belated return - Revised return - Allowable even if no claim is made in the return [S. 139]

The assessee filed its return belatedly and it filed a revised return and claimed deduction in respect of short term capital gains and fresh claim of depreciation on car. The claim was rejected by the Assessing Officer, which was confirmed in appeal. On further appeal to Tribunal the Tribunal held that depreciation allowance under Explanation 5 of section 32 is allowable even if no claim is made in the original return. (A.Y. 2007-08)

Rakesh Singh v. ACIT (2012) 139 ITD 128 / (2013) 152 TTJ 46 / 82 DTR 235 (Bang.)(Trib.)

S. 32 : Depreciation - Machine for purpose of standardization and pasteurization of milk - Process not considered as manufacturing of production activity, hence, addition depreciation not allowed

As Standardization and pasteurisation of milk cannot be considered as a manufacture or production activity and, therefore, additional depreciation under section 32(1)(iia) is not available to machinery installed for purpose of standardization and pasteurization of milk. (A.Y. 2005-06 & 2008-09)

Creamline Dairy Products Ltd. v. Dy. CIT (2012) 139 ITD 517 / 20 ITR 510 (Hyd.)(Trib.)

S. 32 : Depreciation - Asset put to use for 180 days - Benefit of additional depreciation remains unaffected

Assessee purchased new assets during preceding previous year which were put to use for less than 180 days. Apart from normal depreciation, assessee was also eligible to claim additional depreciation at rate of 15 per cent for said new assets. Since assets were put to use for less than 180 days, in preceding assessment year assessee claimed only 50 per cent of 15 per cent. Balance additional depreciation was claimed by assessee in instant assessment year. It was held that benefit of additional depreciation under section 32(1)(iia) is available in full as soon as new assets are purchased and fact that said assets were put to use for less than 180 days, does not affect such benefit. (A.Y. 2004-05 to 2006-07)

Dy. CIT v. Cosmo Films Ltd. (2012) 139 ITD 628 / 13 ITR 340 (Delhi)(Trib.)

S. 32 : Depreciation - Rate of depreciation - Not required to file revised return

Assessee showed addition to machinery as an addition to 'Plant and machinery' in its books. However, in Form 3CD, it showed same addition as addition to 'Building'. Assessing Officer allowed depreciation at rate of 10 per cent. The Tribunal held that to claim higher rate of depreciation, i.e., of 25 per cent, claim could be modified in original return and revised return need not be filed. (A.Y. 2005-06 to 2007-08)

Solaris Bio Chemicals Ltd. V. Dy. CIT (2012) 53 SOT 195 (URO)(Delhi)(Trib.)

S. 32 : Depreciation - Terminal depreciation - Use of asset - For claiming terminal depreciation under section 32(1)(iii), asset must be used for purpose of business or profession

Assessee-company, doing business of offset printing and typesetting, stopped its business and converted land and building into stock-in-trade. It shifted its business into new line of business being real estate development. Assessee also demolished factory building and had used factory land for putting up construction of dwelling units and sold same. While computing its profits of real estate business assessee had taken WDV of factory building and land as terminal depreciation under section 32(1)(iii). The Tribunal held that since assessee had converted land and factory building into stock-in-trade of new business of real estate, said assets of assessee no more survived as business assets and assessee could not be allowed terminal depreciation under section 32(1)(iii) on such assets. (A.Y. 2006-07, 2007-08)

Dy. CIT v. Rajeswari Foundations Ltd. (2012) 53 SOT 569 (Chennai)(Trib.)

S. 32 : Depreciation - Capital expenditure on building - Depreciation was held to be allowable
Assessee is engaged in software development. It claimed depreciation in respect of capital expenditure incurred on building in which it carried on its business. Assessing Officer rejected assessee's claim holding that assessee did not hold lease or other rights of occupancy in building in question as required by Explanation to section 32. The Tribunal held that, it was noticed from records that there was oral understanding between landlady and a director of company for lease of building. Moreover, various authorities like customs department and STPI had given licenses with same property as assessee's address and business was also started from same premises during relevant year, therefore the assessee's claim for deprecation was to be allowed. (A.Y. 2006-07)
ITO v. RSG Media (P.) Ltd. (2012) 53 SOT 588 (Delhi)(Trib.)

S. 32 : Depreciation - Building leased - Leased premises depreciation is not allowable
Assessee has let out 1/3 of the total area of its business to its group concern. Assessee claimed the depreciation on the ground that the activity of letting out was merely incidental to the regular business and for temporary basis. The Tribunal held that activity of letting out was not being temporary one and assessee has let out sizeable portion, hence depreciation on leased premises was not allowable. (A.Y. 2002-03 to 2004-05)
Mastek Ltd. v. Dy. CIT (2012) 74 DTR 318 / (2013) 151 TTJ 484 (Ahd.)(Trib.)

S. 32 : Depreciation - Computation - Gross total income [S. 30 to 43D]
Depreciation was debited in profit and loss account but not claimed. Total gross income to be computed in accordance to provisions of sections 30 to 43D. (A.Y. 1999-2000)
KEC International Ltd. v. Dy. CIT (2012) 20 ITR 282 (Mum.)(Trib.)

S. 32 : Depreciation - Lease - Higher depreciation for motor vehicles used in business of leasing - Matter remanded
The assessee was engaged in the business of financing, leasing, hire purchase, production and distribution of internet media. In the assessment for the A.Y. 1998-99, the claim of the assessee to depreciation at higher rate of 40 per cent on vehicles given on lease was restricted by the Assessing Officer to 25 per cent on the ground that necessary evidence of leasing and licence had not been made available. In the year under consideration, the Assessing Officer disallowed the entire claim of the assessee for deprecation on the ground that there was failure on the part of the assessee to support and substantiate its claim that it was in fact the owner of the vehicles. On appeal, the Commissioner(Appeals) allowed deprecation on vehicles given on lease to the assessee but only at the normal rate relying on his appellate order in the assessee's own case for the A.Y. 1998-99. On appeal Tribunal held that the order of the Commissioner(Appeals) on this issue was to be set aside and the matter restored to the file of the Assessing Officer with a direction to decide it afresh. (A.Y. 2004-05)
Channel Guide India Ltd. v. ACIT (2012) 139 ITD 49 / 20 ITR 438/(2013) 83 DTR 321/153 TTJ 432 (Mum.)(Trib.)

S. 32 : Depreciation - Unabsorbed depreciation - Set-off Current depreciation - Brought forward depreciation can be set off from long term capital gains [S. 72, 73]
Brought forward unabsorbed depreciation is to be treated as current years depreciation because of legal fiction created by provisions of section 32(2) and, therefore, treatment given to current year's depreciation would equally apply to brought forward depreciation and it can be set off against any income. Therefore, brought forward unabsorbed depreciation would be allowed to be set off from long-term capital gains. (A.Y. 2007-08)
Suresh Industries (P.) Ltd. v. ACIT (2012) 54 SOT 450 (Mum.)(Trib.)

S. 32(2) : Depreciation - Unabsorbed depreciation - Set-off - Unabsorbed depreciation of A.Y. 1997-98 to 2001-02 is eligible for relief granted by amended section 32(2) in A.Y. 2002-03

In A.Y. 2006-07, the assessee claimed a set-off of the unabsorbed depreciation brought forward from A.Y. 1997-98, 1999-2000, 2000-01 & 2001-02. The Assessing Officer allowed the claim under section 143(3). Subsequently, within four years from the end of the A.Y. he reopened the assessment on the ground that pursuant to the amendment to section 32(2) by the Finance Act No. 2 of 1996 w.e.f. A.Y. 1997-98, the unabsorbed depreciation for A.Y. 1997-98 could be carried forward up to a maximum period of 8 years from the year in which it was first computed and this period expired in A.Y. 2005-06 and could not be allowed in A.Y. 2006-07. The assessee filed a Writ Petition to challenge the reopening in which it claimed (a) that the reopening was based on a "change of opinion" and (b) that as section 32(2) was amended in A.Y. 2002-03 to remove the time period of 8 years, the claim for unabsorbed depreciation of A.Y. 1997-98 was allowable without any time limit. Held by the High Court upholding the assessee's plea:

(i) There must be "tangible material" to reopen the assessment and it cannot be done because he has drawn another inference from the documents already considered by him because it would amount to a change of opinion. The assessee had disclosed the facts and if the Assessing Officer drew a wrong legal inference, he cannot take benefit of his own wrong & reopen under section 147.

(ii) Prior to the Finance Act No. 2 of 1996 unabsorbed depreciation could be carry forward indefinitely. The Finance Act No. 2 of 1996 restricted the period of carry forward & set-off of unabsorbed depreciation to 8 years from A.Y. 1997-98. Circular No. 762 dated 18.2.1998 clarified that the brought forward depreciation for the earlier years would be added to the depreciation for A.Y. 1997-98 and the period of 8 years would begin from A.Y. 1997-98 onwards. Section 32(2) was amended by Finance Act, 2001 w.e.f. A.Y. 2002-03 to restore the position as it was prevailing prior to the Finance Act No. 2 of 1996 and the period of 8 years was done away with. In Circular No. 14 of 2001, the CBDT clarified that the removal of the 8 year time period was "with a view to enable the industry to conserve sufficient funds to replace plant and machinery". The effect of the amendment is that the unabsorbed depreciation available to an assessee on 1.4.2002 (A.Y. 2002-03) has to be dealt with in accordance with the section 32(2) as amended by the Finance Act, 2001 and not by section 32(2) as it stood before the said amendment. Had the intention of the Legislature been to allow unabsorbed depreciation allowance worked out in A.Y. 1997-98 only for eight subsequent assessment years even after the amendment of section 32(2) by Finance Act, 2001 it would have incorporated a provision to that effect. However, it does not contain any such provision and so a purposive and harmonious interpretation has to be taken. Therefore, the unabsorbed depreciation pertaining to A.Y. 1997-98 can be carried forward for set-off indefinitely. (A.Y. 2006-07)

General Motors India Pvt. Ltd. v. Dy. CIT (2013) 82 DTR 304 (Guj.)(HC)

S. 32(2) : Depreciation - Unabsorbed depreciation - Set-off - Unabsorbed depreciation automatically becomes the depreciation of the subsequent year and would be allowed to be carried forward [S. 139(1), 139(3)]

Assessee has filed a return under section 139(1) declaring nil income which was accepted under section 143(1). The notice was issued under section 148. In the reassessment proceedings the assessees income was determined very high, however after giving effect to the order of Tribunal the assessed income was loss. Assessee moved application under section 154 to carry forward the loss determined in pursuance of return filed under section 139(3). The Assessing Officer rejected the application. In an appeal before the Commissioner(Appeals), the Commissioner(Appeals) held that loss cannot be carried forward, however, the unabsorbed depreciation was allowed to be carried forward. In appeal by the revenue, the Tribunal held that unabsorbed depreciation automatically becomes the depreciation of the subsequent year and the assessee would be entitled to carry forward and set off notwithstanding the fact the return showing nil income was filed and the loss was determined in pursuance to return filed under section 139(3). (A.Y. 1999-2000)

ACIT v. Mehsana District Co-Operative Milk Producers Union Ltd. (2012) 67 DTR 470 / 145 TTJ 107/(2011) 46 SOT 218 (Ahd.)(Trib.)
Mehsana District Co-operative Milk Producers Union Ltd. (2012) 67 DTR 470 / 145 TTJ 107/(2011) 46 SOT 218 (Ahd.)(Trib.)

S. 32A : Investment allowances - Labour contractor - Excavation work - Activity undertaken by the assessee was removal of overburden / earth excavation work carried out for facilitating mining at project site hence not entitled to investment allowance

The assessee claimed to be in the business of mining; the only activity undertaken by the assessee was removal of overburden / earth excavaction work carried out for facilitating mining at lignite project site at Rajpardi and Pandhro; and that the assessee was merely a labour contractor hence the assessee was not entitled to investment allowance. Appeal of revenue was allowed. (A.Y. 1987-88)

CIT v. General Contractors Co. (2012) 210 Taxman 277 / 79 DTR 97 / 254 CTR 223 (SC)

Editorial:- General contractors Co. v. CIT (2006) 206 CTR 10 (Guj.)(HC) set aside.

S. 32A : Investment allowance - Manufacture - Mining of granite - Activities of mining from quarries and exporting them after cutting, polishing, etc., which tantamount to manufacture for the purpose of section 32A

The issue before the Court was whether the assessee entitled to investment allowance on the activities of the assessee, viz, mining granite from quarries and exporting them after cutting, polishing, etc., which tantamount to manufacture for the purpose of Section 32A of the Income-tax Act, 1961. Following the case in Gem Granites v. CIT (2004) 141 Taxman 528 (SC), Civil appeal filed by the assessee was allowed. (A.Y. 1988-89)

Tamil Nadu Minerals Ltd. v. CIT (2012) 349 ITR 695 / 210 Taxman 257 / 254 CTR 105 / 79 DTR 44 (SC)

Editorial:- Decision of Madras High Court in CIT v. Tamil Nadu Minerals Ltd. (2005) 274 ITR 482 (Mad.)(HC) reversed.

S. 32A : Investment allowance - Production - Engaged in mining, polishing and export granites constitute 'production' for claiming deduction under section 32A, matter was remitted to the Assessing Officer for reconsideration

The issue before the Court was whether the assessee has undertaken activity which results in production and consequently, whether the assessee is entitled to claim the benefit of investment allowance under section 32A of the Income-tax Act, 1961. The Court observed that the assessee has not led evidence before the Assessing Officer as to the exact nature of activities undertaken by it in the course of mining, polishing and export of granites. For the reasons the order of High Court as well as Tribunal was set aside and matter remitted to the Assessing Officer to decide the issue within three months.

Vijay Granites (P) Ltd. v. CIT (2012) 349 ITR 350 / 210 Taxman 228 / 254 CTR 101 / 79 DTR 11 (SC)

S. 32A : Investment allowance - Canteen - Refrigerator - Cooking range - Assessee is not entitled to investment allowance in respect of refrigerator, cooking range and fans installed in canteen

Though the canteen may be part of production unit or factory, it cannot be said to be an "industrial undertaking" for the reason that it does not manufacture or produce any article or thing, as required under sub-clause (iii) of clause (b) of section 32A(2), therefore, assessee is not entitled to investment allowance in respect of refrigerator, cooking range and fans installed in its canteen. (A.Y. 1978-79, 1979-80, 1985-86)

Escorts Tractors Ltd. v. CIT (2012) 80 DTR 162 / 211 Taxman 38 / 254 CTR 467 (SC)

S.32A :Investment allowance - Machinery used in manufacture of denatured spirit - Assessee is entitled to investment allowance.[S.263]

The assessee was allowed investment allowance by the Income-tax Officer. The Commissioner, in revision under section 263 of the Income-tax Act, 1961, withdrew it on the ground that the assessee manufactured rectified spirit and denatured spirit and sold arrack after diluting the rectified spirit. Held that item 1 of the Eleventh Schedule reads "Beer, wine, and other alcoholic spirits". The words "other alcoholic spirits" are grouped with the words "beer" and "wine". "Beer" and "wine" are alcoholic spirits which are fit for human consumption. They are in other words postable alcoholic spirits. That is not the case with rectified spirit or industrial alcohol. Industrial alcohol or rectified spirit was not intended to be included within "other alcoholic spirits." The revision held to be not valid and assessee could not be denied investment allowance. (A.Y. 1985-86, 1986-87, 1989-90)

CIT v. O. R. Distilleries Ltd. (2012) 349 ITR 215/87 DTR 268/(2013) 259 CTR 473 (AP)(HC)

S. 32A : Investment allowance - Machinery and plant - Job work - Investment allowance is allowable in respect of machinery and plant used in job work

The assessee is in the business of manufacturing of forging products. They also undertake job work from Republic forge and other companies. The assessee claimed the investment allowance under section 32A. The Assessing Officer disallowed the investment allowance on the ground that the assessee is not manufacturing the products and they are engaged only on job works. The Commissioner(Appeals) also confirmed the view of Assessing Officer. On further appeal the Tribunal allowed the appeal of assessee. On appeal by revenue the Court up held the order of Tribunal and held that investment allowance can be claimed in respect of machineries and plant used in job work. (A.Y. 1983-84, 1984-85)

CIT v. Firma Hi-Tech (2012) 343 ITR 507 (AP)(HC)

S. 35 : Expenditure - Scientific research - Development centre - Reference to Board is required as the Assessing Officer has not referred the matter the order of Tribunal allowing the claim was up held [S. 43(4)]

The assessee-company incurred expenditure of certain sum in setting up a research and development centre (R&D) at Pune for developing sophisticated versatile software products. One such product developed was MAMIS. On such expenditure, the assessee claimed deduction under section 35. The Assessing Officer disallowed the said claim on ground that no new product was developed at said centre and there was only modification in existing product to suit of the requirements of the prospective buyers. On appeal, the Commissioner(Appeals) also confirmed the order of Assessing Officer. On further appeal, the Tribunal was of the opinion that the expression 'scientific research' defined under section 43(4) was of wide amplitude. It accepted the assessee's contention that the product MAMIS would ensure reduction of the process time substantially. This could be treated as a major breakthrough in the field of software processing. It concluded that the assessee had carried out scientific research in the process of developing such software and upheld the assessee's claim for deduction under section 35. It further held that under section 35(1), the Assessing Officer could not have rejected such a claim without making a reference to the Board. On appeal by revenue the Court held that the (i) Tribunal itself ought not to have decided the allowability of claim under section 35 without the opinion of the prescribed authority, particularly without full discussion on the materials on record. (ii) The reference ought to have been sought by the revenue before the Board to the prescribed authority and not having done so, the Tribunal was justified in reversing the orders of the revenue authorities rejecting the assessee's claim for deduction. Accordingly the appeals of revenue were dismissed. (A.Y. 1992-93, 1993-94, 1994-95)

Dy. CIT v. Mastek Ltd. (2012) 210 Taxman 432 (Guj.)(HC)

S. 35 : Expenditure - Scientific research - Motor car - Employees - Purchase of motor car for employees is not eligible for deduction as the employees came into car provided by employer or by public transport or hired car had no bearing on in-house research & development

The assessee contended that, since the salary to employee was eligible for deduction under section 35(2AB), acquisition of motor car for those employees should also be considered as eligible for this benefit. It was held that expenditure on purchase of motor car could not be accepted as expenditure whether capital or revenue incurred on in-house research and development as whether the employees came into car provided by employer or by public transport or hired car had no bearing on in-house research & development. (A.Y. 2005-06)

ACIT v. Torrent Pharmaceutical Ltd. (2012) 137 ITD 301 (Ahd.)(Trib.)

S. 35 : Expenditure - Scientific research - Not necessary in house expenditure

In order to allow deduction for expenses incurred on clinical drug trial, it has to be seen that such expenses are incurred in relation to scientific research carried out in in-house research and development facility, however, it is not necessary that expenditure itself on clinical drug trial should be incurred in-house. (A.Y. 2002-03, 2003-04)

Cadila Pharmaceuticals Ltd. v. ACIT (2012) 53 SOT 356 / 147 TTJ 49 (Ahd.)(Trib.)

S. 35 : Expenditure - Scientific research - Double deductions / benefits are not allowable under fiscal laws, until and unless, special provisions exist in statute, long term capital loss was not allowed [S. 41(3), 48]

Assessee claimed 100 per cent deduction on expenditure incurred for acquiring capital assets used in research and development under section 35.Later on said capital assets were sold and assessee claimed long-term capital loss of Rs. 1.85 crores under section 48. Assessing Officer, however, disallowed long-term capital loss by holding that amount involved was covered under section 41(3). Tribunal held that allowance of claim of capital loss on capital assets used for R & D for which 100 per cent deduction was already allowed in year of its acquisition and use, would amount to double benefit. Further since sections 35 and 41 is part of head 'profits and gains of business or profession' provisions of head 'capital gains' could not be imported to allow assessee one more deduction. Decided in favour of revenue. (A.Y. 2006-07)

Mahindra & Mahindra Ltd. v. Dy. CIT (2012) 54 SOT 146 (URO)(Mum.)(Trib.)

S. 35 : Expenditure - Scientific research - Consultation charges - Patent filing charges is eligible deduction

Consultancy charges paid for obtaining patent information from innovator companies and obtaining innovator samples for research and development purposes would be eligible for weighted deduction. Expenditure incurred towards patent filing charges is eligible for weighted deduction under section 35(2AB). (A.Y. 2007-08)

USV Ltd. v. Dy. CIT (2012) 54 SOT 615 (Mum.)(Trib.)

S. 35 : Expenditure - Scientific research - In house research development is eligible deduction - Expenditure not reported in development of scientific and Industrial Research certificate would not be eligible deduction

The assessee was engaged in business of Manufacturing and Marketing of pharmaceuticals products and bulk drugs. It had three research and development units (R&D). The assessee claimed weighted deduction under section 35(2AB)(1) in respect of following expenses incurred in connection with the in-house Research and Development labs (a) expenses incurred on clinical trials (b) expenses incurred on rent, rates and taxes (c) claims not reported in DSIR certificate. The Assessing Officer as well as the Commissioner(Appeals) disallowed the above said claim of assessee. On Second Appeal the Tribunal held that expenditure on scientific research eligible for weighted deduction under section

35(2AB) should be an expenditure on in-house research and development facilities, therefore, expenditure incurred on clinical trials would not be eligible for weighted deduction under section 35(2AB). Expenditure incurred on repairs, rent, etc., of in-house research and development labs, would be eligible for weighted deduction under section 35(2AB). Expenses not reported in Department of Scientific and Industrial Research (DSIR) certificate, would not be eligible for deduction under section 35(2AB). Appeal partly allowed. (A.Y. 2007-08)
USV Ltd. v. Dy. CIT (2012) 54 SOT 615 (Mum.)(Trib.)

S. 35AB : Expenditure on know-how - Business expenditure - Lump sum technical know-how fees are deductible only under section 35AB and not under section 37(1) [S. 37(1)]
The assessee entered into a "Licence and Technical Assistance Agreement" with an American company pursuant to which the American company agreed to transfer technical know-how to the assessee in consideration of US $2,25,000 to be paid in three installments. The assessee paid the first installment amounting to Rs. 17.49 lakhs. Subsequently, disputes arose between the contracting parties and the know-how was not transferred by the American company. The assessee claimed that as the technical know-how was not received, the amount paid was deductible under section 37(1) and not under section 35AB. The Assessing Officer & CIT(A) rejected the claim though the Tribunal upheld it. The High Court reversed the Tribunal. On appeal by the assessee to the Supreme Court, held: Once Section 35AB comes into play, then Section 37 of the Act has no application. (A.Y. 1993-94)
Drilcos (India) Pvt. Ltd. v. CIT (2012) 348 ITR 382 / 252 CTR 349 / 76 DTR 349 / 210 Taxman 267 (SC)
Editorial:- Decision in CIT v. Drilcos (India) Pvt. Ltd. (2004) 266 ITR 12 (Mad.)(HC) is affirmed.. Section 35AB was inserted by the Finance Act, 1985 w.e.f. 1st April, 1986 to provide for encouragement to indigenous scientific research. As a consequence of introduction of depreciation on know-how under section 32(1) by the Finance (No. 2) Act, 1998 w.e.f. 1st April, 1999, the provision has been rendered inoperative. A new sub-section (3) was inserted in section 35AB so at to enable the amalgamated company or resulting company to avail the relief earned by the amalgamating or demerged company for the period of relief.

S. 35B : Export markets development allowance - Interest on export credit loan - Not allowable weighted deduction
Assessee is not entitled to weighted deduction under section 35B in respect of interest and bank charges incurred by it on export packing credit facilities. (A.Y. 1980-81)
Larsen & Toubro Ltd. v. CIT (2012) 79 DTR 225 / (2013) 256 CTR 252 (Bom.)(HC)

S. 35D : Amortisation of preliminary expenses - Reimbursement of expenses of promoters - Project development - Reimbursement of project development expenses are eligible for deduction under section 35D
The assessee is a public Limited company. In the return of income the assessee claimed deduction under section 35D in respect of a sum of Rs. 2,12,665, which represented expenditure incurred by the promoters for project development. The amount was reimbursed by the company after its formation to the promoters. The Assessing Officer held that as the expenditure was incurred only after 31st March, 1970 it would not qualify for a deduction under section 35D. The view of Assessing Officer was confirmed by the Commissioner(Appeals) and Tribunal. On reference the Court held that the assessee was liable in respect of the expenditure incurred only after acceptance of that liability. That event took place after the date 31st March 1970. The fact that that promoters had incurred the expenditure prior to 31st March, 1970 would not detract from the position that same represented expenditure incurred by the assessee only after the acceptance of the liability which took place after the specified

date, hence the expenditure incurred by promoters before 31st March, 1970, reimbursed by the company thereafter is entitled to deduction under section 35D. (A.Y. 1975-76)
Zuari Agro Chemicals Ltd. v. CIT (2012) 72 DTR 12 / 251 CTR 233 (Bom.)(HC)

S. 35D : Amortisation of preliminary expenses - Expenditure in connection with issue of shares for new projects and expansion deduction allowable under section 35D
Proceeds kept in investment pending authorisation from various Governmental bodies. Purpose and raising of the Euro issue not being in dispute, nor there being material to counter the claim of the assessee that the expenditure was in connection with raising the capital for the new projects as well as for expansion, relief under section 35D could not be disallowed for the reason that proceeds were kept in investment pending authorisation from various Govt. Bodies. (A.Y. 1994-95 & 1995-96)
EID Parry (India) Ltd. v. Dy. CIT (2012) 79 DTR 249 / 209 Taxman 214 / (2013) 256 CTR 104 (Mad.)(HC)

S. 35D : Amortisation of preliminary expenses - Proposal to expand capacity of production - Expenditure on issue of shares expenditure to be amortised
The assessee derived income from the manufacture and sale of commercial vehicles, engines and parts thereof. The assessee claimed a sum of Rs. 14,21,52,904 being Euro issue expenditure as revenue expenditure. The assessee furnished the particulars in respect of its expenses, which amounted to a sum of Rs. 14,21,52,402. The issue document indicated the proposal of the company to invest approximately Rs. 6,493 million for expanding production capacity of vehicles, particularly the cargo range of vehicles. The company was also planning to invest approximately Rs. 722 million in the modernisation of its Ennore plant, in particular, the paint shop. Apart from that, a sum of Rs. 1,640 million was proposed to be invested in routine capital replacement, modernisation of other existing facilities and development. The assessee pointed out that the assessee also planned capacity expansion of its units at Hosur. In the context of its proposal for expansion, the assessee claimed that it was entitled to claim deduction under section 35D. The claim was, however, rejected. The Tribunal held that the expenditure was incurred for expansion of the industrial undertaking and, hence, it qualified for deduction. As far as the qualifying amount to be considered under section 35D was concerned, the Tribunal remanded the matter to the Assessing Officer to recompute the deduction in accordance with the provisions of the Act. On appeal to the High Court, dismissing all the appeals, that the Tribunal was right in equating the proposal to expand the capacity of production with extension of industrial undertaking under section 35D. The Tribunal was right in holding that the expenses related to "Euro issue" by the assessee were entitled to be amortised under section 35D. (A.Y. 1995-96)
Ashok Leyland Ltd. v. CIT (2012) 349 ITR 663 / 75 DTR 305 (Mad.)(HC)

S. 35D : Amortization of preliminary expenses - Premium on lease - Premium on lease claimed as amortization was not allowed
Assessee took on lease a land from municipality for 60-95 years. It paid heavy premia and a nominal rent for lease .Assessee was entitled to transfer benefit of lease to another party with previous consent of municipality .It claimed amortization of heavy premia which claim was disallowed by Assessing Officer on ground that it was capital expenditure. assessee though not owner of land, had enjoyment of land substantially. Assessee's claim for amortization of expenses was rightly disallowed. (A.Y. 1999-2000, 2000-01)
GAIL India Ltd. v. JCIT (2012) 211 Taxman 587 (Delhi)(HC)

S. 35D : Amortisation of preliminary expenses - Expenditure on preference shares - Disallowance was confirmed as extension of industrial undertaking could not be completed during the relevant year

The assessee issued non-convertible cumulative preference shares of Rs. 150 crores. Assessee claimed the entire issue expenditure as revenue. The assessing officer held that the said expenditure was capital in nature. On appeal Tribunal held that the purchase of a rig might result in extension of its Industrial undertaking. But the deduction under section 35D of the Act would be allow for ten successive years beginning with the year in which extension of industrial undertaking was complete. It was found that the rig was under refurbishment and was not put to use and assessee had shown this as part of work in progress. No article classified as work in progress could be considered as a completed item. As the extension of industrial undertaking could not be considered as complete during relevant assessment year, claim under section 35D cannot be allowed. (A.Y. 2005-06, 2006-07)

Dy. CIT v. Aban Offshore Ltd. (2012) 13 ITR 180 (Chennai)(Trib.)

S. 35DDA : Amortisation of expenditure - Voluntary Retirement Scheme - Compliance with conditions of Rule 2BA is not mandatory for deduction under section 35DDA [S. 10(10C)]

Compliance with conditions of Rule 2BA is mandatory only to avail exemption under section 10(10C) by employees but said rule is not relevant to deduction under section 35DDA. (A.Y. 2007-08)

State Bank of Mysore v. CIT(A) (2012) 139 ITD 526 (Bang.)(Trib.)

S. 36(1)(iii) : Deductions - Interest on borrowed capital - Subsidiary - Equity capital -Whether interest paid is allowable or not, requires reconsideration

The Tribunal held that as the assessee, being a holding company had a deep interest in its subsidiary, and hence if the holding company advanced borrowed money to a subsidiary and the same is used by the subsidiary for some business purposes, the assessee would be entitled to deduction of interest on its borrowed loans. On appeal by the department, Held by the Supreme Court. Issue notice on the applications for condonation of delay as also on the special leave petitions. In our view, S.A. Builders Ltd. v. CIT, needs reconsideration.

ACIT v. Tulip Star Hotels Ltd. (2012) 21 taxmann.com 97 (SC)

S. 36(1)(iii) : Deductions - Interest on borrowed capital - Extension of existing business -Interest paid on funds borrowed for purposes of setting up of sugar plant was held to be as allowable deduction

The assessee having a ferroalloys manufacturing plant has set up a sugar pant at different places out of its borrowed fund. There was a unity of control and management in respect of ferroalloys plant as well as sugar plant and there was also intermingling of funds and dove-tailing of business. Since it was mere extension of business of ferro-alloys plant, interest paid on funds borrowed for purpose of setting up of sugar plant was allowable as deduction. (A.Y. 1996-97)

CIT v. Monnet Industries Ltd. (2012) 210 Taxman 264 / 254 CTR 109 / 79 DTR 47 / (2013) 350 ITR 304 (SC)

Editorial:- CIT v. Monnet Industries Ltd. (2009) 332 ITR 627 / 176 Taxman 81 (Delhi)(HC), affirmed.

S. 36(1)(iii) : Deductions - Interest on borrowed capital - Acquisition of capital asset - Interest paid in respect of borrowings for acquisition of capital assets not put to use in concerned financial year can be allowed as deduction under section 36(1)(iii)

The question before the Court was whether the interest paid in respect of borrowings for acquisition of capital assets not put to use in the concerned financial year can be permitted as allowable deduction under section 36(1)(iii) of the Income-tax Act, 1961. Following the judgment in Dy. CIT v. Core Health Care Ltd. (2008) 298 ITR 194 (SC), the Civil appeals filed by the assessee are allowed. (A.Y. 1992-93)

Vardhaman Polytex Ltd. v. CIT (2012) 349 ITR 690 / 210 Taxman 261 / 254 CTR 102 / 79 DTR 41 (SC)

Editorial:- Decision of full bench of Punjab and Haryana High Court in CIT v. Vardhaman Polytex Ltd. (2008) 299 ITR 152 and CIT v. Vardhaman Polytex Ltd. (2008) 300 ITR 186 is reversed. Proviso to section 36(1)(iii) inserted by the Finance Act, 2003, w.e.f. 1.4.2003)

S. 36(1)(iii) : Deductions - Interest on borrowed capital - Money lending business -Borrowals had been accepted in earlier year - Interest cannot be disallowed [S. 14A]

Assessee is in the business of money lending. Interest on borrowed money was allowed in earlier years. The interest is allowable as deduction subject to provisions of section 14A. (A.Y. 1998-99).

Rajendra Kumar Dabriwala & Ors. v. CIT (2012) 347 ITR 353 / 247 CTR 206 / 66 DTR 420 / (2011) 202 Taxman 643 (Cal.)(HC)

S. 36(1)(iii) : Deductions - Interest on borrowed capital - Wholly owned subsidiary - Borrowed funds not used by the assessee for purposes of investment in the shares of subsidiary or for making advances to RIL hence disallowance was not justified

The assessee was engaged in the business of providing telecommunication infrastructure which mainly consisted of a Pan India Fibre Optic Network R. Ltd., wholly owned subsidiary of the assessee which is engaged in the business of providing telecommunication services. The CIT(A) and Tribunal held that the investment made by the assessee in its wholly owned subsidiary and the interest free advances given to RIL were for furthering the business interest of the assessee apart from their concurrent finding of fact that borrowed funds were not used by the assessee for purposes of investment in the shares of subsidiary or for making advances to RIL. There was no justification to make pro-rata disallowance out of deduction which is otherwise allowable under section 36(1)(iii). (A.Y. 2003-04)

CIT v. Reliance Communications Infrastructure Ltd. (2012) 71 DTR 237 / 207 Taxman 319 /(2013) 260 DTR 159 (Bom.)(HC)

S. 36(1)(iii) : Deductions - Interest on borrowed capital - Pre-construction interest - Interest capital receipt - Funds invested by the assessee and the interest earned were inextricably linked with the setting up of the power plant and, therefore, the interest earned on fixed deposit of amounts borrowed cannot be treated as a revenue receipt [S. 4]

The assessee was in the process of expansion of its business by setting up new units for generation of power. It borrowed funds for the project and incurred interest expenditure which was capitalized. A part of the funds were invested in temporary deposits and in deposits by way of margin or giving advances etc. for the purpose of expansion. Such deposits earned interest of Rs. 331.58 lakhs. The assessee claimed, relying on CIT v. Bokaro Steel Ltd. (1999) 236 ITR 315 (SC) that the interest earned had to be reduced from the interest paid on the borrowings and was not assessable as "income". The CIT(A) accepted the claim but the Tribunal rejected it on the ground that CIT v. Bokaro Steel Ltd. (1999) 236 ITR 315 (SC) and the other judgements on the point were not good law in view of the Proviso to section 36(1)(iii) inserted w.e.f. 1.4.2004. On appeal by the assessee to the High Court, Held reversing the Tribunal:

In Indian Oil Panipat Power Consortium Limited v. ITO (2009) 315 ITR 255 (Delhi)(HC) it was held that if the interest received was "inextricably linked" with the setting up of the plant, it could not be treated as income from other sources. This reasoning is in line with Bokaro Steel Ltd., CIT v. Karnataka Power Corp. (2001) 247 ITR 268 (SC) & Bongaigaon Refinery and Petro chemicals Ltd. v. CIT (2001) 251 ITR 329 (SC). Though the proviso to section 36(1)(iii) enacts that any amount of the interest paid towards ("in respect of") capital borrowed for acquisition of an asset or for extension of existing business regardless of its capitalization in the books or otherwise, "for any period beginning from the date on which the capital was borrowed for acquisition of the asset till the date on which

such asset was first put to use" would not qualify as deduction, in all these cases, when the interest was received by the assessee towards interest paid for fixed deposits when the borrowed funds could not be immediately put to use for the purpose for which they were taken, the Courts held that if the receipt is "inextricably linked" to the setting up of the project, it would be capital receipt not liable to tax but ultimately be used to reduce the cost of the project. By the same logic, in the present case too, the funds invested by the assessee and the interest earned were inextricably linked with the setting up of the power plant and, therefore, the interest earned on fixed deposit of amounts borrowed cannot be treated as a revenue receipt.

NTPC SAIL Power Company Ltd. v. CIT (2012) 210 Taxman 358 (Delhi)(HC)

S. 36(1)(iii) : Deductions - Interest on borrowed capital - Interest free advances to sister concerns, held not allowable as business expenditure

Facts regarding borrowings made immediately before the loans to subsidiaries were granted noticed by the Assessing Officer would establish a direct nexus with the borrowings made by the assessee and loans granted by the assessee. If interest free loans were not made, then at least to the extent the assessee need not have borrowed from other entities. Borrowals purportedly made for meeting the day to day needs of business, to that extent could have been met from internal resources itself. Such funds then cannot be taken to be having been used for or invested in the business. To that extent there cannot be any claim for business expenditure. (A.Y. 1992-93)

CIT v. Harrisons Malayalam Ltd. (2012) 76 DTR 335 / 210 Taxman 115 (Ker.)(HC)

S. 36(1)(iii) : Deductions - Interest - Borrowed capital - Interest on Indian venture is allowable as business expenditure

Assessee borrowed money for working capital loan and paid interest on said loans Assessee also advanced the amount for placing the interest free security deposit for the accommodation of MIL regional business head. Assessing Officer disallowed the proportionate interest in respect of amount kept as security deposit. The Tribunal held that as a group holding company of Indian ventures, it provides certain support / steward services to various downstream ventures in India. Mr. 'S' was south Asia head of the MIL group. It is thus clear that interest free advance in question was owing to commercial and business expediency. The disallowance of interest was not justified. (A.Y. 2003-04, 2004-05)

Dy. CIT v. Monsanto Holdings (P) Ltd. (2012) 134 ITD 189 / 13 ITR 90 (Mum.)(Trib.)

S. 36(1)(iii) : Deductions - Interest on borrowed capital - Mercantile system of accounting - When the interest free fund is available with assessee, no disallowance can be made in respect of interest free advances made to sister concern. Deduction of interest could not be denied on the ground that transaction was not recorded in books of account [S. 145]

The assessee had given interest free advances to its sister concern. The Assessing Officer disallowed the claim under section 36(1)(iii) by applying 15% rate of interest, which was confirmed by Commissioner(Appeals). Tribunal following the judgment in CIT v. Reliance Utility & Power Ltd. (2009) 313 ITR 340 (Bom.)(HC), held that if assessee has interest free funds as well as interest bearing funds, then the presumption would be that investments were made from interest free funds. When interest free funds available at disposal of assessee were far in excess of interest free loans advanced to sister concerns, no disallowance could be made under section 36(1)(iii) on account of said interest free advances. Assessee which followed the mercantile system of accounting claimed deduction of interest for which no accounting entries were made. The Assessing Officer disallowed the assessee's claim, which was confirmed in appeal by Commissioner(Appeals). On appeal to Tribunal, the Tribunal held that in mercantile system of accounting deduction is allowed on accrual of liability and it is not material whether the amount is paid or not whether or not recorded in the books of account. As the liability is accrued to the assessee, which is duly acknowledged by assessee.

Deduction of interest could not be denied on the ground that transaction was not recorded in books of account. Accordingly the claim of assessee was allowed. (A.Y. 2005-06)

Pranik Shipping & Services Ltd. (2012) 135 ITD 233 / 70 DTR 417 / 146 TTJ 543 / (2013) 21 ITR 489 (Mum.)(Trib.)

S. 36(1)(iii) : Deductions - Interest on borrowed capital - Interest expenditure incurred on acquiring land on lease for setting up hotel business held to be disallowed

The assessee took loan from its holding company for acquiring a plot of land on lease. The assessee claimed deduction under section 36(1)(iii) on interest paid to holding company on the loan taken. The Tribunal upheld the disallowance on the ground that since interest expenditure was incurred prior to the setting of the business, in view of proviso to section 36(1)(iii), same was not allowable. (A.Y. 2007-08)

Breeze Construction P. Ltd. v. ITO (2012) 51 SOT 546 (Delhi)(Trib.)

S. 36(1)(iii) : Deductions - Interest on borrowed capital - Share capital - No interest -bearing funds were utilized by the assessee for subscribing to the share capital of its subsidiary, hence additions cannot be made

The assessee demonstrated that working capital loan was not utilized for investment with the subsidiary. The Tribunal held that though the assessee had failed to prove that the investment with the subsidiary is for the purpose of business, it has utilized interest free, funds for making the said investment as the assessee's shareholders' fund comprising of share capital and reserves and surplus, and also cash profits during the relevant year are much more than the amount invested by the assessee in the share capital of its subsidiary during the year and therefore, no part of interest on borrowings could be disallowed. (A.Y .2007-08)

Visen Industries Ltd. v. Addl. CIT (2012) 136 ITD 309 / 74 DTR 57 / 148 TTJ 137 (TM)(Mum.)(Trib.)

S. 36(1)(iii) : Deductions - Interest on borrowed capital - Interest free advances to sister concern, disallowance of interest is not justified

Total cash profits of the assessee company in the relevant year being far more than the total interest free advances given by it to subsidiary companies it has to be presumed that the entire interest free advances were given out of interest free funds available with the assessee and no part of the borrowed funds can be said to have been diverted as non interest bearing advances to the subsidiary companies and, therefore no disallowance can be made out of interest paid on borrowings. (A.Y. 2006-07 & 2007-08)

S. P. Jaiswal Estates (P.) Ltd. v. CIT (2012) 147 TTJ 649 / 74 DTR 294 / (2013) 140 ITD 19 (Kol.)(Trib.)

S. 36(1)(iii) : Deductions - Interest on borrowed capital - Funds advanced to sister concern out of business exigencies - Not in nature of personal diversion, hence to be allowed

Assessee as well as its sister concern being engaged in the same field of business and the assessee having advanced funds to the sister concern out of business exigenicies, it cannot be said to be in the nature of personal diversion of funds and therefore, interest on borrowings could not be disallowed. (A.Y. 2002-03, 2003-04, 2006-07 & 2007-08)

Quintegra Solutions P. Ltd. v. ITO (2012) 148 TTJ 471 / 75 DTR 302 (Chennai)(Trib.)

S. 36(1)(iii) : Deductions - Interest on borrowed capital - Interest free advances to subsidiary

There is no need to establish the nexus when it is proved that assessee has its own funds which are much more than the advances/investments made by assessee to its sister concern. It is further seen that the only loan taken by assessee was of Rs. 10.5 crores during the year and interest paid by

assessee on its loan and advances was Rs. 27 crores, therefore, disallowance cannot exceed these amounts. Therefore, for this reason also disallowance deserves to be deleted. Even otherwise, the amount has been advanced to its sister concern/subsidiary, which are doing business and it has been clearly stated that the same has been advanced for commercial expediency, therefore, no disallowance is to be made. (A.Y. 1997-98 & 1999-2000)

Hutchison Essar Telecom Ltd. v. JCIT (2012) 149 TTJ 673 / 78 DTR 1 (Delhi)(Trib.)

S. 36(1)(iii) : Deductions - Interest on borrowed capital - Deduction of interest on loans taken from two banks, money had been borrowed in earlier years, no evidence to show that money utilized for personal benefit hence claim was allowed

The assessee claimed deduction of interest on loans taken from two banks taken in the F.Y. 2002-03 and 2003-04 respectively for discharge of personal liabilities. The Assessing Officer disallowed the claim on the ground that the assessee had borrowed the sums for personal use, and had given loans of to various parties from whom no interest was offered as income. It was held that the money had been borrowed in earlier years. Although the Assessing Officer had mentioned that the amount had been borrowed for personal use he had not brought any material on record to substantiate this. The assessee being a film star had to maintain a certain standard of living for which he may require money from time to time. Even assuming that the assessee had borrowed money to purchase a luxurious car, that would justify looking to the nature of profession of the assessee. The claim was rightly allowed. (A.Y. 2002-03, 2003-04)

Jackie Shroff v. ITO (2012) 19 ITR 83 (Mum.)(Trib.)

S. 36(1)(iii) : Deductions - Interest on borrowed capital - Interest free loans to subsidiary companies allowable as deduction

Assessee's own funds are far in excess of the interest free loans and advances given by the assessee to its subsidiary companies. In the absence of any nexus establishing that the interest hearing borrowed funds were given as interest free to its subsidiaries, the disallowance of funds were given as interest free to its subsidiaries, the disallowance of interest is not justified. (A.Y. 2002-03)

Reliance Industries Ltd. v. Addl. CIT (2012) 79 DTR 315 / (2013) 55 SOT 8 (URO) (Mum.)(Trib.)

S. 36(1)(iii) : Deductions - Interest on borrowed capital - Assessee failed to establish nexus of use of funds borrowed from bank for purpose of business - Interest paid on amounts diverted to sister concerns or other persons on interest free basis be disallowed

Once an assessee claims deduction under section 36(1)(iii), onus is on it to satisfy Assessing Officer that loan raised were used for business purposes and if it transpires that assessee had diverted certain funds to sister concern without any interest, assessee has to justify all action before Assessing Officer to his satisfaction that loan raised were used for business purposes and if it transpires that assessee has diverted certain funds to sister concern without any interest, assessee has to justify its action before Assessing Officer to his satisfaction. It was held that where assessee failed to establish nexus of use of funds borrowed from bank for purpose of business to claim deduction under section 36(1)(iii), interest paid by assessee to bank to the extent amounts were diverted to sister concerns or other persons on interest free basis was to be disallowed. (A.Y. 2008-09)

ACIT v. Samrat Rice Mills (P.) Ltd. (2012) 54 SOT 1 (Delhi)(Trib.)

S. 36(1)(iii) : Deductions - Interest on borrowed capital - No interest disallowance if surplus is advanced to sister concern

Where assessee had utilised its own surplus funds to give interest free loans to its sister concerns, disallowance of interest payment made by Assessing Officer under section 36(1)(iii) was to be deleted. (A.Y. 2004-05)

ACIT v. Apollo Hospital Enterprise Ltd. (2012) 139 ITD 594 (Chennai)(Trib.)

S. 36(1)(iii) : Deductions - Interest on borrowed fund - Advance of interest - Free loans to subsidiary - Disallowance is deleted

Disallowance on account of opening balance which had already been deleted by Tribunal in earlier year, no disallowance can be made-Advances small compared to current profit hence, no justification for disallowance. (A.Y. 1999-2000)

KEC International Ltd. v. Dy. CIT (2012) 20 ITR 282 (Mum.)(Trib.)

S. 36(1)(iii) : Deductions - Interest on borrowed capital - Advance to sister concern - Disallowance is held to be justified

Where assessee had borrowed interest-bearing funds but certain funds were advanced to sister concerns interest-free for non-business purpose, interest on said advance was to be disallowed under section 36(1)(iii). (A.Y. 2005-06 & 2006-07)

Dy. CIT v. SMR Builders (P.) Ltd. (2012) 54 SOT 105 (URO)(Hyd.)(Trib.)

S. 36(1)(iii) : Deductions - Interest on borrowed capital - Burden is on assessee

Loans and advances to relatives. No material to suggest assessee discharged onus. The Tribunal held that the onus is on assessee to establish that borrowings used for business purposes. On facts there was no finding of Commissioner(Appeals) on these aspects. Order of Commissioner(Appeals) was set aside and matter was remanded for deciding afresh. (A.Y. 2008-09)

Arun Kumar Gupta (HUF) v. ACIT (2012) 20 ITR 727 / 54 SOT 509 (Delhi)(Trib.)

S. 36(1)(iii) : Deductions - Interest on borrowed capital - Advance to subsidiaries

Tribunal held that there is no nexus between interest-bearing loans and investment in Indian subsidiaries hence interest cannot be disallowed. (A.Y. 2005-06, 2006-07)

Suzlon Energy Ltd. v. Dy. CIT (2012) 20 ITR 391 / 57 SOT 54 (URO)(Ahd.)(Trib.)

S. 36(1)(iv) : Deductions - Provident fund, contribution towards recognized - Condition as to recognised fund - No express approval deduction is allowed. [S. 2(38)]

Assessing Officer disallowed contribution made by assessee towards provident fund on ground that fund was unrecognized. Though apparently no express approval seemed to have been taken for such fund in 12 successive assessments, authorities, based on a letter produced by assessee, had accepted assessee's position that scheme was a recognised one. Therefore, disallowance of claim was not justified. (A.Y. 2005-06)

CIT v. Indian Sugar Exim Corpn. Ltd. (2012) 211 Taxman 107 (Mag.)(Delhi)(HC)

S. 36(1)(va) : Deductions - Employees' contributions to certain funds - Paid before due date of filing of return

Contribution made by employer towards provident fund and employees' State insurance beyond prescribed period under Provident Fund Act has to be allowed as deduction if same is paid on or before due date of furnishing of return of income under section 139(1) held to be allowable and matter remanded. (A.Y. 2005-06 to 2007-08)

Imerys Ceramics (India) (P.) Ltd. v. ACIT (2012) 54 SOT 84 (URO)(Hyd.)(Trib.)

S. 36(1)(vii) : Deductions - Bad debt - Banks - Banks are entitled to bad debts and provision for doubtful debts - Both deductions - Circulars are binding on department [S. 36(1)(viia), 119]

Provisions of 36(1)(vii) and 36(1)(viia) are distinct and independent items of deduction and operate in their respective fields; proviso to section 36(1)(vii) operates only in cases falling under cl. (viia) to limit the deduction to the extent of difference between the debt or part thereof written off in the

previous year and credit the balance in the provision for bad and doubtful debt made under cl. (viia) and, therefore, scheduled and non-scheduled commercial banks are entitled to full benefit of deduction of provision for bad and doubtful debts under section 36(1)(viia). Under section 119 the CBDT is entitled to issue Circulars to explain or tone down the rigours of law and to ensure fair enforcement of its provision. These circulars have the force of law and are binding on the Income-tax authorities. Though they cannot override or detract from the provisions of the Act but it can seek to mitigate the rigour of a particular provision for the benefit of the assessee in certain specific circumstances. So long as the circular is in force, it aids the uniform and proper administration and application of the provisions of the Act. (UCO Bank v. CIT (1999) 237 ITR 889 (SC) followed.)

Catholic Syrian Bank Ltd. v. CIT (2012) 343 ITR 270 / 68 DTR 1 / 248 CTR 1 / 206 Taxman 182 / (2012) 3 SCC 784 / Vol. 42 Tax LR May 382 (SC)

Dhanlakshmi Bank Ltd. v. CIT (2012) 343 ITR 270 / 68 DTR 1 / 248 CTR 1 / 206 Taxman 182 / (2012) 3 SCC 784 / Vol. 42 Tax LR May 382 (SC)

S. 36(1)(vii) : Deductions - Bad debt - Ordinary course of business - Allowed as deduction

The court held that in view of the concurrent finding of facts the bad debt incurred in the ordinary course of business held to be allowed as deduction. (A.Y. 2003-04)

CIT v. Smifs Securities Ltd. (2012) 348 ITR 302 / 75 DTR 417 / 252 CTR 233 / 210 Taxman 428 (SC)

S. 36(1)(vii) : Deductions - Bad debt - Provision for non-performing assets - Not entitled to deduction of the provision made by it for non performing assets [S. 37(i)]

The question before the Court was, whether the Tribunal was right in law in holding that the assessee is not entitled to deduction of the 'provision' made in respect of non-performing assets which are considered as irrecoverable. The Court following the Sothern Technologies Ltd. v. JCIT (2010) 320 ITR 577 (SC), held that assessee is not entitled to deduction of the provision made by it for non-performing assets. (A.Y. 1998-99)

Sundaram Finance Ltd. v. ACIT (2012) 349 ITR 356 / 252 CTR 353 / 76 DTR 417 / 210 Taxman 280 / 10 SCC 430 (SC)

Editorial:- Refer, Sundaram Finance Ltd. v. ACIT (2009) 318 ITR 452 (Mad.)(HC)

S. 36(1)(vii) : Deductions - Bad debt - Schedule bank - Provision for bad and doubtful debt - Deduction is allowable independently and irrespective of provision for bad and doubtful debts created by it [S. 36(1)(viia)]

The question before the Court was whether in case of schedule bank, deduction under section 36(1)(vii) is available independently and irrespective of provision for bad and doubtful debts created by it in relation to advances made by its rural branches. Subject to limitation that an amount should not be deducted twice under section 36(1)(vii) and 36(1)(viia) simultaneously. The court followed the ratio of the judgment in case of Catholic Syrian Bank Ltd. v. CIT (2012) 343 ITR 270 (SC) and dismissed the civil appeal of the department. (A.Y. 1993-94, 1994-95)

Dy. CIT v. Karnataka Bank Ltd. (2012) 349 ITR 705 / 210 Taxman 235 / 254 CTR 103 / 79 DTR 42 (SC)

Editorial:- Judgement in Dy. CIT v. Karnataka Bank Ltd. (2008) 175 Taxman 325 / (2009) 316 ITR 345 (Karn.)(HC), affirmed. The Supreme Court followed its earlier judgment in Catholic Syrian Bank Ltd. v. CIT (2012) 343 ITR 270 (SC).

S. 36(1)(vii) : Deductions - Bad debt - State Industrial Development Corporation - Sick company - Commercial test - Bad debt to be allowed [S. 36(2)]

The assessee, a state industrial development corporation, advanced loans and credit facilities to V, a joint sector company promoted by the assessee. The Board for Industrial and Financial Reconstruction by order dated Feb., 22, 1988, declared V a sick company. In the circumstances, the

assessee did not file a suit or take recovery proceedings. The Tribunal denied the assessee deduction of the bad debt. In appeal, the High Court affirmed the disallowance on the ground that since the assessee had merely made a provision in its books, the second condition under section 36(2)(i)(b) of the Act, namely, that the debt should be written off in the accounts, was not satisfied. On appeal: Held, allowing the appeal, that, firstly, the assessee was a state public sector undertaking, and, secondly, the assessee was in the business of promoting industrial development in the State of Kerala and in the course of the business, had promoted V. As a promoter, it was in a position to find out whether V was in a position to carry on business in future. Thirdly, V was a joint sector company. None of these aspects had been considered by the Tribunal or by the High Court. Lastly, a declaration was made in February, 1988, by the BIFR that V had become a sick company and till the end, the company could not be revived and had been wound up. In the circumstances, applying the commercial test and business exigency test, both conditions under section 36(1)(vii) read with section 36(2)(i)(b) of the Act were satisfied. There was no reason to deny to the assessee the deduction of bad debt under section 36(1)(vii) read with section 36(2)(i)(b) of the Act. (A.Y. 1988-89)

Kerala State Industrial Development Corporation Ltd. v. CIT (2012) 349 ITR 365 / 80 DTR 197 / 254 CTR 643 (SC)

Editorial:- Before amendment w.e.f. 1-4-1989. Decision of Kerala High Court in Kerala State Industrial Development Corporation Ltd. v. CIT (2006) 281 ITR 413 (Ker.)(HC) was reversed.

S. 36(1)(vii) : Deductions - Bad debt - Money lending - Money lending business allowable as bad debts

Assessee has advanced the money in the course of money lending business, therefore the claim of bad debt was allowable under section 36(1)(vii) read with second limb of section 36(2). (A.Y. 2000-01)

All Grow Finance & Investment (P) Ltd. v. CIT (2011) 338 ITR 496 /(2012) 66 DTR 131 / 249 CTR 361 (Delhi)(HC)

S. 36(1)(vii) : Deductions - Bad debt - Share broker - Brokerage offered to tax, the principal debt qualifies as a "bad debt" under section 36(1)(vii) r.w.s. 36(2)

The assessee, a share broker, claimed deduction under section 36(1)(vii) of Rs. 28.24 lakhs as a "bad debt" being the amount due to him by his clients on account of transactions of shares effected by the assessee on their behalf which had become irrecoverable. The Assessing Officer rejected the claim on the ground that as the assessee had offered only the amount of brokerage as income and not the entire amount due from the client, the condition in section 36(2) that the amount of bad debts must be taken into account in computing the total income was not satisfied. The CIT(A) & the Special Bench of the Tribunal (Dy. CIT v. Shreyas S. Morakhia [(2010) 40 SOT 432 (SB)] allowed the claim. On appeal by the department to the High Court, Held dismissing the appeal:

Section 36(2)(i) provides that a deduction on account of a bad debt can be allowed only where such debt or part thereof has been taken into account in computing the income of the assessee. The debt comprised of the value of the shares transacted and the brokerage payable by the client. The brokerage as well as the value of the shares constituted a part of the debt due to the assessee since both arose out of the same transaction. The fact that the liability to pay brokerage arose at a point in time anterior to the liability to pay the value of the shares transacted makes no material difference to the position. As the brokerage from the transaction of the purchase of shares had been taxed in the hands of the assessee as business income, the debt or part thereof has been taken into account in computing the income of the assessee and the requirements of section 36(1)(vii) r.w.s. 36(2) were satisfied. (Issue regarding the value of the shares which remain in the hands of the assessee which has to be adjusted against the amount receivable from the client left open) [CIT v. T. Veerabhadra Rao (1985) 155 ITR 152 (SC) CIT v. Bonanza Portfolio Ltd. (2010) 320 ITR 178 (Delhi) followed]. (A.Y. 1998-99)

CIT v. Shreyas S. Morakhia (2012) 342 ITR 285 / 249 CTR 30 / 206 Taxman 32 / 69 DTR 105 / (2012) Vol. 114 (2) Bom.L.R. 0942 (Bom.)(HC)

S. 36(1)(vii) : Deductions - Bad debt - Interest income - Interest income offered as income in earlier years which was not realized written back is allowable as bad debts

Assessee a financial institution which is governed by RBI guidelines offered interest in earlier years as income and assessed as such, as the amount was not realised the same was written back, when it is found that the same is not recoverable. The said amount is allowed as bad debt. (A.Y. 2000-01).

CIT v. Industrial Finance Corporation of India Ltd. (2012) 66 DTR 490 / 248 CTR 69 / (2011) 201 Taxman 75 (Delhi)(HC)

S. 36(1)(vii) : Deductions - Bad debt - Share broker - Claim was allowed

The Court following the judgment in CIT v. Shreyas S. Morakha (2012) 342 ITR 2985 (Bom.)(HC) dismissed the appeal of revenue and allowed the bad debts. (A.Y. 2004-05)

CIT v. Kotak Securities Ltd. (No.2) (2012) 346 ITR 352 (Bom.)(HC)

S. 36(1)(vii) : Deductions - Bad debt - Irrecoverable advances - Money lending was part of business activity irrecoverable debt cannot be allowed as bad debt

The assessee was not recognised as a moneylender under any law or as a financial institution, it cannot be said that assessee is carrying on money lending activity as part of its business. Therefore, amount advance by the assessee becoming irrecoverable cannot be allowed as bad debt under section 36(1)(vii) of the Act. (A.Y. 2001-02)

CIT v. Epsilon Advisers (P) Ltd. (2012) 80 DTR 366 / 208 Taxman 332 (Karn.)(HC)

S. 36(1)(vii) : Deductions - Bad debt - Not Written off in the books of the relevant year - Held as allowable

Where amount on account of bad debts claimed by the assessee was written off in the accounts of the concerned previous year, Tribunal rightly allowed deduction on account of bad debts. (A.Y. 2001-02)

CIT v. EDS Electronic Data Systems (India) (P.) Ltd. (2012) 211 Taxman 133 (Delhi)(HC)

S. 36(1)(vii) : Deductions - Bad debt - Banking business - Held to be allowable

The assessee is a statutory corporation established under the SIDBI Act, 1989. It is engaged in the business of promotion, financing and development of the small scale industry. The income of the assessee was exempted from payment of income tax by virtue of section 50 of the SIDBI Act. The aforesaid exemption as provided under section 50 of the SIDBI Act was withdrawn from 1-4-2002 by virtue of Finance Act, 2001. For the A.Y. 2003-04 the assessee filed its return of income declaring a total income of Rs. 221 crores. In the above return of income, the assessee claimed an amount of Rs. 178 crores as bad debts. The Assessing Officer rejected the assessee's claim holding that the bad debts which the assessee was claiming had resulted from its business activities in the years prior to the A.Y. 2002-03 in which year the assessee's income was not taxable. Consequently, the bad debts was disallowed. The Commissioner(Appeals) upheld the order of the Assessing Officer. The Tribunal held that the assessee was in the business of banking for SSI units. Consequently, the bad debts claimed were allowable under section 36(1)(vii) as it satisfied the second part of the proviso to section 36(2). On appeal to High Court, the High Court confirmed the order of Tribunal. (A.Y. 2003-04)

CIT v. Small Industries Development Bank of India (2012) 211 Taxman 341 / (2013) 85 DTR 436 (Bom.)(HC)

S. 36(1)(vii) : Deductions - Bad debt - Provision for bad debts - Claim of bad debts can be allowed only to the extent of opening balance in the provision for bad and doubtful debts account as at the beginning of the year

The Tribunal held that from a conjoint reading of clause (vii) and (viia) it clearly emerges that opening balances of the provision is required to be adjusted against the amount of bad debts written off during the year for computing the amount deductible under cl. (vii) and it is only thereafter that the provision is made under clause (viia) in respect of the remaining debts outstanding as at the end of the year. Accordingly the Tribunal held that the Commissioner(Appeals) was justified in directing the Assessing Officer to restrict the claim of bad debts by the amount of opening balances in the provision for bad debt and doubtful debts account as at the beginning of the year instead of the closing balance then allowing deduction under section 36(1)(viia). (A.Y. 2000-01).

The Siam Commercial Bank PCL v. Dy. DIT (2012) 134 ITD 463 / 66 DTR 369 / 144 TTJ 235 (Mum.)(Trib.)

S. 36(1)(vii) : Deductions - Bad debt - Business loss - Money lending is one of the ancillary objects hence the loss was not allowable [S. 28(1), 37(1)]

Money lending is one of the ancillary objects of assessee company, as the loan advanced was not in the course of money lending, the loss is neither deductible as bad debts nor business expenditure. (A.Y. 2001-02 & 2004-05)

Maini Shipping P. Ltd. v. ACIT (2012) 13 ITR 440 (Mum.)(Trib.)

S. 36(1)(vii) : Deductions - Bad debt - Individual debtors account - Amount debited to profit and loss account it is not necessary that individual debtors account also be closed

It was held that after insertion of Explanation to section 36(1)(vii), taxpayer is required not only to debit profit and loss account but simultaneously also reduce loans and advance/debtors account to extent of corresponding amount so that, at the end of year, amount on loans and advances/debtors account is shown as net provisions for bad debt. Therefore, in order to claim deduction on account of bad debt, it is not necessary that individual debtors account has to be closed by crediting said account to extent of provision for bad and doubtful debt is sufficient. (A.Y. 2006-07)

Arrow Coated Products Ltd. v. ACIT (2012) 136 ITD 315 / 77 DTR 314 / 150 TTJ 309 (Mum.)(Trib.)

S. 36(1)(vii) : Deductions - Bad debt - Write off - After the amendment with effect from April 1, 1989, it is sufficient to write off the bad debts in the account hence the bad debt is to be allowed

Though the fee disclosed as bad debt had been taken as income of the previous year in respect of the invoices relating to the eight parties and subsequently the assessee had disclosed the debts as irrecoverable and written them off in the books of account for the A.Y. in question. After the amendment with effect from April 1, 1989, it is sufficient that the assessee had written off the bad debts in the account and the debt has to be allowed. Thus, the claim of the bad debt was allowed. (A.Y. 2001-02, 2002-03 & 2003-04)

KPMG India P. Ltd. v. Dy. CIT (2012) 17 ITR 569 (Mum.)(Trib.)

S. 36(1)(vii) : Deductions - Bad debt - Bank - Non-rural branch - Bad-debt written off relates to non-rural branch is held to be entitled for deduction

Tribunal following the judgment of Apex Court in Catholic Syrian Bank Ltd. v. CIT (2012) 343 ITR 270 (SC), the assessee bank is held to be entitled to deduction under section 36(1)(vii) in respect of bad-debt written off relating to its non-rural branch. (A.Y. 2001-02)

Allahabad Bank v. Dy. CIT (2012) 137 ITD 290 (Kol.)(Trib.)

S. 36(1)(vii) : Deductions - Bad debt - Claim raised for first time in revised return filed in pursuance of notice issued under section 153A - Claim not allowed [S. 139, 153A]

Claim of bad debts raised by assessee for first time in revised return filed in pursuance of notice issued under section 153A, could not be allowed because assessee had failed to write off said bad debts in accounts maintained in ordinary course of business as required under section 36(1)(vii). (A.Y. 2001-02)

Gendmal Kothari v. Dy. CIT (2012) 139 ITD 397/(2013) 152 TTJ 652 (Jodh.)(Trib.)

S. 36(1)(vii) : Deductions - Bad debt - Short deduction allowable as bad debts

Assessee with a view to maintain customer relationship and not to loose valuable customers assessee-advertising company accepted short payments against bills raised and short payments were written off by assessee as bad debts. The Tribunal held that write off of the amount was a reversal of income which was booked in excess and was borne out of a commercial consideration and therefore could not be termed as arbitrary or irrational, therefore, assessee's claim of bad debts was to be allowed. (A.Y. 2005-06 to 2007-08)

Hindustan Thompson Associates (P.) Ltd. v. ACIT (2012) 53 SOT 389 (Mum.)(Trib.)

S. 36(1)(vii) : Deductions - Provision for doubtful debts

Provision for doubtful debts made in profit and loss account, claim is allowable. (A.Y. 1999-2000)

KEC International Ltd. v. Dy. CIT (2012) 20 ITR 282 (Mum.)(Trib.)

S. 36(1)(vii) : Deductions - Bad debt - Debt written off in books - Held allowable

The assessee's claim for bad debts written off was disallowed by the Assessing Officer on the ground that the assessee had failed to prove that the relevant debts had actually become bad and that the amounts of such debts had been taken into account as credit in the books of account. On appeal, the Commissioner (Appeals) confirmed the disallowance holding that any claim of bad debt could be considered only when it was established by the assessee that the said debts had become bad in the relevant year. On appeal it was held, that the claim of bad debt made by the assessee was allowable. (A.Y. 2004-05)

Channel Guide India Ltd. v. ACIT (2012) 139 ITD 49 / 20 ITR 438/(2013) 83 DTR 321/153 TTJ 432 (Mum.)(Trib.)

S. 36(1)(vii) : Deductions - Bad debt - Inter-corporate deposits written off - Matter set aside

Tribunal gave direction to Assessing Officer to verify and decide under law, matter remanded. (A.Y. 2004-05)

Torrent Power Ltd. v. Dy. CIT (2012) 20 ITR 653 / (2013) 58 SOT 6 (URO)(Ahd.)(Trib.)

S. 36(1)(vii) : Deductions - Bad debt - No evidence - Held not deductible

The Tribunal held that in the absence of evidence that debt was for purposes of business, bad debt was held not deductible. (A.Y. 1990-91)

Siltex India v. ITO (2012) 20 ITR 300/(2013) 58 SOT (URO) (Mum.)(Trib.)

S. 36(1)(viia) : Deductions - Bad debt - Provision for bad and doubtful debts - Schedule bank - Bad debt qua sub-standard assets of banking company

Licence of the assessee, a banking company, having been suspended by the RBI vide order dt. 29th Sept., 2011, the case clearly falls under section 36A(1)(b) of the Banking Regulation Act, 1949. Assessee company was obliged to classify its assets according to RBI norms as any other non scheduled bank irrespective of the fact that its banking licence stood cancelled by the RBI prior to 31st March, 2002. Therefore, assessees claim for deduction under section 36(1)(viia) in respect of sub-standard assets is allowed to the extent it relates to loss or doubtful assets as per the RBI norms and is

otherwise consistent with the provisions of section 36(1)(viia), subject to the confirmation that the notification under section 36A(2) of the Banking Regulation Act was made on 21st Sept., 2002, i.e. subsequent to 31st March, 2002. Merely because it was not able to canvass the legal basis of its claim before the authorities below would not preclude the assessee from doing so before the Tribunal. Contention of the assessee based on the provisions of the applicable law cannot be considered as a new plea, thus matter is restored back to the Assessing Officer for verification and appropriate findings in accordance with law. (A.Y. 2002-03)

Vinayak Local Area Bank Ltd. v. Dy. CIT (2012) 76 DTR 129 / 149 TTJ 261 (Jaipur)(Trib.)

S. 36(1)(viia) : Deductions - Bad debt - Provision for bad and doubtful debts - Schedule bank - Set off against opening credit balance is allowable

Bad debts written off in the books of account during the relevant previous year has to be set off against the credit balance in the provision for bad and doubtful debts to arrive at the quantum of deduction for the relevant year. (A.Y. 1995-96 to 2000-01)

Abu Dhabi Commercial Bank Ltd. v. ADIT (IT) (2012) 138 ITD 83 / 78 DTR 234 / 150 TTJ 85 (Mum.)(Trib.)

S. 36(1)(viia) : Deductions - Bad debt - Provision for bad and doubtful debts - Schedule bank - Newly created during the year - Not to be netted against the amount written back or reversed while computing deduction

Provision for bad and doubtful debts newly created during the year under consideration should not be netted against the amount written back or reversed while computing deduction under section 36(1)(viia). (A.Y. 2007-08)

The Kanpur District Co-op. Bank Ltd. v. ACIT (2012) 147 TTJ 744 (Cochin)(Trib.)

S. 36(1)(viii) : Deductions - Eligible business - Special reserve - Financial corporation - Dividend - Interest on short term deposit - Service charges on SDF loans is not income derived from business of providing long term finance

Assessee claimed deduction under section 36(1)(viii), in respect of following items of income (a) Dividend received in respect of redeemable preference share in companies (b) Interest on short deposits with banks (c) Service charges on SDF loans. Assessing opined that these were income not 'derived from' business of providing long term finance. Tribunal and High Court up held the view of Assessing Officer. (A.Y. 1999-2000 to 2004-05, 2007-08)

National Co-operative Development Corporation v. ACIT (2012) 204 Taxman 6 / 65 DTR 295/(2013) 356 ITR 184 (Delhi)(HC)

S. 36(1)(viii) : Deductions - Eligible business - Special reserve - Financial corporation - Amount transferred from general reserve to special reserve account for doubtful account was deductible prior to 1st April, 1998 [S. 41(4A)]

Assessee a financial institution claimed deduction being special reserve created under section 36(1)(viii). Assessee transferred certain amount to provision for bad and doubtful debts accounts. The Assessing Officer disallowed the claim. The Court held that prior to A.Y. 1998-99 the only requirement for claiming deduction under section 36(1)(viii) was creation of reserve equivalent to 40 percent of total income by debit to the profit and loss account. Only from the A.Y. 1998-99 that the amendment provided for such reserve to be maintained intact and in case of any withdrawal of tax under section 41(4A) in the year of withdrawal. Provision being prospective. Deduction is allowable as bad debt. (A.Y. 1993-94 to 1998-99)

CIT v. Industrial Finance Corporation of India Ltd. (2012) 66 DTR 490 / 248 CTR 69 / (2011) 201 Taxman 75 (Delhi)(HC)

S. 37(1) : Business expenditure - Capital or revenue - Encroachment - Removal of encroachments is allowable as revenue expenditure

Expenditure towards removal of encroachments in and around technical area of airport for safety and security is merely for purpose of removal of disability hence allowable as revenue expenditure. (A.Y. 1998-99)

Airports Authority of India v. CIT (2012) 340 ITR 407 / 247 CTR 149 / 66 DTR 440 / 205 Taxman 84 (Mag.) / (2012) Tax.LR 497 (FB)(Delhi)(HC)

Editorial:- SLP of revenue is rejected. (2013) 214 Taxman 24(Mag.) (SC)(A.Y. 1996-97)

S. 37(1) : Business expenditure - Capital or revenue - Suspension of one manufacturing activities - Severance cost of employees is allowable as business expenditure

The assessee company had started manufacturing of powdered soft drink. During the accounting year relevant to the A.Y. 2003-04, it decided to stop its manufacturing activity as it was found to be non-profitable. Many of employees who were directly in the manufacturing activity were laid off and the severance cost to those employees were paid. Assessee continued to do the trading activity. The Court held that suspension of one of the activities did not amount to closer of business, hence the expenditure was allowable. (A.Y. 2003-04)

CIT v. Kjs India P. Ltd. (2012) 340 ITR 380 (Delhi)(HC)

S. 37(1) : Business expenditure - Capital or revenue - Membership of club - ISO certificate - Both allowable as revenue expenditure

Expenditure incurred for acquiring membership of clubs is revenue expenditure. ISO certificate would only certify the quality which is already maintained by the assessee in the manufacturing process and does not confer any benefit of enduring credibility, hence the expenditure is revenue in nature. (A.Y. 1994-95 to 1996-97)

CIT v. Infosys Technologies Ltd. (No. 1) (2012) 349 ITR 582 / 65 DTR 347 / (2013) 213 Taxman 50 (Mag.)(Karn.)(HC)

CIT v. Infosys Technologies Ltd. (No. 3) (2012) 349 ITR 598 / 65 DTR 271 / 205 Taxman 389 (Karn.)(HC) (A.Y. 1997-98)

CIT v. Infosys Technologies Ltd. (No. 4) (2012) 349 ITR 606 / 205 Taxman 59 (Karn.)(HC)

S. 37(1) : Business expenditure - Contribution to traffic police - Not allowable - Repairs and renovation of leasehold premises is allowable as revenue expenditure

The contribution made to traffic police can at the most be considered as donation and cannot be considered as wholly and exclusively incurred for the purpose of business. Expenditure incurred on repairs and renovation of the leasehold premises and done in connection with the business of the assessee to improve the ambience of the office was revenue in nature and allowable as business expenditure. (A.Y. 1993-94, 1994-95 & 1996-97)

CIT v. Infosys Technologies Ltd. (No. 2) (2012) 349 ITR 588 / 65 DTR 353 / 246 CTR 371 (Karn.)(HC)

S. 37(1) : Business expenditure - Capital or revenue - Stock-in-trade - Acquiring unfinished works and inventories of another company - Stock-in-trade - Revenue expenditure

The assessee is engaged in the business of construction of buildings. The assessee entered into an agreement with AFEL on July 1, 1992, to take over by assignment and complete all the pending projects / contracts / work in progress remaining to be completed by transfer company and in future, take up by itself, housing projects. Apart from those projects, the agreement also contemplated takeover of future projects etc. The assessee claimed the amount paid as revenue expenditure. The Assessing Officer held that the said expenditure was capital in nature, which was confirmed by the Tribunal. On appeal to High Court, the Court held that what was transferred under the agreement was

in the nature of stock-in-trade and not entire building division of the transferor and there were no clauses to lead to inference that with the transfer of the ongoing projects and that the projects awaited agreements to be signed, the transferor company had transferred its entire business. The expenditure was deductible as revenue expenditure. (A.Y. 1993-94)
Alacrity Housing Ltd. v. CIT (2012) 341 ITR 264 (Mad.)(HC)

S. 37(1) : Business expenditure - Swapping - Foreign currency - Expenditure in connection with swapping of foreign currency is allowable expenditure
Expenditure incurred in connection with swapping of foreign currency is allowable as business expenditure. (A.Y. 1993-94 to 1998-99)
CIT v. Industrial Finance Corporation of India Ltd. (2012) 66 DTR 490 / 248 CTR 69 / (2011) 201 Taxman 75 (Delhi)(HC)

S. 37(1) : Business expenditure - Stock broker - Margin money - Payment made by stock broker for late submission of margin certificate, trading beyond exposure limit is allowable deduction, it is not infraction of law
Assessee a stock broker has made payment to stock exchange for violation of trading beyond exposure limit, late submission of margin certificate and delay in making deliveries of shares due to deficiencies were deductible as a business expenditure, as the amounts were paid during course of business of the assessee's business and there was no infraction of law. (A.Y. 2000-01)
CIT v. Prasad and Co. (2012) 341 ITR 480 / 69 DTR 76 (Delhi)(HC)

S. 37(1) : Business expenditure - Foreign tour - Wife of Chairman - Expenditure incurred on foreign tour of chairman's wife is held not allowable
The assessee company claimed the foreign tour expenses of the chairman's wife who accompanied him in foreign tour held to be not allowable when she is not occupying any official position in the company. (A.Y. 1996-97)
CIT v. S & S Power Switchgear Ltd. (2012) 67 DTR 59 / 247 CTR 604 (Mad.)(HC)

S. 37(1) : Business expenditure - Corporate membership - Club - Subscription for obtaining corporate membership in club is allowable as revenue expenditure
Assessing Officer has held that the subscription of corporate membership as capital expenditure. Tribunal held the said expenditure as revenue in nature. On appeal by revenue the High Court affirmed the view of tribunal and held allowable as revenue expenditure. (A.Y. 1999-2000)
CIT v. Infosys Technologies Ltd. (No. 5) (2012) 349 ITR 610 / 205 Taxman 250 (Karn.)(HC)

S. 37(1) : Business expenditure - Royalty payment held to be revenue expenditure - Foreign tour expenditure of wife of president to attend budget conference held to be allowable business expenditure
Assessee has entered into an agreement with Luwa Switzerland in respect of obtaining new technology and know-how and licence feeat 5 percent on sales of cost of standard, as per approval given by the Reserve Bank of India. The Assessing Officer held that the expenditure of capital in nature. The first appellate authority and Tribunal held that the expenditure is of revenue in nature. On appeal by revenue the Court held that since licence was granted as per agreement subject to payment of royalty to make use of know how- and more over royalty payable was depending upon sales made and export the Tribunal was justified in treating the same as revenue expenditure. The president of the assessee company had gone abroad with his wife to attend budget conference. The assessee claimed deduction of said expenditure. The Assessing Officer held that the assessee had failed to prove that accompanying of the wife of the president on a foreign tour was for business purpose, and therefore, assessee was not entitled to deduction, which was confirmed by Commissioner(Appeals). On appeal

to the Tribunal, the Tribunal held that tour of the president was for the purpose of business obligation and therefore, assessee was entitled to claim deduction. On appeal by revenue the High Court confirmed the view of Tribunal. (A.Y. 1997-98)

CIT v. Luwa India Ltd. (2012) 205 Taxman 342 / 75 DTR 367 (Karn.)(HC)

S. 37(1) : Business expenditure - Commission - Managing director - Commission to CMD for personal guarantee may be treated as "ploy to divert funds" hence not allowable

The assessee claimed a deduction for the "guarantee commission" of Rs. 1.15 crores that it paid to its Chairman Shri. Vijay Mallya. The Assessing Officer & CIT(A) disallowed the claim on the ground that the so-called guarantee was a mere signature on a document, not backed by specific assets and that as the commission payment exceeded Mr. Mallya's net wealth of Rs. 70 lakhs, it was an "innovative method of diverting income from the company" and an "unwarranted benefit" to Vijay Mallya. However, the Tribunal allowed the claim. On appeal by the department, held reversing the Tribunal:

None of the bankers had obtained details of the assets & liabilities of Vijay Mallya in India or abroad. He stood guarantor in respect of total borrowings of Rs. 115 crores and received commission of Rs. 1.15 crores even though his net worth was hardly Rs. 70.47 lakhs. Also, as he was a NRI, the permission of the RBI ought to have been taken which was not done. The assessee paid the MD commission "on the pretext" of paying guarantee commission and it is a "clear case" of "a ploy to divert the income of the companies under his management". The payment was characterized as commission to overcome the RBI's directions, the provisions of section 309 of the Companies Act and was not a lawful payment and could not be allowed as a deduction under section 37(1).

CIT v. United Breweries Ltd. (2012) 204 Taxman 244 (Karn.)(HC)

S. 37(1) : Business expenditure - Unaccounted expenditure - Setoff-Block assessment - Unaccounted expenditure to be set-off against unaccounted income despite Expl. to section 37(1) & proviso to section 69C - Govt. criticized for apathy towards black money [S. 69C, 158BC]

Pursuant to a search under section 132, an assessments under section 158BC was made and various additions were made. One of the issues was whether if the Assessing Officer makes an addition of unaccounted income on the basis of seized records, he is required to give a deduction for the unexplained expenditure shown in the same records. Held by the Court:

(i) The assessee was engaged in unaccounted business and the seized accounts showed unaccounted receipts and unaccounted expenditure. There is no justification for doubting the entries found in the seized records pertaining to expenditure while accepting the income found recorded therein. When the Department relies on the seized records for estimating undisclosed income, there is no reason why the expenditure stated therein should be disbelieved merely because there is no written agreement and that payments were not made through cheques or demand drafts. This would be unrealistic and not justified. The statute authorizes assessment of "undisclosed income" which has to be arrived at after allowing expenditure incurred by the assessee whether it be accounted in the regular books or not. The Explanation to section 37(1) does not apply because the unaccounted business is not an "illegal business". Section 69C is concerned, in the first place the proviso introduced with effect from 01/04/1999 does not apply to the block assessment for the period covered herein and secondly we do not think excess expenditure over accounted expenditure in business is covered by section 69C itself.

(ii) We are constrained to observe about the effort made by us to persuade the Central Government to take steps to prevent generation and circulation of black money. Through a detailed interim order we appraised the Government that unless prohibition is introduced against cash dealings particularly in property sales in film industry and the like against at least for payments over a certain limit in cash, black money generation and circulation cannot be controlled because the disincentives

on cash dealings contained under the various provisions of the Income Tax Act have failed to achieve the objective. Further, by prohibiting use of cash in major transactions terror and mafia funding and corruption could be arrested to a large extent. Above all, the worst enemy of our economy that is, circulation of high denomination counterfeit currencies (presently estimated at 7000 crores) could be prevented to a large extent. Unfortunately, the response of the Central Finance Ministry is not at all encouraging in as much as Government wants status quo to continue to the detriment of the economic interest of the country and the people as a whole. Our limitations while exercising appellate jurisdiction under section 260A inhibit us from initiating any proceedings or issuing direction against the Central Government. However, we express our anguish on the attitude of the Central Government to have created this vicious situation and allow the same to continue. (A.Y. 1988-89 to 1997-98)

CIT v. P. D. Abrahm (Ker.)(HC) www.itatonline.org

S. 37(1) : Business expenditure - Keyman insurance policy - Premium paid on key man insurance policy is allowable as deduction

The premium paid for keyman insurance policy is allowable as deduction. The nature of expenditure is to be seen at the time it is incurred. Department could not sit on the armchair of the assessee and decide as to whether it was appropriate on business expediency for the assessee to incur such an expenditure or not. The argument of the department that it is a colourable device is rejected by the High Court. (A.Y. 1994-95 to 2000-01)

CIT v. Escorts Heart Institute & Research Centre Ltd. (2012) 349 ITR 8 / 249 CTR 141 / 69 DTR 250 (Delhi)(HC)

CIT v. Rajan Nanda (2012) 349 ITR 8 / 249 CTR 141 / 69 DTR 250 (Delhi)(HC)

S. 37(1) : Business expenditure - C&F handling charges - No evidence of rendering service - Cryptic order - Tribunal's order not dealing with finding of "sham" transaction is "perverse", allowing of expenditure held to be not justified

The Assessing Officer disallowed payments made by the assessee to M/s. Blue Chip & Co. towards "C&F handling charges" on the ground that the transactions were a "sham" and intended to provide interest-free funds to Vijay Mallya & his wife Samira Mallya. This was confirmed by the CIT(A) though the Tribunal allowed the claim on the ground that a similar issue had been allowed in the earlier years. On appeal by the department, Held reversing the Tribunal:

It is not in public interest to accept such a claim when there is no evidence of rendering any service by Blue Chip & Co to the assessee. The sole object of diverting funds to Blue Chip & Co. was to facilitate passing of funds as interest free loan to Vijay Mallya and Samira Mallya. The agreement between the assesee and Blue Chip was found to be a "sham transaction" by the Assessing Officer & CIT(A). The Tribunal committed grave error by recording the order as if it is a consent order though the DR had categorically defended the Assessing Officer & CIT (A)'s order. Also, the earlier orders of the Tribunal had been challenged before the High Court. Therefore the findings of the Tribunal are wholly erroneous, cryptic, perverse, laconic and perfunctory.

CIT v. Punjab Breweries Ltd. (2012) 71 DTR 65 / 207 Taxman 53 (P&H)(HC)

S. 37(1) : Business expenditure - Travel allowance - Disallowance to be calculated with respect to each journey undertaken [Rule 6D]

Intrinsic evidence available in the Rule 6D demonstrates that the disallowance which is available qua an employee or such other person ought to be calculated in respect of each of such journey undertaken. (A.Y. 1989-90)

CIT v. SRF Ltd. (2012) 342 ITR 106 / 71 DTR 199 (Delhi)(HC)

S. 37(1) : Business expenditure - Royalty - Sister concern - Held to be allowable as no substantial question of law [S. 260A]

The assessee had made payments to sister concern for the use of trade mark which was held to be genuine and accordance with business exigencies. The Tribunal has followed its own decision for the earlier years, which has been accepted by revenue. The High Court up held the order as no substantial question of law would arise. (A.Y. 2005-06)

CIT v. Galaxy Surfactants Ltd. (2012) 343 ITR 108 / 249 CTR 38 / 69 DTR 42 (Bom.)(HC)

S. 37(1) : Business expenditure - Capital or revenue - Software expenditure - Expenditure for indigenization of software is revenue expenditure

The assessee had undertaken expenditure for indigenization of software. The Tribunal noted that software is a product subject to high obsolescence hence the same is allowable as revenue expenditure. High Court affirmed the view holding that no substantial question of law arises. (A.Y. 1998-99)

CIT v. Sonata Software Ltd. (2012) 343 ITR 397 / 249 CTR 441 / 70 DTR 369 (Bom.)(HC)

S. 37(1) : Business expenditure - Fully convertible debenture - Expenditure on issue of debentures is allowable as deduction

Expenditure on fully convertible debentures could not be treated as expenditure on equity and was deductible even though the time and conversion price was fixed [CIT v. Secure Meters Ltd. (2003) 321 ITR 611 (Raj.) (SLP dismissed) followed] (A.Y. 2005-06)

CIT v. Havells India Ltd. (2012) 208 Taxman 114 / 73 DTR 57 / 253 CTR 271 / (2013) 352 ITR 376 (Delhi)(HC)

S. 37(1) : Business expenditure - Capital or revenue - Construction of flyovers, pedestrain facilities - Expenditure on construction of flyovers, is of revenue expenditure

The assessee was given license to conduct and carry on liquor trade in Delhi. On the basis of the minutes of the meeting construction of flyovers etc was a precondition or an obligation imposed and had to be complied with to enable the assessee to conduct business of sale of country liquor in Delhi. The Assessing Officer has held that the said expenditure is capital in nature. Tribunal held that the said expenditure is revenue in nature. On appeal by revenue the Court held that the assessee a corporation established by the Government NCT Delhi having constructed flyovers, etc. as a precondition or obligation imposed by Delhi Administration for permitting it to carry on country liquor trade in Delhi which were to be transferred to the Delhi Government, no enduring benefit or advantages has accrued to the assessee and therefore, expenditure incurred by the assessee on the construction of flyovers etc. was revenue expenditure and not capital expenditure. (A.Y. 1990-91 & 1991-92)

CIT v. D.T.T.D.C. Ltd. (2012) 71 DTR 115 / 206 Taxman 507 / 251 CTR 268 (Delhi)(HC)

D.T.T.D.C. Ltd. v. CIT (2012) 71 DTR 115 / 206 Taxman 507 / 251 CTR 268 (Delhi)(HC)

Editorial: SLP granted . CIT v.Delhi Tourism and Transport Development Corporation Ltd (CCno 21273 of 2012 dt 7-12-2012 (2013) 216 Taxman 203 (Mag.)(SC)

S. 37(1) : Business expenditure - Education expenses of director - Expenditure could not be regarded as wholly and exclusively incurred for purpose of business hence not allowable

The assessee company incurred certain expenditure on education of one of its directors, who had undergone a course at United Kingdom from University of Nottingham, and claimed deduction of the same as business expenditure. The Tribunal held that the expenditure in question was not expenditure wholly and exclusively incurred for the purpose of business. On appeal the High Court held that expenditure could not be regarded as wholly and exclusively incurred for the purpose of business. Accordingly the appeal was dismissed. (A.Y. 2006-07)

Natco Exports (P) Ltd. v. CIT (2012) 345 ITR 188 / 206 Taxman 491 / 78 DTR 37 (Delhi)(HC)

CIT v. Career Launcher India Ltd. (2012) 71 DTR 161 / 207 Taxman 28 / 250 CTR 240 (Delhi)(HC)

S. 37(1) : Business expenditure - Expenditure - Know-how - Preliminary survey - agreement providing for preliminary survey in respect of existing facilities of the assessee and feasibility of proposed project, as no transfer of technical know-how section 35AB cannot be made applicable, however the expenditure is allowable under section 37(1). [S. 35AB]

The agreement provided for a preliminary survey in respect of the existing facilities of the assessee and on feasibility of a proposed project. Commissioner(Appeals) and Tribunal held that, as there was no transfer of know how involved provisions of section 35AB cannot be applicable, however the same is deductible under section 37(1). On appeal to the High Court, also confirmed the view of Tribunal. (A.Y. 1994-95)

CIT v. Raymond Ltd. (2012) 71 DTR 258 / 209 Taxman 154 (Bom.)(HC)

S. 37(1) : Business expenditure - Capital or revenue - Premium on redemption of debenture is held to be revenue expenditure

The amount expended towards premium is, properly construed as liability which the assessee incurred for the purpose of business in order to obtain the use of funds for the period covered by the issue of non convertible debentures. Therefore, the premium on redemption of debenture is allowable as revenue expenditure. (A.Y. 1992-93)

CIT v. Raymond Ltd. (2012) 71 DTR 253 / 208 Taxman 454 (Bom.)(HC)

S. 37(1) : Business expenditure - Capital or revenue - Pre-operative expenses related to salary, wages, etc. held as revenue expenditure

It was held that pre-operative expenses related to various item i.e. salary, wages, power, travelling, legal and professional fees constituted revenue expenditure. (A.Y. 1997-98)

CIT v. Raymond Ltd. (2012) 71 DTR 265 / 209 Taxman 65 (Bom.)(HC)

S. 37(1) : Business expenditure - ESOP - Market price - Option price - Difference between market price & option price of ESOP shares deductible

The assessee allotted shares to its employees under an ESOP scheme. In accordance with the Employees Staff Option Plan and Employee Staff Purchase Scheme Guidelines, 1999 issued by SEBI, the difference between the market value of the shares and the value at which they were allotted to the employees was debited to the P&L A/c. This was claimed as a deduction under the head "staff welfare expenditure". The Assessing Officer allowed the claim though the CIT revised the assessment under section 263 and held that the expenditure was notional and contingent in nature and not allowable as a deduction. On appeal, the Tribunal (2004) S.S.I. Ltd. v. Dy. CIT (2004) 85 TTJ 1049 (Chennai)(Trib.) held that as the SEBI regulations required the difference between the market price of the shares and the price at which the option is exercised by the employees to be debited to the P&L A/c as expenditure, it was an ascertained expenditure and not contingent in nature. On appeal by the department to the High Court, held dismissing the appeal:

As far as the Employees Stock Option Plan is concerned, as rightly pointed out by the Tribunal, the assessee had to follow SEBI direction and by following such directions, the assessee claimed the ascertained amount as liability for deduction. There is no error in the order of the Tribunal. (A.Y. 2000-01)

CIT v. PVP Ventures Limited (2012) 211 Taxman 554/(2013) 90 DTR 340 (Mad.)(HC)

S. 37(1) : Business loss - Advance for purchase of property - Real estate business - Bad debt - Amount advanced for purchase of property, property not transferred and amount not repaid, loss is allowable as business loss [S. 36(1) (vii), 36(2)]

The assessee is in the business of real estate. The assessee advanced the amount for purchase of property. In spite of reminders neither the physical possession was given not the amount was

returned. The Assessee claimed the said amount as bad debt which was disallowed by the Assessing Officer which was confirmed by the Commissioner(Appeals). On appeal to the tribunal the tribunal allowed the loss under section 37 of the income-tax Act. On appeal by the revenue, the court dismissed the appeal of revenue and held that, merely because the assessee also had rental income did not establish that the properties, which were being purchased from Gulmohar Estate were to be treated as investment and not for stock-in-trade. Accordingly the loss was deductible, order of Tribunal confirmed. (A.Y. 2004-05)

CIT v. New Delhi Hotels Ltd. (2012) 345 ITR 1 (Delhi)(HC)

S. 37(1) : Business expenditure - Financial assistance to manufacturers - Allowable as business expenditure

Assessee was a manufacturer of standardized herbal chemicals. Expenditure incurred by the assessee in providing help to the farmers by supplying seedlings, fertilizer and financial assistance for growing herbal plants which were required for manufacture of the assessee's product was held deductable under section 37(1) of the Act. (A.Y. 2004-05)

CIT v. Sami Labs Ltd. (2012) 72 DTR 172 (Karn.)(HC)

S. 37(1) : Business expenditure - Capital or revenue expenditure - Settlement and legal charges - Expenses incurred by assessee who merely given licence and permission to conduct and manage the restaurant is allowable as revenue expenditure

The assessee who was owning and conducting a hotel handed over the restaurant to run on contract basis for a period of fifteen years. There was certain dispute, the matter was settled by consent term under which the assessee paid Rs. 10 lakhs to the conductor and also incurred the legal expenses of Rs. 1,65,500/-. On reference to the High Court by the revenue the Court held that this payment was made for resolving disputes and removing hindrance in the management and running of the restaurant and was incurred as a matter of commercial expediency the payment to a person who was a bare licensee and had no interest by way of settlement charges as well as the legal expenses incurred by the assessee is allowable as revenue expenditure. Question was answered in favour of assessee.

CIT v. Airlines Hotel (P) Ltd. (2012) 346 ITR 33 / 75 DTR 166 / 253 CTR 78 / 208 Taxman 91 (Mag.)(Bom.)(HC)

S. 37(1) : Business expenditure - Capital or revenue - Professional fees - Professional fees paid for proposed setting up of factory constitute a capital expenditure

The assessee was engaged in the business of manufacturing cement manufacturing machinery. It proposed to set up plant for manufacturing cement and for that purpose incurred expenses on professional fees paid to consultants in relation to cement project at Chandrapur. The said expenditure was claimed as revenue expenditure. The Assessing Officer treated the said expenditure as capital in nature, which was affirmed by Commissioner(Appeals) and Tribunal. On reference to the High Court the Court held that where the expenditure incurred for the project / feasibility report in connection with exploring the feasibility of a new business venture then such expenditure is capital expenditure and not revenue expenditure. (A.Y. 1979-80)

Larsen & Toubro Ltd. v. CIT (2012) 75 DTR 30 (Bom.)(HC)

S. 37(1) : Business expenditure - Capital or revenue - Software expenses - Software expenses is revenue in nature and treatment in books of account is not conclusive

The assessee is in the business of manufacturing safety glass. It installed the financial software and in the books of accounts it claimed as deferred revenue expenditure. In the return of income it claimed as revenue expenditure. The Assessing Officer disallowed the expenditure as revenue in nature. On appeal the Commissioner(Appeals) allowed the claim of assessee as revenue in nature. On appeal by the revenue the Tribunal up held the order of the Commissioner(Appeals) by holding that the

expenses were incurred for either upgrade the system or to run the system therefore the said expenditure is revenue in nature. On appeal to High Court by revenue the Court held that expenditure was not to create new asset or new source of income but to upgrade system and extent of expenditure cannot be a decisive factor in determining its nature and treatment in books of account is not conclusive hence the software expenditure is allowable as revenue expenditure. (A.Y. 1997-98, 1998-99)

CIT v. Asahi India Safety Glass Ltd. (2012) 346 ITR 329 / (2011) 245 CTR 529 / 203 Taxman 277 / 64 DTR 63 (Delhi)(HC)

S. 37(1) : Business expenditure - Capital or revenue - Development of software is revenue expenditure

The expenditure on development of software was held to be revenue expenditure. (A.Y. 1994-95)

CIT v. Shri Renuga Textils Mills Ltd. (2012) 77 DTR 355 / 254 CTR 423 (Mad.)(HC)

S. 37(1) : Business expenditure - Capital or revenue - Software expenses - Purchase of computer software was held to be revenue in nature

The assessee treated the computer software as revenue expenditure. The Assessing Officer treated the said expenditure as capital in nature and allowed the depreciation. The Claim of assessee was allowed by Tribunal. On appeal by revenue to High Court, the court affirmed the view of Tribunal and held that it would be a unrealistic to ignore rapid advances and to attribute a degree of endurability and permanence to the technical - know how at any particular stage in fast changing area of science. Thus the expenses incurred by assessee on purchase of computer software revenue in nature.

CCIT v. O. K. Play India Ltd. (2012) 346 ITR 57 (P&H)(HC)

S. 37(1) : Business expenditure - Capital or revenue - Software expenditure - Held allowable as revenue expenditure

The assessee purchased a software applications i.e. MS office software, antivirus software, Lotus notes software and message exchange applications. The assessee in respect of these applications acquired a licence to use the said applications on payment of consideration. The said expenditure was disallowed by the Assessing Officer as capital in nature and allowed the depreciation at 25%. On appeal the Commissioner(Appeals) allowed the depreciation at 60%. Both the assessee and revenue carried the appeal to Tribunal. The Tribunal allowed the appeal of assessee and restored the matter to the file of the Assessing Officer with the direction to follow the decision of Special Bench. Against the direction of Tribunal the revenue has filed an appeal before the High Court. High Court following the Judgment in CIT v. Asahi India Safety Glass Ltd. (2012) 346 ITR 329 (Delhi)(HC), decided in favour of assessee. (A.Y. 2001-02, 2002-03)

CIT v. Amway India Enterprises (2012) 346 ITR 341 / 65 DTR 313/207 Taxman 103(Mag.) (Delhi)(HC)

Editorial:- Special Bench of Delhi Tribunal in Amway India Enterprises v. Dy. CIT (2008) 111 ITD 112 (SB)(Trib.)(Delhi) is affirmed.

S. 37(1) : Business expenditure - Capital or revenue - Software expenditure - Held allowable as revenue expenditure

On the facts of the case the Tribunal has restored the matter to decide the issue in the light of the decision on the special Bench of the Tribunal Amway India Enterprises v. Dy. CIT (2008) 111 ITD 112 (Delhi)(SB)(Trib.). The court dismissed the appeal of revenue. The Court also observed that the Delhi High Court arising from the Special Bench decision has held that entire expenditure was allowable as revenue expenditure CIT v. Amway India Enterprises (2012) 346 ITR 341 (Delhi)(HC), accordingly the software expenses allowable is as revenue expenditure. (A.Y. 2002-03)

CIT v. Kotak Securities Ltd. (No. 1)(2012) 346 ITR 349 (Bom.)(HC)

S. 37(1) : Business expenditure - Compensation - Amount paid in terms of settlement is not in nature of penalty hence deductible

The assessee was manufacturing environmental control system. It had been exporting its products to a firm in Canada, S, a company in the USA filed a suit against the Canadian company. The Canadian company settled the dispute and paid compensation to the American company. The American company sued the assessee. Since the cost of litigation was expected to be exorbitant, the assessee after considering the advice of its legal representative, settled the dispute by making payment of US $ 6,75,000. This amount was claimed as business expenditure. The Assessing Officer rejected the claim but the Tribunal allowed it. On appeal to the High Court: it was held, dismissing the appeal, that no finding had been given by any court that the assessee had violated the patent right of the American company. The payment under the settlement was compensatory in nature. (A.Y. 2005-06)

CIT v. Desiccant Rotors International P. Ltd (2012) 347 ITR 32 (2011) 245 CTR 572 / 201 Taxman 144 / 64 DTR 214 (Delhi)(HC)

S. 37(1) : Business expenditure - Keyman Insurance Policy - Firm - Partner - Allowable as business expenditure [S. 10(10D)]

Partner comes within the purview of the person who is "connected with in any manner whatsoever with the business" of the firm within the meaning of explanation to section 10(10D), hence the premium paid by assessee firm for Keyman insurance policy of partner such premium is allowable business expenditure under section 37(1).

CIT v. Gem Art (2012) 76 DTR 374 / 252 CTR 451 / 208 Taxman 47 (Guj.)(HC)

S. 37(1) : Business expenditure - Capital or revenue - Non compete fees paid was held to be capital expenditure [S. 32(1)(ii)]

Assessee purchasing business as a going concern, non-compete fee paid as a part of consideration is capital expenditure, hence not deductible; Tribunal rightly remanded the matter to Assessing Officer to consider whether depreciation thereupon is to be allowed or not under section 32(1)(ii). (A.Y. 2005-06)

Pitney Bowes India (P) Ltd. v. CIT (2012) 76 DTR 34 / 254 CTR 38 (Delhi)(HC)

S. 37(1) : Business expenditure - Capital or revenue - Enhanced lease rentals, and relinquishment of right was revenue expenditure. Non-compete fees within specified area was capital expenditure

Enhanced lease rent paid by the assessee company to the extent it is attributable to the expenditure incurred by the lessor trust on modernization and improvement of the plant and machinery which has been taken on lease and to normal appreciation in the lease rentals prevailing in the market would be revenue expenditure. Relinquishment of the right to purchase Khairwood from State Government by the lessor-trust in favour of the assessee resulted in better availability of raw material at a cheaper price to the assessee and not acquisition of the source of raw material itself and, therefore, part of the enhanced lease rent which is attributable to the right to purchase Khairwood is also revenue expenditure. Lessor-trust having agreed not to compete with the assessee's business within a specified area after leasing out whole of its production unit to the assessee, the benefits which accrued to the assessee company on account of elimination of competition from the trust were of enduring nature and hence, increase in lease rent, to the extent it is attributable to this benefit, is a capital expenditure. (A.Y. 1992-93 to 2003-04 & 2007-08)

Shanker Trading (P) Ltd. v. CIT (2012) 76 DTR 40 / 208 Taxman 526 / 254 CTR 44 (Delhi)(HC)

S. 37(1) : **Business expenditure - Penalty - Stock exchange allowable as deduction explanation to section 37 was held not applicable**

The following question of law raised by the revenue before High Court.
"(C) Whether on the facts and in the circumstances of the case and in law the Hon'ble Tribunal was justified in deleting the disallowance made by the Assessing officer of claim of the Assessing company for a deduction of payment of Rs. 6,51,240/- towards penalty paid to Stock Exchange even though such penalty payment was clearly disallowable under Explanation to Section 37(1) of the Income tax Act?"
The Court held that as regards question (C) is concerned the finding of fact recorded by the ITAT is that the amount paid as penalty was on account of irregularities committed by the assessee's clients. Such payments were not on account of any infraction of law and hence allowable as business expenditure. In such a case the explanation to section 37 would not apply. Accordingly question (C) raised by the Revenue cannot be entertained. (ITA (L) No. 475 of 2011, dt. 28/07/2011)
The Income Tax Commissioner Mumbai City v. Angel Capital & Debit Market Ltd. (Bom.)(HC) (unreported)
Editorial:- ITA No. 5560/M/2009, A.Y. 2006-07, Bench "D" Dated 29/10/2010 DCIT v. Angel Capital & Debit Market Ltd.

S. 37(1) : **Business expenditure - Capital or revenue expenditure - Expenditure on renovation of leasehold office premises was held revenue expenditure - Compensation held as capital in nature**
Amount spent by the assessee for the renovation of the leasehold office premises is allowable as a revenue expenditure but the amount paid by the assessee to the lessor as compensation to put up a structure or alter the structure to suit the requirements of the assessee is not a revenue expenditure. Further, assessee cannot also claim benefit of depreciation in respect of the latter amount as it is not the assessee who has put up the construction and spent the amount thereon. (A.Y. 1997-98)
CIT v. Lucent Technologies Hindustan Ltd. (2012) 252 CTR 438 / 345 ITR 407 / 75 DTR 99 (Karn.)(HC)
Editorial:- Lucent Technologies Hindustan Ltd. v. JCIT (2007) 106 TTJ 205 (Bang.)(Trib.) partly affirmed.

S. 37(1) : Business expenditure - Personal expenditure - Company - No disallowance for 'personal expenditure' in case of a company
There can be no disallowance for 'personal expenditure' in case of a company. (A.Y. 1988-89)
CIT v. Nuchem (2012) 208 Taxman 250 (Mag.)(P&H)(HC)

S. 37(1) : Business expenditure - Foreign travel expenses - New business - Allowable as revenue expenditure
Foreign travel expenses incurred to explore new business opportunities, are eligible as 'revenue' in nature. (A.Y. 1988-89)
CIT v. Nuchem (2012) 208 Taxman 250 (Mag.)(P&H)(HC)

S. 37(1) : Business expenditure - Education abroad - Son of ex-director - Expenditure was held to be allowable
The assessee is engaged in the business of printing and distribution of news papers and magazines, it incurred expenditure on employee who was son of the ex-director for higher studies in printing technology. It claimed the said expenditure as allowable expenditure. The Assessing Officer disallowed the expenditure. Tribunal in appeal allowed the claim of assessee. On appeal by the revenue the court up held the view of Tribunal by holding that ex-director's son was an employee of assessee and he was sent by assessee to have advanced knowledge of latest printing technology which was directly related to assessee-company business. Appeal of revenue was dismissed. (A.Y. 2005-06, 2006-07)

CIT v. Naidunia News and Networking (P.) Ltd. (2012) 210 Taxman 73 / 80 DTR 126 (MP)(HC)

S. 37(1) : Business expenditure - lease rent - Allowable as revenue expenditure
There is a lot of difference between the purchase, hire purchase and lease agreement. In this case, the terms indicate that the provider of the machines was required to maintain the machines and, therefore, he was entitled to take the rent also as per the terms of the agreement, and the assessee, in the relevant year, could not have exercised his right to purchase the air conditioner and his right to purchase the air conditioner could have been exercised after expiry of certain period of time. Therefore, in that situation, there was an agreement for lease only and the Tribunal was right in allowing the claim of expenses on lease rent as revenue expenditure.
CIT v. Tata Robins Fraser Ltd. (2012) 78 DTR 22 / 253 CTR 227 (Jharkhand)(HC)

S. 37(1) : Business expenditure - Subsidy to school is allowable as business expenditure
Subsidy to school in which children of the employees of the assessee company study was deductible as business expenditure.
CIT v. Tata Robins Fraser Ltd. (2012) 78 DTR 22 / 253 CTR 227 (Jharkhand)(HC)

S. 37(1) : Business expenditure - Capital or revenue - Abandoned project
It is not in dispute that the project could not be accomplished because of the reason that the place where it was to be undertaken had a poor quality of soil and all the construction already damaged other articles bought by the assessee also got damaged. In that fact situation, the Tribunal was fully justified in holding that such expenditure which may be pre operational expenditure for a project can be treated to be a revenue expenditure actually and not a capital expenditure.
CIT v. Tata Robins Fraser Ltd. (2012) 78 DTR 22 / 253 CTR 227 (Jharkhand)(HC)

S. 37(1) : Business expenditure - Lease 90 years - Amortisation of premium - Lease premium held to be capital in nature and cannot be allowed as revenue in nature for the A.Y. 2004-05
Assessee entered into an agreement with development authority in 1989 by which certain land was allotted in favour of assessee for a period of 90 years. Assessee was entitled to set up office complex on said land. It paid substantial amount of premium (upfront fee) to development authority at time of allotment. In addition, assessee had to pay 2.5 per cent of said premium as annual rent. Assessee amortized amount of premium paid over period of lease and claimed deduction of same in relevant assessment year. In fact the revenue authorities have allowed the claim for 15 years, however for the relevant A.Y. the revenue authorities rejected assessee's claim holding that lease of land for 90 years conferred a benefit of enduring nature to assessee and, consequently, it was in nature of capital expenditure. The view of Assessing Officer was up held by the Commissioner(Appeals) and Tribunal. On appeal to the High Court the Court held that in view of fact that tenure of lease was quite substantial and virtually created ownership rights in favour of assessee who was at liberty to construct upon plot, expenditure incurred by assessee towards upfront fee was capital in character and could not be allowed to be amortized over period of lease. The Court also held that the fact that for period of about 15 years, Income-tax authorities had accepted assessee's claim and permitted annual amortization of initial lease consideration as advance rent, could not be ground to allow such deduction in relevant assessment year. (A.Y. 2004-05)
Krishak Bharati Co-operative Ltd. v. Dy. CIT (2012) 210 Taxman 123 / 80 DTR 264 / (2013) 350 ITR 24 (Delhi)(HC)
Editorial:- The Supreme Court has granted special leave to the assessee to appeal against this judgment (2013) 350 ITR 2(St)/(2013) 216 Taxman 206 (Mag.)(SC).

S. 37(1) : Business expenditure - Capital or revenue - Non-compete fee - Payment of non-compete fee to a joint venture partner for keeping him out of the market for seven years will be capital in nature

The Assessee paid amount to joint venture partner to the extent o 26 percent was to keep out of market for seven years claimed as revenue expenditure. The High Court held that payment of non-compete fee to a joint venture partner for keeping out of the market for seven years constituted capital expenditure. (A.Y. 2001-02)

Sharp Business System v. CIT (2012) 254 CTR 233 / 79 DTR 329 / 211 Taxman 576 (Delhi)(HC)

S. 37(1) : Business expenditure - Expenditure in connection with travelling - Reaching the place of destination Rule 6D held applicable - Each employee rather than trip basis [Income-tax Rules, 1962 - Rule 6D]

Following the ratio in CIT v. Gannon Dunkerly & Co. (1993) 69 Taxman 563 it was held that the expenses incurred by the employee after reaching the place of destination including stay expenses was to be treated as disallowance under section 37 read with Rule 6D. Following the ratio in CIT v. Arrow India Ltd. (1998) 229 ITR 325 (Bom.)(HC) it was held that the disallowance under rule 6D should be worked out on each employee basis rather than on trip basis. (A.Y. 1983-84)

Mather & Platt (I) Ltd. v. CIT (2012) 210 Taxman 509 / 79 DTR 12 (Bom.)(HC)

S. 37(1) : Business expenditure - Lease rent - Capital expenditure - Arrangement between lessor and assessee constituted sale of property, hence lease rent was treated as capital expenditure. Assessee was held to be entitled to depreciation on said capital expenditure [S. 32]

The Assessee entered into an agreement for taking factory shed on lease for 30 years at a rent of Rs. 28,500/- payable half yearly. On the same day the assessee made further payment of Rs. 16,76,750/- for 29 years and six months towards advance rent, which would be adjusted against monthly rent. Another agreement was entered into where an option was given to the assessee to pay Rs. 5,000/- and balance would be adjusted against the advance rent paid of Rs. 2,85,000/-. The assessee claimed the lease rent as revenue expenditure. On appeal the Commissioner(Appeals) confirmed the disallowance, however allowed the depreciation. Tribunal held that the expenditure is capital in nature, however the assessee is not entitled for depreciation. On reference, the High Court held that arrangement between lessor and assessee constituted sale of property, hence lease rent was treated as capital expenditure. The High Court allowed the depreciation on entire capital expenditure of Rs. 16,91,250/- (A.Y. 1983-84)

Mather & Platt (I) Ltd. v. CIT (2012) 210 Taxman 509 / 79 DTR 12 (Bom.)(HC)

S. 37(1) : Business expenditure - Advertisement - Rents and rates - Expenditure on hiring space for hoardings is neither deductible as rent nor deductible as business expenditure [S. 30, 37(3A), 37(3B(i)]

The assessee, claimed deduction under section 30 for the rental paid for hiring space on hoardings. The Assessing Officer disallowed the deduction. The Commissioner disallowed the claim holding that it would not come under section 37(3A) read with section 37(3B)(i), which was confirmed by Tribunal. On a reference, held, that the hire charges paid for advertisement on hoardings would not come within the ambit of use of the premises for the purposes of business. It was not deductible under section 30. The mere hiring of a space on hoardings could not be treated as expenditure for advertisement or publicity or sales promotion. It was also not deductible under section 37. (A.Y. 1985-86, 1986-87)

Bakelite Hylam Ltd. v. CIT (2012) 349 ITR 317 /(2013) 259 CTR 268(AP)(HC)

S. 37(1) : Business expenditure - Capital or revenue - Fee paid for obtaining software and licence and for renewing licence is revenue expenditure - Provision for warranty is deductible

When the life of a computer or software is less than two years and the right to use it is for a limited period, the fee paid for acquisition of the right is allowable as revenue expenditure and if the software is licensed for a particular period, fresh licence fee is to be paid for utilizing it for subsequent years. Therefore, without renewing the licence or without paying the fee on such renewal, it is not possible to use the software. Therefore, the fee paid for obtaining the software and the licence and for renewing it was revenue expenditure. Provision for warranty is allowable, however there should not be double deduction hence for verification of double deduction the matter was set aside. (A.Y. 2004-05)

CIT v. Toyota Kirloskar Motors P. Ltd. (2012) 349 ITR 65 / (2013) 213 Taxman 49 (Mag.)(Karn.)(HC)

S. 37(1) : Business expenditure - New project - Professional fees - Capital expenditure

Professional fees paid by the assessee in respect of its new project was a capital expenditure and not revenue expenditure. (A.Y. 1980-81)

Larsen & Toubro Ltd. v. CIT (2012) 79 DTR 225 / (2013) 256 CTR 252 (Bom.)(HC)

S. 37(1) : Business expenditure - Expenditure on sending a trainee abroad for higher education is not allowable as business expenditure

Expenditure on sending a trainee abroad for higher education in the field of software development which was not the business of assessee was not allowable as deduction, more so as this was also not a regular practice of the company, in as much as no one before or thereafter had been selected by the company for such preferential treatment in the matter of obtaining overseas education. (A.Y. 1991-92 & 1996-97)

Standipack (P) Ltd. v. CIT (2012) 78 DTR 252 / 211 Taxman 144 / (2013) 350 ITR 251 / 255 CTR 197 (Cal.)(HC)

S. 37(1) : Business expenditure - Impermissible by law - Commission for providing help in getting tenders is not allowable as business expenditure

The nature of the contract namely providing expertise in preparation and procurement of tender in favour of assessee company with regard to tender floated by public sector organizations there is no doubt that scope and ambit of payment of such commission transcended the lawful or permissible limits of participation in such tenders. Furthermore, the Tribunal has rightly held that the nature of such expertise in preparation of tender documents and follow up action for obtaining such tender has not been clearly spelt out. When the commission payments had been made for purposes which are prima facie impermissible in law the question of permitting such expenses on the anvil of commercial expediency does not arise at all. The finding of the Tribunal that such agreement does not shut out other companies from contesting the tender is also a justifiable ground for such disallowance. Therefore, the findings of the Tribunal are clearly justified and the confirmation of the disallowance is justly warranted in law. (A.Y. 1991-92 & 1993-94)

Standipack (P) Ltd. v. CIT (2012) 78 DTR 252 / 211 Taxman 144 / (2013) 350 ITR 251 / 253 CTR 197 (Cal.)(HC)

S. 37(1) : Business expenditure - Capital or revenue expenditure - Depreciation - Non compete fee is capital expenditure - Non-compete fee does not qualify for depreciation under section 32(1)(ii) [S. 32(1)(ii)]

Advantage which the assessee derived on account of its agreement with L&T was that the latter, a previous joint venture partner to the extent of 26 per cent was kept out of the market for a period of 7 years. Coupled with the fact that the L&T has its own presence in consumer goods sector and would be, if it chooses, able to put up an effective competition for business engaged in by the assessee, there

is no doubt that the amount is to ensure a certain position in the market by keeping out L&T. Payment of non-compete fee therefore constituted capital expenditure. (A.Y. 2001-02)
Sharp Business System v. CIT (2012) 254 CTR 233 / 79 DTR 329 / 211 Taxman 576 (Delhi)(HC)

S. 37(1) : Business expenditure - Capital or revenue - Royalty for supply of know-how is allowable as revenue expenditure
Royalty paid by assessee to another company for supply of technical know how to manufacture goods of a particulars brand under a knowhow licence agreement which could be terminated and did not grant the licensee any right to exploit or in any way to use the know how after the expiration of the agreement could not be treated as capital expenditure. (A.Y. 2005-06 & 2006-07)
CIT v. Modi Revlon (P) Ltd. (2012) 78 DTR 342 (Delhi)(HC)

S. 37(1) : Business expenditure - Research expenses of head office - Apportionment of expenses - Apportionment of expenses held to be not proper
The assessee carries on business inter alia of manufacturing Ayurvedic medicines and ointments It has head office and four units. The head office as well as each units have their own R&D departments equipped with a laboratory. The Assessing Officer allocated the head office expenses on the basis of proportionate turnover of various units. On appeal Commissioner(Appeals) and Tribunal confirmed the addition. On appeal to the High Court the Court held that Tribunal was not justified in confirming the allocation of R&D expenses incurred by the head office among the four manufacturing units on the presumption that the expenditure so incurred is for the benefit of these manufacturing units, when in fact such research conducted had no connection with the business of said units, nor any benefit is received by them from the said research. Assessees appeal was allowed. (A.Y. 1993-94)
Zandu Pharmaceuticals Works Ltd. v. CIT (2012) 80 DTR 322 / (2013) 350 ITR 366/259 CTR 253 (Bom.)(HC)

S. 37(1) : Business expenditure - Capital or revenue expenditure - Expenditure incurred for purpose of sub-division of shares for purpose of easy trading of shares in market is revenue in nature and, therefore, allowable
The assessee incurred an expenditure of Rs. 4.12 lakh for the purpose of sub-division of its shares. It claimed same as revenue expenditure. The revenue disallowed the same by holding that it was capital in nature. The Tribunal confirmed the order of Assessing Officer by holding that the expenditure was incurred in connection with the capital structure of the company and gave the company an advantage of enduring nature. On appeal by assessee the court held that the expenditure admittedly was made for the purpose of sub-division of the shares. It is not even the case of the Department that by such arrangement, share capital of the assessee company in any manner increased. Such sub-division was made only for the purpose of easy trading of the shares in the market. Such arrangement, therefore, may result into some benefit for the shareholders of the company, nevertheless it is difficult to see as to how the revenue can argue that such division of shares resulted into any enduring benefit for the company. In case of sub-division of the shares, there is no increase in the share capital of the company. Accordingly the appeal of assessee was allowed. (A.Y. 1987-88)
G.S.F.C. Ltd. v. Dy. CIT (2012) 210 Taxman 448 / 80 DTR 188 (Guj.)(HC)

S. 37(1) : Business expenditure - Loss on account of foreign exchange difference - Legal and professional charges - Tribunal relying on audited accounts and deleting disallowance held to be justified
The assessee produced its audited accounts before the Assessing Officer but did not furnish the vouchers called for by the Assessing Officer in support of the audited accounts. The Assessing Officer, disallowed the loss on account of fluctuation in the rates of foreign exchange and legal and professional charges for want of supporting documents. The Commissioner(Appeals) affirmed this,

but the Tribunal deleted the disallowances. The assessee having stated that the vouchers for payment of legal and professional charges being not traceable, the Tribunal took note of the fact that the assessee was continuously paying professional charges and allowed the claim to the extent on the basis of the expenditure claimed under the said head. On appeal by the revenue the Court held that the Tribunal was justified in deleting the disallowance on foreign exchange difference. The Court also held that merely mentioning that since such amount was paid by the assessee against the head of the legal and professional charges in other years, did not mean that this was treated to be res judicata. It was for the purpose of determination and quantification alone that the amount of previous years had been taken into account by the Tribunal which could not be said to be impermissible. Accordingly the appeal of revenue was dismissed.

CIT v. Timken India Ltd. (2012) 349 ITR 546 (Jharkhand)(HC)

S. 37(1) : Business expenditure - Capital or revenue - Lease rent - Lease rent paid to NOIDA is allowable as revenue expenditure

The Assessing Officer disallowed the lease rent payment of Rs. 2,04,400/- to the Noida authorities treating it as capital expenditure. The Tribunal allowed it as revenue expenditure holding that the amount paid was not for acquiring any leasehold right by way of annual lease rent. Thus, the payment was for continuing to enjoy the leasehold rights. In such situation, the assessee would not acquire any new capital asset but merely maintain capital asset already acquired. Thus, the expenditure assumed the character of revenue in nature and not capital expenditure. On appeal by revenue the order of Tribunal was up held. (A.Y. 1999-2000)

CIT v. Perot Systems TSI India Ltd. (2012) 349 ITR 563 (Delhi)(HC)

S. 37(1) : Business expenditure - Capital or revenue expenditure - Payment to employees under voluntary retirement scheme for periods prior to introduction of section 35DDA held to be allowable as revenue expenditure [S. 35D]

Court held, that the assessee is entitled to deduction of the expenditure of Rs. 66,75,665/- incurred by way of payments to employees who took retirement under the voluntary retirement scheme during the previous year relevant to the A.Y. Accordingly the order of Tribunal was up held. (A.Y. 1999-2000)

CIT v. O. E. N. India Ltd. (2012) 349 ITR 554 / 238 CTR 340 / 196 Taxman 131 / 49 DTR 94 (Karn.)(HC)

Editorial:- Section 35DDA with effect from April 1, 2001-**Obiter dicta** : Section 35DDA is virtual declaration of the fact that expenditure incurred under the voluntary retirement scheme should not be allowed as a revenue expenditure in one year and it is in the nature of a capital expenditure to be amortized in the course of a few years. Therefore, even for the period prior to the introduction of section 35DDA with effect from April 1, 2001, the assessee would be entitled to claim deduction of expenditure incurred under the voluntary retirement scheme only in a phased manner in the course of a few years which has to be rationally fixed by the assessee by making accounting entries.

S. 37(1) : Business expenditure - Current repairs - Capital or revenue expenditure - Tests [S. 30]

Precise rules for distinguishing capital expenditure from revenue expenditure cannot beformulated. The line of demarcation is thin. Certain broad tests have, however, been laid down. Each case turns on its own facts. The aim and object of the expenditure would determine the character of the expenditure whether it is a capital expenditure or a revenue expenditure. When an expenditure is made for acquiring or bringing into existence an asset or an advantage for the enduring benefit of the business, it is properly attributable to capital and is of the nature of capital expenditure. Amount spent on providing wooden partition, painting of leased premises, carrying out repairs so as to make premises workable, to replace glasses is held to be revenue expenditure. Expenditure on electricity

and civil works and interior decoration, matter remanded to find out nature of expenditure. (A.Y. 1995-96)
CIT v. H. P. Global Soft Ltd. (2012) 349 ITR 462 / 208 Taxman 275 / 248 CTR 201 / 66 DTR 242 (Karn.)(HC)

S. 37(1) : Business expenditure - Provision - Wages - Based on past experience is allowable
Provision for wage revision based on past experience, previous Pay Commission reports of public sector employees, union demands and other relevant factors cannot be disallowed as contingent liability. (A.Y. 1988-89 & 1998-99)
CIT v. Bharat Heavy Electrical Ltd. (2012) 80 DTR 7 / 210 Taxman 155 (Mag.) / (2013) 352 ITR 88 (Delhi)(HC)

S. 37(1) : Business expenditure - Expenditure incurred on proposed business - Mere common funding will not amount to business venture hence expenditure not allowable
Where business proposed involves common elements such as unified administration and management, resource sharing and common funding, in such a case proposed business has to be taken as a part of existing business and expenditure incurred in respect of proposed business can be allowed as business expenditure. However, mere common funding and fact that there was a management which conceived start of a new business activity, does not make a proposed business venture an 'existing business' for expenditure to qualify as revenue expenditure. (A.Y. 1999-2000, 2000-01)
CIT v. Hindustan Times (2012) 211 Taxman 202 (Delhi)(HC)

S. 37(1) : Business expenditure - Repairs - Lease hold premises - Held allowable
Expenditure incurred by assessee on account of improvement of lease hold premises would be allowable as deduction under section 37(1). (A.Y. 2001-02)
CIT v. EDS Electronic Data Systems (India) (P.) Ltd. (2012) 211 Taxman 133 (Delhi)(HC)

S. 37(1) : Business expenditure - Capital or revenue - Fees for guarantee to purchase Deep Discount Bonds is revenue expenditure
It was held that Guarantee fee paid to two companies for purchase of Deep Discount Bonds from the bond holders, pursuant to exercise of redemption option by them constituted revenue expenditure. (A.Y. 2002-03)
CIT v. Noida Toll Bridge Co. Ltd. (2012) 80 DTR 379 / (2013) 255 CTR 80 (All)(HC)

S. 37(1) : Business expenditure - Provision for increased wages - Year of allowability
The Tribunal had noticed that there was no dispute as regards the terms of employment of the workers and officers. The only question was the exact quantification of the compensation or wage revision. The Tribunal also held that with the expiry of one wage settlement or agreement, invariably, there is a time lag when another fresh wage revision agreement is negotiated and entered. The deduction claimed for that period cannot be termed as contingent because the wage and the probable revision or rates of revision would be within the fair estimation of the employer. In this, assessee had the benefit of past experience of such pay revisions. Its liability could not be characterized as contingent but was in fact ascertained; the quantification, however, had not happened. There is no infirmity with the reasoning of the Tribunal about the deduction claimed on account of wage revision being permissible. (A.Y. 1988-89 & 1998-99)
CIT v. Bharat Heavy Electrical Ltd. (2012) 80 DTR 7 / 210 Taxman 155 / (2013) 352 ITR 88 (Delhi)(HC)

S. 37(1) : Business expenditure - Donation to trusts - Not allowable as business expenditure

There is no documentary evidence to show that the amounts involved (which are quite substantial) could be deemed necessary or expedient to promote the assessee's business. While the philanthropic activity such as donation is laudable and, in principle, cannot be faulted, however, parting with of large amounts to "gain local support," per se cannot constitute deductible business expenditure. Parliament having chosen one method of dealing with donations i.e. as in the case of section 80G the adoption of another route as business expenditure would not be permissible. (A.Y. 1988-89 & 1998-99)

CIT v. Bharat Heavy Electrical Ltd. (2012) 80 DTR 7 / 210 Taxman 155 (Mag.) / (2013) 352 ITR 88 (Delhi)(HC)

S. 37(1) : Business expenditure - Capital or revenue - New product - Expenditure incurred on development of new product in same line of business is allowable as revenue expenditure [S. 35D]

The assessee engaged in manufacturing of permanent magnets, in its books showed under the head "Miscellaneous expenditure" a sum of Rs. 27,05,401/- being pre-production expenses in relation to bonded permanent magnet and claimed the said expenditure as revenue expenditure in the return of income. The Assessing Officer disallowed the said expenditure on the ground that the assessee had shown the expenditure as "Pre production expenses" and having capitalized in the books of account, the said expenditure to be amortised under section 35D. Commissioner(Appeals) and Tribunal held that, expenditure for development of new product in same line of business is revenue expenditure. (A.Y. 2004-05)

Dy. CIT v. Magnetic Meter Systems India Ltd. (2012) 13 ITR 43 (Chennai)(Trib.)

S. 37(1) : Business expenditure - Travelling expenses - Employee - Foreign citizens to be considered for computing disallowance under Rule 6D

The Assessing Officer, calculated the disallowance under Rule 6D of the Income-tax Rules, 1962, with reference to each trip of the individual employee and after considering other related expenses. Commissioner(Appeals) agreed with the assessee that other related expenses like telephone, local conveyance could not be considered for the purpose of Rule 6D. However, computation in respect of each trip was up held. Tribunal confirmed the view of Commissioner(Appeals). Tribunal held that travelling expenses of foreign citizens to be considered for computing disallowance under Rule 6D. (A.Y. 1995-96)

Aditya Birla Nuvo Ltd. v. ACIT (2011) 131 ITD 511 / 141 TTJ 702 / 61 DTR 343 / (2012) 13 ITR 128 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Capital or revenue - Access road - Construction of access road to new plant is capital in nature

The Tribunal held that the approach road was connected to the additional profit earning apparatus being built by the assessee at the new unit of the expansion programme, therefore expenditure incurred on the approach road was in connection with augmentation to the existing profit earning apparatus of the company and hence the expenditure would be capital in nature. (A.Y. 1995-96)

Aditya Birla Nuvo Ltd. v. ACIT (2011) 131 ITD 511 / 141 TTJ 702 / 61 DTR 343 / (2012) 13 ITR 128 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Loss on fluctuation exchange rate - Deductible

Assessee borrowed in foreign exchange. Loss on account of fluctuation in exchange rate is deductible. (A.Y. 2007-08)

Ascendas (India) P. Ltd. v. Dy. CIT (2013) 21 ITR 665 / 152 TTJ 57 (Chennai)(Trib.)

S. 37(1) : Business expenditure - Firm - Key man insurance - Insurance premium on key man insurance policy of partner is allowable [S. 10(10D)]

The assesseee-firm took a keyman insurance policy in respect of a partner, paid insurance policy premium on the policy and claimed it as expenditure. The Assessing Officer held that the partner was not a separate and independent person from the firm and, therefore, the payment of keyman insurance premium in respect of the policy taken on the life of partner amounted to claiming the deduction for self and not allowable. The Tribunal confirmed the order of Commissioner(Appeals) who held that insurance premium on keyman insurance policy to insure life of partner is allowable. (A.Y. 2007-08)

ACIT v. Paramount Impex (2012) 13 ITR 374 (Chd.)(Trib.)

S. 37(1) : Business expenditure - Advertisement expenditure - Ad-hoc disallowance is not justified

The Assessing Officer cannot disallow the expenditure on ad-hoc basis merely because the advertisement expenditure has increased by 200%, as neither pointing out any defects in the books of account nor rejected the books of account. (A.Y. 2007-08)

Widex India (P) Ltd. v. Dy. CIT (2012) 66 DTR 57 (Delhi)(Trib.)

S. 37(1) : Business expenditure - SWAP cost - Forward contracts - SWAP cost which pertained to the contracts which had not matured during the previous year, relevant A.Y. cannot be allowed as deduction

Assessee entered into forward contract with third party for purchasing equivalent number of dollars. The difference between buying and selling rate was claimed as loss spread over of two years. The Tribunal held that disallowance of loss by the Assessing Officer was justified as the SWAP cost which pertained to the contracts had not matured during the previous year relevant to the A.Y. under consideration as there was no relation whatsoever between the transaction of the assessee receiving FCNR deposit and converting in to Indian rupees with the transaction by which it entered into a forward contract as both these transactions are independent of each other and whether such rate would be higher or lower at the time of maturity in the succeeding year is not capable of ascertainment at the close of the year on 31st March, 2000. Tribunal upheld the disallowance made by the Assessing Officer. (A.Y. 2000-01)

The Siam Commercial Bank PCL v. Dy. DIT (2012) 134 ITD 463 / 66 DTR 369 / 144 TTJ 235 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Rent - Advance payment - Amount paid in advance was lost - Loss is allowable as business expenditure

Assessee entered into a contract for purpose of storage of Kerosene oil and paid advance rent. But the Government prohibited the import of Kerosene oil. The assessee claimed the payment of advance rent as business loss. The Assessing Officer disallowed the loss on the ground that the assessee actually not used the storage facility. The Tribunal held that loss was incurred in the course of business and same is allowable as business loss under section 37. (A.Y. 2004-05)

Seven Seas Petroleum P. Ltd. v. ACIT (2012) 14 ITR 21 (Chennai)(Trib.)

S. 37(1) : Business expenditure - Capital or revenue - Renovation - Rented premises - Expenditure incurred on renovation of rented premises is allowable as revenue expenditure [S. 30(a)(i)]

Assessee a Solicitor had taken office premises on rental basis. During relevant assessment year the assessee carried our renovation work in office premises which included tiling, plastering, POP, electrification work, etc. The Assessing Officer treated the said expenses as capital expenditure. The Tribunal held that since the expenses had been incurred by assessee only to create a better working environment and agreement specifically provided that repairs shall be carried out only by assessee

subject to permission of land lord. The expenses were allowable under section 30(a)(i) as well as under section 37(1). (A.Y. 2001-02)
Dy. CIT v. Bijesh Thakkar (2012) 49 SOT 502 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Transport business - Violation of traffic rules - Expenses incurred for violation of traffic rules being for infraction of law is not allowable deduction
The assessee incurred expenditure for violating traffic rules by entering town on no entry times, one way traffic violation, etc. The Tribunal held that the expenses being penalty/fine for violation of traffic rules and payment being for infraction of law explanation to section 37 of the Act is applicable and deduction is not allowable under section 37. (A.Y. 2005-06)
Kranti Road Transport (P) Ltd. v. ACIT (2012) 50 SOT 15 (Visakha.)(Trib.)

S. 37(1) : Business expenditure - Son of Director - Higher foreign education - Foreign educational expenses of son of director who was not an employee is not allowable
The Assessing Officer disallowed the foreign educational expenses of son of Director who was not an employee holding that the same is personal in nature. On appeal Commissioner(Appeals), concurred with the findings of Assessing Officer. On further appeal to Tribunal, the Tribunal held that the expenditure on higher education of son of director cannot be said to be wholly and exclusively for the purpose of the business of the assessee and without any extra commercial circumstances, accordingly the disallowance was confirmed. (A.Y. 2006-07)
Sunidi Consultancy Services Ltd. v. Dy. CIT (2012) 50 SOT 223 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Interest unpaid purchase consideration - Interest payable on unpaid sale consideration allowable as business expenditure and provisions of section 43B cannot be applicable [S. 36(1)(iii), 43B]
The assessee is engaged in the business of manufacturing of polyester film. It was allotted plot of land by GIDC. As per terms of allotment the assessee was required to pay the purchase consideration of the land in installments with interest. For the year under consideration the assessee had paid the sum of Rs. 99.97 lakhs as interest to GIDC and the same was claimed as business expenditure. According to the Assessing Officer the expenditure was capital in nature. On appeal the Commissioner(Appeals) held that the same is allowable as revenue in nature. On appeal by revenue the revenue contended that since interest was not paid the same is not allowable under section 43B. The Tribunal held that the interest is allowable under section 37(1) and since the interest payable is in respect of un paid sale consideration provisions of section 43B cannot be applicable as the expenditure is allowable under section 37(1) and not under section 36(1)(iii). (A.Y. 2004-05)(ITA no 5015/M/2009 dt 30-12-2011)
Dy. CIT v. MTZ Poly Films Ltd. (2012)March-P 22-654/43B BCAJ (Mum.)(Trib.)

S. 37(1) : Business expenditure - Fringe benefit tax - Expenses - Expenditure which are subjected to FBT is allowable as business expenditure
The Tribunal referred to the CBDT Circular No. 8/2005, dated 29-8-2005 and opined that once fringe benefit tax is levied on expenses incurred, it follows that the same are treated as fringe benefits provided by the assessee as employer to its employees and the same have to be appropriately allowed as expenses incurred wholly and exclusively incurred by the assessee for the purpose of its business. (A.Y. 2006-07)(ITA No. 2397/M/10, dt. 16-9-11)
Hansraj Mathuradas v. ITO (2012)February-25/Vol. 43 B Part 5 BCAJ (Mum.)(Trib.)

S. 37(1) : Business expenditure - Licence fee - Capital or revenue - Licence fee paid held to be revenue expenditure as benefit of fees paid endures only till end of the relevant year and not extend to the subsequent financial year [S. 35ABB]

The assessee is engaged in the business of digital communication services for data, fax, etc. The assessee made payment for obtaining licence for providing telecommunication services through for a period of 10 years. The licence fee was payable on yearly basis. The benefit of licence fee paid during the year endures only till end of the relevant year and does not extend to the subsequent financial year. Thus, it was held that the license fee was not in the nature of capital expenditure falling under Section 35ABB but revenue expenditure as per Section 37(1). (A.Y. 2002-03 to 2004-05)

Bharti Airtel Ltd. v. ACIT (2012) 145 TTJ 161 / (2010) 48 DTR 416 / 41 SOT 175 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Performance guarantee - Contractual obligation - Compensation paid for default of assessee as performance guarantee is held to be allowable expenditure

Where during the continuity of business if in a particular contract the assessee had to compensate for his own default by offering performance guarantee which was a contractual obligation and that the said business continued later on, then a disallowance for a particular contract could not be considered separately. Same be allowed as business expenditure. (A.Y. 2006-07) (ITA No. 3026/Ahd/2009 dt. 24/2/2012)

Neo Structo Construction Ltd. v. Addl. CIT, (2012) ACAJ-Vol. 35 Feb. P. 555 (Ahd.)(Trib.)

S. 37(1) : Business expenditure - Royalty - Trade mark - Payment of royalty for use of trademark as well as technical information, in relation to manufacture, use and sale of product is held to be revenue expenditure

The assessee made payment of royalty on net sales for use of trademark and technical information in relation to manufacture, use and sale of product and not in relation to setting up of plant. The assessee did not acquire the ownership over the trademark or technical information as there was no provision for transfer of the same. The Tribunal held that the said expenditure is revenue expenditure. (A.Y. 2003-04, 2004-05, 2006-07)

Mafatlal Denim Ltd. v. Dy. CIT (2012) 135 ITD 483 / 147 TTJ 346 / 72 DTR 281 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Foreign Income-tax - Foreign income-tax is deductible as business expenditure, bar in section 40(a)(ii) does not apply to foreign taxes [S. 40(a)(ii)]

The assessee paid Rs. 42.57 lakhs in Belgium as income-tax and claimed that as deduction under section 37(1). The Assessing Officer rejected the claim by relying on section 40(a)(ii) which provides that any sum paid on account of tax levied on profits or gains of business shall not be allowable as a deduction. CIT(A) allowed the claim on the ground that the bar in section 40(a)(ii) did not apply to foreign taxes. On appeal by the department, Held dismissing the appeal:

The term "tax" is defined in section 2(43) to mean income-tax chargeable under the provisions of this Act. Section 37(1) allows a deduction of all taxes and rates. Taxes levied in foreign countries whether on profits or gains or otherwise are deductible under section 37(1) not hit by section 40(a)(ii). It is also not application of income. The same view has been taken by ITAT Mumbai in South East Asia Shipping Co. & Tata Sons Ltd. and the department's Reference Applications under section 256(1) & 256(2) were rejected and the issue has reached finality. (A.Y. 2002-03, 2003-04 and 2004-05)

Dy. CIT v. Mastek Limited (2012) 74 DTR 318 / (2013) 151 TTJ 484 (Ahd.)(Trib.)
Mastek Limited v. Dy. CIT v. (2012) 74 DTR 318 /(2013) 151 TTJ 484 (Ahd.)(Trib.)

S. 37(1) : Business expenditure - Royalty - Associated enterprises - Payment of royalty to associated enterprises is not hit by provision of section 92. Hence allowable as business expenditure [S. 92]

The Assessing Officer disallowed the claim of royalty payment of Associated enterprise holding that the Transfer Pricing Officer has determined the ALP of royalty paid at nil which was confirmed in appeal by the Commissioner(Appeals). On appeal the Tribunal held that for a transaction to come

under section 92 of the Act, it is necessary to establish that the course of business between resident and non-resident is so arranged that the business transacted between them provides to the resident either (i) no profit or (ii) less than ordinary profits which might be expected to arise in the business. In the present case, the assessee had declared income and therefore it is not case of "no profit". So are regards the adequacy of profits vis-à-vis ordinary profits which might be expected to arise in the business, the same can be found out only, when exercise is done to compare the income of the assessee with other comparable enterprises in India. In the present case, the TPO observed that no royalty was charged by other group entities and accordingly the Arms Length Price for royalty charges was inferred as nil. The finding of the Assessing Officer in considering the royalty charges as nil as arms length price cannot be accepted since the Assessing Officer in the present case has not brought on record, the originary profits which can be earned in such type of business. Therefore in our view the payment of royalty is not hit by the provisions of Section 92 of the Act and there is no reason to hold that the expenses should not be allowed under section 37(1) of the Act, since the expenditure has been incurred by the assessee during the course of business and is having the nexus with the business of the assessee. (A. Y. 2004-05)

KHS Machinery (P) Ltd. v. ITO (2012) 69 DTR 283 / 146 TTJ 692 / 18 ITR 479 / 53 SOT 100 (URO)(Ahd.)(Trib.)

S. 37(1) : Business expenditure - Illegal purpose - Fact that payment is used for 'illegal' purpose does not attract Explanation to section 37(1)

The assessee exported tea to Iraq under the 'Oil for Food Program', as sanctioned by the United Nations. It paid commission of Rs. 1.28 crores to one Alia Transportation, a Jordanian company. The Volcker Committee, which was set up to expose the 'Oil for Food scam' found that this company was a front company for the Iraqi regime, meant to receive illegal kickbacks, and did not render any services. The Assessing Officer, acting on the report, held that the commission paid by the assessee was "illegal" and not allowable under the Explanation to section 37(1). This was reversed by the CIT(A). On appeal by the department to the Tribunal, held:

There was no dispute that the assessee had in fact paid Alia. Though the Volker Committee report stated that the amounts paid to Alia were actually kickbacks to Iraqi regime, that fact per se would not attract Explanation to section 37(1). In order to fall within the Explanation to section 37(1), the expenditure has to be for "for any purpose which is an offence or which is prohibited by law". Alia was a Jordanian company and while the transactions between Alia and the Iraqi regime may be contrary to the UN sanctions, the transactions between the assessee and Alia were not hit by the UN sanctions. The Revenue has not pointed out any other specific violation of law. The assessee's payment accordingly cannot be said to be for a purpose which is an offence or which is prohibited by law. What the recipient of the payment does is not important from this perspective because the assessee has no control over the matter. It is not the case that the assessee knew that the monies would be used for the purposes of kickbacks to the Iraqi regime. The onus of demonstrating that the assessee was aware that the payments were intended for kickbacks is on the Assessing Officer which has not been discharged. The "purpose" of the expenditure has to be seen. If the payment is for bonafide business purposes, the fact that they end up being used as illegal kickbacks, will not attract Explanation to section 37(1). The commercial expediency of the payments was not called into question by the Assessing Officer [TIL Ltd. (2007) 16 SOT 33 (Kol.) referred]. (A.Y. 2003-04)

Dy. CIT v. Rajrani Exports Pvt. Ltd. (2012) 72 DTR 425 / 52 SOT 168 / 17 ITR 239 / 147 TTJ 171 (Kol.)(Trib.)

Editorial: Affirmed by High Court , CIT v. Rajarani Exports Pvt Ltd .www.itatonline.org.

S. 37(1) : Business expenditure - Capital or revenue - Market support service - Market support services do not result in acquisition of a capital asset hence allowable as revenue expenditure

Assessee acquired personal computer business from IBM and entered in to a market support agreement with IBM with a view to retain a market share in the business. As per the marketing

support agreement, IBM was to provide services to facilitate the sale of the products by the assessee and to extend services to the customers through one or more of its subsidiaries or third parties. The services to be rendered by the IBM are for a period of five years. The Assessing Officer treated the said expenses as capital in nature. The Tribunal held that services rendered by IBM to facilitate the sale of products by the assessee under market support agreement were meant for smooth and efficient running of the business of the assessee for a period of five years and it did not result in acquisition of a capital asset and therefore, fees paid by the assessee for the said marketing support services rendered by IBM is a revenue expenditure. (A.Y. 2006-07)

Lenovo (India) (P) Ltd. v. ACIT (2012) 71 DTR 90 / 147 TTJ 102 / 140 ITD 127 (Bang.)(Trib.)

S. 37(1) : Business expenditure - Commission - Discount - Takeover of business -Liability pertaining to period prior to acquisition of business is allowable as business expenditure

The assessee claimed the commission and discount payable to dealers as business expenditure. The Assessing Officer disallowed the expenditure on the ground that the expenditure relating to the period before acquisition of the business by assessee hence cannot be allowed for the relevant year. The Tribunal held that the assessee having taken over a running business from another company along with the liabilities which include the commission and discounts payable to the dealers, it is bound to make payments thereof in order to maintain business relations with the dealers and therefore, such payments are allowable as business expenditure of the assessee. (A.Y. 2006-07)

Lenovo (India) (P) Ltd. v. ACIT (2012) 71 DTR 90 / 147 TTJ 102 / 140 ITD 127 (Bang.)(Trib.)

S. 37(1) : Business expenditure - Allotment of sweet equity shares - The value of shares allotted free of cost to employees is deductible revenue expenditure

The assessee allotted 3,94,692 Sweat Equity shares (ESOP) to its employees free of cost for rewarding them for past services or providing know how for making available rights in the IPR as per section 79A of the Companies Act, 1956. Though the shares were allotted for no consideration, the assessee accounted for the shares at Rs. 106.26 each (face value Rs. 10) at its arms length price and claimed Rs. 4.19 crores as a deduction towards "employees benefit expenses". The shares were not allotted as at 31.3.2006. The Assessing Officer disallowed the claim on the ground that it was not an ascertained liability but was a contingent liability though the CIT(A) allowed the claim. In appeal before the Tribunal, the department relied on Ranbaxy Laboratories. v. ACIT (2009) 124 TTJ 771 (Delhi) & VIP Industries (Mum.)(Trib.). Held dismissing the appeal:

Though the allotment of the ESOP shares was not done as of 31.3.2006, the number of shares to be allotted to the employees as on 31.3.2006 was specified and immediately thereafter the said shares were so allotted. Consequently, the mere non-allotment of the shares pending completion of certain formalities does not merit the disallowance of said expenditure as being a contingent liability. The fact that the scheme provided for a lock in period of five years under which in case the employee left employment before the expiry of five years, the shares so allotted to him would revert to the assessee, did not make the liability contingent because where the shares were forfeited, the value thereof would be offered to tax in that year (S.S.I. Ltd. v. Dy. CIT (2004) 85 TTJ 1049 (Chennai) followed; Ranbaxy Laboratories v. ACIT (2009) 124 TTJ 771 (Delhi)(Trib.) & VIP Industries (Mum.)(Trib.) distinguished) (A.Y. 2006-07)

ACIT v. Spray Engineering Devices Ltd. (2012) 53 SOT 70 (Chd.)(Trib.)

S. 37(1) : Business expenditure - Website development - Depreciation - Assessee treated the said expenses as intangible hence not allowable as business expenditure

The Tribunal held that since the assessee itself has claimed the website development as part of block of assets on which depreciation eligible to intangible assets has been claimed and allowed, the same cannot be treated as revenue expenditure. (A.Y. 2004-05)

Makemytrip (India) (P) Ltd. v. Dy. CIT (2012) 72 DTR 466 / 51 SOT 98 (Delhi)(Trib.)

S. 37(1) : Business expenditure - Cost of production of feature film - Producer of feature film - Even if Rule 9A is applied, the assessee is entitled to claim the un recouped cost of production as loss [Rule 9A]

The Assessing Officer disallowed the excess un recouped cost of production of film. In appeal the Commissioner of Income-tax (Appeals) allowed the claim. On further appeal to Tribunal by the revenue the Tribunal held that the assessee being producer of feature film is entitled to claim the un recouped cost of production in terms of Rule 9A(3) as also de hors the provisions of Rule 9A. (A.Y. 2005-06)

Addl. CIT v. Nitin M. Panchamiya (2012) 73 DTR 202 / 148 TTJ 96 / 50 SOT 468 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Capital or revenue expenditure - Expenditure on purchase of furniture in leasehold premises - Held that expenditure incurred for capital asset thus, not allowable as revenue expenditure - Depreciation allowed [S. 32]

Huge expenditure incurred by the assessee on purchase of plywood, furniture, etc. for making partitions, cabins, cubicles, desks, etc. in its leasehold premises was expenditure incurred for capital asset and, therefore, it was not allowable as deduction but is subject to allowance of depreciation in terms of Explanation 1 to section 32. (A.Y. 2001-02 to 2004-05)

Free India Assurance Services Ltd. v. Dy. CIT (2012) 147 TTJ 423 / (2011) 62 DTR 349 / 132 ITD 60 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Expenditure for increase in share capital after commencement of business - Held expenditure of revenue nature

Expenditure incurred for increase in share capital of company after commencement of business is not capital expenditure but a regular business expenditure of revenue nature. (A.Y. 2005-06)

Dy. CIT v. Raj Laxmi Stone Crusher (P.) Ltd. (2012) 52 SOT 112 (Delhi)(Trib.)

S. 37(1) : Business expenditure - Feature film - Cost of production - Cost of production is not allowed, which is hit by sub-rule (5) of rule 9A [Rule 9A]

Assessee having neither himself exhibited feature film on commercial basis nor sold rights of exhibition of the feature film nor transferred the rights of exhibition of feature film, then the claim of deduction in respect of cost of production is hit by sub-rule (5) of rule 9A and cannot be allowed. (A.Y. 2007-08)

Sagar Sarhadi v. ITO (2012) 135 ITD 153 / 148 TTJ 86 / 73 DTR 192 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Enterprise Resource Planning (ERP) - Capital or revenue - Expenditure incurred on ERP is held to be revenue in nature

The assessee company is manufacturer of pharmaceutical items. Following the decision laid in assessee's own case in other Assessment year and decision of Bombay High Court in CIT v. Raychem RPG Ltd. (ITA No. 4176 of 2009 dated 4/7/2011), it was held that expenditure incurred on Enterprise Resource Planning (ERP) was revenue in nature. (A.Y. 2005-06)

ACIT v. Torrent Pharmaceutical Ltd. (2012) 137 ITD 301 (Ahd.)(Trib.)

S. 37(1) : Business expenditure - Repairs - Improve condition of building - Building used for business purpose hence repair expenses incurred to improve the condition of building held to be allowable revenue expenditure

The expenditure incurred by assessee on repairs to improve bad condition of building which was used for its business purpose was to be allowed as business expenditure. (A.Y. 1998-99, 1999-2000)

Dy. CIT v. Sandoz (P.) Ltd. (2012) 137 ITD 326 / 80 DTR 129 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Expenses for profession - Advocate - If there is no doubt that expenditure has been incurred, disallowance is not sustainable

While computing the tax liability of an assessee the Assessing Officer is obliged to compute the correct income of the assessee. Once in substance he is in agreement that the expenditure has been incurred for earning the professional income, no disallowances is sustainable in law. Nowhere the Assessing Officer has doubted that the expenditure claimed as deduction has been incurred by the assessee. In alleging that the expenditure has been deducted in computing the income from other sources, the Assessing Officer has ignored the fact that in the return of income, the gross amount of interest income, without any deduction, has been shown under the head "income from other sources" and the income under the head "profits and gains of business or profession" has been shown in the tax return on net basis after deducting the expenditure incurred. (A.Y. 2005-06 to 2006-07)(ITA No. 50, 72, 49 (Gau/2010 Bench 'D' dated 31-8-2012)

Lira Goswami v. ACIT (Delhi)(Trib.) www.itatonline.org

S. 37(1) : Business expenditure - Petty cash expenses not supported by vouchers

Total petty cash expenses were to the tune of Rs. 5.43 crores addition of Rs. 20 lacs made by Assessing Officer in order to prevent leakage of revenue on this account after recording that the petty cash expenses vouchers were either not supported with proper bills and vouchers or are missing. CIT(A) deleted addition as not justified. Onus is always on the assessee to satisfy the Assessing Officer with evidence to his satisfaction to substantiate that the expenditure has been incurred wholly and exclusively for the purpose of business. Merely because the total expenditure of Rs. 5,42,69,498/- is 1.82 per cent of the total operations at 297.76 crores, it cannot be a ground for accepting the whole of the expenses as genuine. However, in the facts and circumstances, disallowance needs to be reduced to Rs. 10 lakhs. (A.Y. 2004-05, 2005-06)

ACIT v. Agility Logistics (P) Ltd. (2012) 136 ITD 46 / 76 DTR 212 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Misuse charges - Interest - Construction of commercial centre on plot in violation of master plan - Misuse charges and interest are not allowable as deduction

The assessee constructed commercial centre on plots in violation of master plan. It was held that misuse charges and interest paid by the assessee for the same not allowed as deduction. (A.Y. 2008-09)

ACIT v. Mohan Exports (P.) Ltd. (2012) 138 ITD 108 / (2013) 82 DTR 110/151 TTJ 667 (Delhi)(Trib.)

S. 37(1) : Business expenditure - Marketing and travelling expenses

The Tribunal observed that the disallowance had been sustained by the DRP mainly on the ground that assessee has been unable to justify the incurrence of such expenditure wholly and exclusively for the purpose of its business. Observations of DRP vide which the addition has been sustained cannot be said to be speaking observation to hold the matter against the assessee. Moreover, the Assessee had furnished a chart to show that all these expenses have been recovered as cost. A clear finding of fact has to be recorded on such arguments of the assessee. Assessee has also been able to show that most part of the cost is incurred on the media covering Indian territory. Matter is remanded for reconsideration. Regarding foreign travel expenses, when complete details are filed, disallowances cannot be made on adhoc basis. Expenses relating to travelling to Singapore having been allowed by DRP only on the ground that assessee has AE in Singapore and for other countries these expenses have not been allowed on the ground that travel to other countries was not justified. Such reason is not sufficient to make disallowance. (A.Y. 2007-08)

Symantec Software Solution (P) Ltd. v. ACIT (2012) 77 DTR 161 / 149 TTJ 554 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Payment of premium for purchase of its own shares from shareholder creating problem - Allowable as business expenditure as smoothens functioning of business

Expenditure incurred by the assessee company on payment of premium for purchase of its own shares from warring group of shareholders who were creating problems in the smooth functioning of the business and raising dispute which adversely affected day to day business of the assessee is revenue expenditure and is allowable as business expenditure. (A.Y. 2007-08)

Chemosyn Ltd. v. ACIT (2012) 139 ITD 68 / 19 ITR 6 / 149 TTJ 294 / 79 DTR 89 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Replacing old worn out mechanical yarn clearers - Revenue expenditure - Expenditure incurred on replacing old worn out mechanical yarn clearers held as revenue expenditure

Expenditure incurred on replacing old worn out mechanical yarn clearers with electronics yarn clearers is not new advantage to assessee, and hence, expenditure is held as revenue expenditure. (A.Y. 2007-08)

Prabhu Spinning Mills P. Ltd. v. Dy. CIT (2012) 19 ITR 106 (Chennai)(Trib.)
Sudhan Spinning Mills P. Ltd. v. Dy. CIT (2012) 19 ITR 106 (Chennai)(Trib.)

S. 37(1) : Business expenditure - Fine - Transporter of goods - Held not allowable

Assessee is engaged in the business of transport of goods. Police authorities levied penalty in the course of regulating the traffic. The Tribunal held that whatever may be the reason for paying penalty, it is paid for violation of traffic rules, therefore, it is against the public policy and hence such payment cannot be allowed as business expenditure. (A.Y. 2006-07)

T. T. Kuruvilla v. Dy. CIT (2012) 77 DTR 278 (Cochin)(Trib.)

S. 37(1) : Business expenditure - Expenditure incurred on a director for studies abroad

No bond executed by director that she would work for the assessee company after she completes the course and on failure shall return the money spent - said director had applied for the said course even before she completed her graduation and joined the same in continuation. Expenditure was not wholly and exclusively for business of assessee company, hence not allowable as business expenditure. (A.Y. 2006-07)

Natco Exports (P) Ltd. v. CIT (2012) 78 DTR 37 / 345 ITR 188 / 206 Taxman 491 (Delhi)(Trib.)

S. 37(1) : Business expenditure - Capital or revenue - Repairs and maintenance of drilling rigs and its auxiliary equipments is of revenue in nature

Expenditure was incurred on upkeep, servicing and maintenance of drilling rigs and its auxiliary equipments. Equipments had been already installed and the expenditure was incurred purely towards repairs and maintenance of the same. Expenditure was incurred on procurement of stores, spares, consumables, etc. These consumable items do not have substantial life and are required to be replaced frequently. Further, it was incorrect to contend that the impugned expenditure was incurred prior to the commencement of business. As per the details of expenditure placed on record, same was incurred after the date of acquisition of business. No capital asset had come into existence whereby assessee has obtained enduring benefit. Therefore, the expenditure in question is revenue in nature. (A.Y. 2004-05 to A.Y. 2006-07)

Addl. DIT (International Taxation) v. Dalma Energy LLC (2012) 78 DTR 219 / 150 TTJ 70 (Ahd.)(Trib.)

S. 37(1) : Business expenditure - Set up of business - Commencement of business - Business of assessees should be considered to be set up from date when water was supplied through main canals during current year and all revenue expenditure after that date had to be allowed as deduction

A company can be said to have set up its business from date when one of categories of its business is started and it is not necessary that all categories of its business activities must start either simultaneously, or that last stage must start before it can be said that business was set up. Test to be applied is as to when a businessman would regard a business as being commenced and approach must be from a commonsense point of view. Assessee corporation had object to promote government irrigation and water supply in State. It was claim of assessee that during year under consideration it had started activity of supplying water to people through its canal from Narmada Dam. It claimed that all expenditure incurred by it for purpose of carrying on its business had to be allowed as deduction. Assessee in fact achieved purpose for which it was established and mere fact that entire stretch of canal up to desired destination was not completed would not be sufficient to hold that assessee's business was not set up/commenced. Business of assessees should be considered to be set up from date when water was supplied through main canals during current year and all revenue expenditure after that date had to be allowed as deduction. (A.Y. 2001-02)

Sardar Sarovar Narmada Nigam Ltd. v. ACIT (2012) 138 ITD 203 / 149 TTJ 809 / 78 DTR 172 (SB) / 19 ITR 133 (Ahd.)(Trib.)

S. 37(1) : Business expenditure - Provision for Warranty - Warranty clause in sale document - Allowable as deduction

Where warranty clause was part of sale document and it imposed a liability upon assessee to discharge its obligations under said clause for period of warranty, provision made for warranty charges was to be allowed as deduction. (A.Y. 2005-06)

Sree Rayalaseema Green Energy v. Dy. CIT (2012) 139 ITD 139 (Hyd.)(Trib.)

S. 37(1) : Business expenditure - Capital or revenue - Non-compete fee is a capital expenditure not allowable as revenue expenditure

It was held that the amount paid for non-compete fees is capital outlay and same cannot be allowed as revenue expenditure under section 37(1). Further, since amount is not in nature of revenue expenditure, a part of it cannot be considered as deferred revenue expenditure so as to allow over period of non-compete agreement. (A.Y. 1996-97)

NELITO Systems Ltd. v. Dy. CIT (2012) 139 ITD 321 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Lump-sum amount paid for licensed trade mark and brand name for period of 10 years is allowed as revenue expenditure

Assessee-company entered into an agreement with a foreign company for use of trade mark and brand name of said company on its licensed products for a period of 10 years. It was held that where lump-sum royalty was paid to a foreign company for use of its brand name and trade work for 10 years, 25 percent of said payment was to be allowed as depreciation whereas balance 75 per cent was to be allowed as revenue expenditure. (A.Y. 2005-06)

Fenner (India) Ltd. v. ACIT (2012) 20 ITR 48 (Chennai)(Trib.)

S. 37(1) : Business expenditure - Foreign travel expense - Incurred to explore possibility of expansion of business - Deduction allowed even when the orders not booked due to commercial reasons

Where foreign travel expenses are for exploration of possibility of expansion of business, they are allowable even though object for such expenditure incurred has not been materialized i.e. even when the orders are not booked due to commercial reasons. (A.Y. 2005-06)

I. J. Tools & Castings (P.) Ltd. v. ACIT (2012) 139 ITD 414 (Amritsar)(Trib.)

S. 37(1) : Business expenditure - Capital or revenue - Expenditure on software packages - Revenue in nature

Expenditure incurred on development of various software packages for being sold is revenue expenditure. (A.Y. 2003-04, 2004-05, 2007-08)
Opus Software Solutions Ltd. v. ACIT (2012) 139 ITD 427 (Pune)(Trib.)

S. 37(1) : Business expenditure - Reimbursable pre-operative expenses from holding company is not allowable as business expenditure
Impugned expenditure has not been routed through P&L A/c but has been shown in the balance sheet. When the expenditure was incurred, the amount was shown as receivable from the holding company and when the amount was reimbursed, the same was credited to the pre-operative expenses account. Assessee has not claimed any deduction for the expenditure in the year under consideration. In this year the only incident was of reimbursement of the expenditure by the holding company. Therefore, Assessing Officer was not justified in disallowing the same. (A.Y. 2003 - 2004)
American Express (India) (P) Ltd. v. JCIT (2012) 79 DTR 127 / 150 TTJ 316 (Delhi)(Trib.)

S. 37(1) : Business expenditure - Capital or revenue expenditure - Entertainment expenses - Omission of section 37(2) - Once Legislature deleted certain artificial disallowances, those cannot be again covered by the Assessing Officer under section 37(1). [S. 37(2)]
The Assessing officer disallowed entertainment expenses despite omission of section 37(2) with effect from 1-4-1998. He held that such disallowances hitherto included in section 37(2A) would henceforth be covered under section 37(1). It was held that importing of crux of section 37(2) by Assessing Officer in section 37(1), was obviously not mandate of omission of provision. Hence once Legislature has deleted certain artificial disallowances, those cannot be again covered by Assessing Officer in section 37(1). Therefore, disallowance made by Assessing Officer was not justified. (A.Y. 1998-99 to 2000-01)
ADIT (IT) v. Credit Lyonnais (2013) 21 ITR 359 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Prior period expenses - Held to be not allowable
Assessee claimed deduction in respect of audit fee and purchase of raw material. Assessing Officer rejected assessee's claim holding that said expenses were prior period expenses. Tribunal held that as regards audit fee, since audit was carried out in earlier years, even if bill was not received in previous year, expenses should have been considered in respective year and hence deduction was not allowable in year under consideration. As regards raw material cost, since assessee failed to bring any material on record to show in support of its case that there was any dispute regarding payment to be made to supplier and said dispute was settled in relevant year, no case was made out for deduction, hence disallowance was held to be justified. (A.Y. 2002-03, 2003-04)
Cadila Pharmaceuticals Ltd. v. ACIT (2012) 53 SOT 356 / 147 TTJ 49 (Ahd.)(Trib.)

S. 37(1) : Business expenditure - Debentures - Interest - Held to be allowable
Assessee-company issued optionally convertible debentures to another company. Assessee had debited interest on debentures in profit and loss account and claimed deduction of same. OCDs had been converted to equity shares of assessee-company. The Tribunal held that interest on debentures could not be treated as contingent liability and accordingly, same was to be allowed. Whether debentures, fully or partly or optionally (OCDs) are nothing but debt till date of conversion and any interest paid on these debentures is allowable as normal business expenditure. (A.Y. 2008-09)
Dy. CIT v. UAG Builders (P.) Ltd. (2012) 53 SOT 370 (Delhi)(Trib.)

S. 37(1) : Business expenditure - Business activities or rental income - Matter was set aside for verification [S. 24(b)]
Assessee claimed deduction of expenses of certain amount under head 'business expenditure' Tribunal held that since no material was brought on record indicating fact that assessee had carried

out business activities and assessee had only shown rental income against which only expenses enumerated in section 24(b) could be allowed, claim of assessee could not be allowed. The Assessee also claimed financial expenses and alleged that interest bearing funds were used for raising construction. Claim was rejected on ground that assessee failed to establish as to how interest bearing funds were used for raising construction, which enabled assessee to earn rental income. Assessee filed a bank certificate contending that it had raised unsecured loans from individuals for construction and those loans were repaid by taking a term loan from bank. It was held that revenue authorities had failed to look into accounts of assessee for earlier years and, therefore, it was appropriate to set aside these issues to file of Assessing Officer for verification and re-adjudication. (A.Y. 2008-09)
Rare Garments (P.) Ltd. v. ACIT (2012) 53 SOT 374 (Delhi)(Trib.)

S. 37(1) : Business expenditure - New line of business - Development cost of earlier business which was discontinued is not allowable as revenue expenditure
Assessee-company, doing business of offset printing and typesetting, it developed land and constructed factory in it. Land and building became part of business assets. Later on assessee shifted its business into new line of business being real estate development and converted land and building into stock in trade. Assessee demolished factory building and had used factory land for putting up construction of dwelling units and sold same. Assessee claimed that development cost incurred earlier for land portion was now to be allowed as business expenditures. Since business in respect of which said development cost had been incurred was discontinued, same could not be claimed as revenue expenditure in respect of another business being real estate business. Held in favour of revenue. (A.Y. 2006-07 & 2007-08)
Dy. CIT v. Rajeswari Foundations Ltd. (2012) 53 SOT 569 (Chennai)(Trib.)

S. 37(1) : Business expenditure - Travelling expenses - Director - Expenditure to attend board meeting held to be allowable as business expenditure
Travelling expenses were incurred by assessee-company on travel of its director so as to enable him to attend Board meetings and to file various documents before various authorities, assessee's claim for deduction was to be allowed. (A.Y. 2006-07)
ITO v. RSG Media (P.) Ltd. (2012) 53 SOT 588 (Delhi)(Trib.)

S. 37(1) : Business expenditure - Year of deduction - Commission - Held to be allowable in the year of sale
During assessment proceedings, Assessing Officer rejected assessee's claim in respect of commission paid to foreign agents. On appeal, it was noted that liability to pay commission had arisen by virtue of sales in relevant financial year. In this regard, realization of sale amount in next financial year would not make much difference as liability to pay commission had crystallised in year of sale itself. The Tribunal held that in view of above, assessee's claim for deduction in respect of commission payment was to be allowed. (A.Y. 2005-06)
Devendra Exports (P.) Ltd. v. ACIT (2012) 54 SOT 220 (Chennai)(Trib.)

S. 37(1) : Business expenditure - Common services - Expenditure held to be allowable
Assessee-company was engaged in business of purchase and sale of software. It had entered into an agreement with SSL for availing common services in areas of finance, accounts, taxation, legal administration, HRD, etc. Assessing Officer disallowed assessee's claim of expenditure by holding that assessee did not prove with supporting evidence that services were in fact rendered by SSL. Tribunal held that the assessee had given detailed statement of various expenditure and how same were allocated, further, service charges recovered from assessee were shown as income in SSL's account. Accordingly the expenses was held to be allowable as business expenditure. (A.Y. 2008-09)
Sonata Information Technology Ltd. v. Dy. CIT (2012) 54 SOT 233 / 19 ITR 408 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Capital or revenue expenditure - Renovation of leased building is revenue in nature

Expenditure on renovating leased building. Expenditure incurred by assessee under the head "Repairs" by renovating the building to improve the bad conditions of the building and to prevent further deterioration is revenue in nature. (A.Y. 1998-99 & 1999-2000)

Dy. CIT v. Sandoz (P.) Ltd. (2012) 137 ITD 326 / 80 DTR 129 (Mum.)(Trib.)

S. 37(1) : Business expenditure - CENVAT credit written off - Allowable as business expenditure

Assessee is engaged in business of manufacture and trading of yarn and fibre, closed down its manufacturing unit. Consequently, benefit of Cenvat credit, which was not availed of against excise duty payable on manufactured items, could not be utilized by assessee and credit available in CENVAT account, which was adjustable only against excise duty payable on products manufactured by assessee, remained unadjusted in absence of any excisable finished goods. Assessee wrote off said credit and claimed same as business expenditure. Write off of Cenvat credit was allowable as business expenditure under section 37(1). (A.Y. 2006-07)

Mohan Spg. Mills v. ACIT (2012) 54 SOT 524 (Chd.)(Trib.)

S. 37(1) : Business expenditure - Distribution of dividend is application of income not allowable as expenditure

Distribution of dividend is application of income and not an expenditure laid out for earning income and, therefore, assessee's claim for deduction under section 37(1) in respect of payment of dividend was to be rejected. (A.Y. 1992-93 to 1995-96)

Hindustan Petroleum Corpn. Ltd. v. Dy. CIT (2012) 54 SOT 315 (Mum.)(Trib.)

S. 37(1) : Business expenditure - 20 point programme - Entertainment expenses - 20 Point programme allowed - Disallowance of entertainment expenses confirmed

Following the order passed by the Tribunal in assessee's own case relating to assessment year 1989-90, assessee's claim for expenditure on 20 point programme was to be allowed. The assessee claimed 50 per cent of the expenditure incurred towards entertainment as attributable to the staff of the assessee on estimate basis, which was reduced by the Assessing Officer to 25 per cent. In the absence of any material and details regarding the exact number of staff and guest on various occasions, there was no reason to interfere with the orders of the Assessing Officer on this issue. (A.Y.1992-93 to 1995-96)

Hindustan Petroleum Corpn. Ltd. v Dy. CIT (2012) 54 SOT 315 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Capital or revenue - Consultation fees for upgradation of management information is revenue expenditure

Payment of professional fees paid to consultant for upgradation of management information system in connection with existing business is revenue expenditure. Claim not to be disallowed merely there were no agreements. (A.Y. 1999-2000)

KEC International Ltd. v. Dy. CIT (2012) 20 ITR 282 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Pre-operative expenses - Foreign projects

Pre-operative expenses in relation to foreign projects is allowable. (A.Y. 1999-2000)

KEC International Ltd. v. Dy. CIT (2012) 20 ITR 282 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Capital or revenue expenditure - Voluntary retirement scheme

Expenses on payments under voluntary retirement scheme is allowable as revenue expenditure. (A.Y. 1999-2000)
KEC International Ltd. v. Dy. CIT (2012) 20 ITR 282 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Sales commission - Held allowable
The tribunal after considering the evidence that commission agents had rendered services, sales commission deductible. (A.Y. 2005-06, 2006-07)
Suzlon Energy Ltd. v. Dy. CIT (2012) 20 ITR 391 / 57 SOT 54 (URO)(Ahd.)(Trib.)

S. 37(1) : Business expenditure - Commission paid to director - No contract for any services and no evidence of any services by director - Commission not deductible
The commission paid was disallowed by the Assessing Officer and Commissioner(Appeals). On appeal to Tribunal, the Tribunal held that Commission cannot be allowed as an expenditure simply because, it is approved by the Board and it is in accordance with the provisions of the Companies Act, 1956. An expenditure which falls within the ambit of section 37 of the Income-tax Act, 1961 can be allowed, if it is incurred wholly and exclusively for the purpose of business. On the facts the assessee had failed to prove that the expenditure incurred was wholly and exclusively for the purpose of business. The commission was not deductible. (A.Y. 2005-06)
Orient Longman P. Ltd. v. JCIT (2012) 20 ITR 664 / (2013) 57 SOT 58 (URO) (Hyd.)(Trib.)

S. 37(1) : Business expenditure - Foreign travel expenses – Matter remanded
Expenses incurred on business and pleasure trips. Tribunal gave direction to Assessing Officer to bifurcate expenses of business and pleasure trips and disallow expenditure relating to pleasure trips, matter remanded. (A.Y. 2005-06)
Creamline Dairy Products Ltd. v. Dy. CIT (2012) 139 ITD 510 / 20 ITR 510 (Hyd.)(Trib.)

S. 37(1) : Business expenditure - Contribution for construction of collector's office held allowable
Tribunal held that, contribution by assessee for construction of Collector's office at request of Collector and District Magistrate and the offer to exhibit assessee's name at an appropriate place, expenditure for purposes of business hence deductible. (A.Y. 2004-05)
Torrent Power Ltd. v. Dy. CIT (2012) 20 ITR 653 / (2013) 58 SOT 6 (URO)(Ahd.)(Trib.)

S. 37(1) : Business expenditure - Expenditure on cars and telephones - Disallowance of one-fifth for personal use is held to be reasonable [S. 38(2)]
The Assessing Officer disallowed one-fifth of conveyance expenses, vehicle maintenance expenses and telephone expenses claimed by the assessee, on the ground that personal use of vehicles and telephones was not ruled out. The Commissioner(Appeals) upheld the disallowance. On appeal the Tribunal held that since personal use of cars and telephones by the karta of the assessee Hindu undivided family and his family members or staff had not been denied nor was it claimed that the karta or his family members had any independent vehicles or telephones for personal use, disallowance of one fifth of the conveyance expenses, expenses on running and maintenance of vehicles as also expenses on telephones and mobile telephones, in the light of the provisions of section 38(2) of the Act, was reasonable. (A.Y. 2008-09)
Arun Kumar Gupta (HUF) v. ACIT (2012) 20 ITR 727 / (2013) 54 SOT 509 (Delhi)(Trib.)

S. 37(1) : Business expenditure - Trade mark - Allowed as revenue expenditure in earlier year - Allowable in current year also

Expenditure on acquisition of trade mark written off was allowed as business expenditure in earlier years. The Tribunal held that same is also allowable in assessment years 2002-03 and 2003-04. Order of Commissioner(Appeals) set aside. (A.Y. 2002-03 & 2003-04)
Mettler Toledo India P. Ltd. v. ITO (2012) 20 ITR 461 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Registration charges as per statutory requirement got itself registered under Anti-National Drug Application (ANDA) in USA for selling drug is allowable as expenditure
Where assessee as per statutory requirement got itself registered under Anti-National Drug Application (ANDA) in USA for selling its pharmaceutical products and bulk drugs in USA market without any hinderance, expenditure incurred on said registration would be allowable as business expenditure as it was for business purposes. (A.Y. 2007-08)
USV Ltd. v. Dy. CIT (2012) 54 SOT 615 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Computer software expenses - Matter remanded
Assessee incurred computer software expenses and claimed same as revenue in nature. Assessing Officer noted that assessee could not substantiate its claim by producing relevant documents and treated same as capital expenditure .Since no proper examination of issue had been carried out by Assessing Officer, matter was to be remitted back for reconsideration. (A.Y. 2005-06)
Timken Engineering & Research India (P.) Ltd. v. Dy. CIT (2012) 54 SOT 195 (URO)(Bang.)(Trib.)

S. 37(1) : Business expenditure - Keyman policy - Firm partners - Allowable as business expenditure
Premium paid on Keyman insurance policy taken by assessee-firm on life of its partners is allowable as revenue expenditure. (A.Y. 2006-07)
Emdee Apparels v. ACIT (2012) 54 SOT 600 / 19 ITR 623 (Bang.)(Trib.)

S. 37(1) : Business expenditure - Expansion of business - Setting up a new showroom - Expenditure on lease hold premises - Revenue expenditure
Setting up a new showroom would amount to only an expansion of existing business and not setting up of new business, therefore, expenditure incurred for purpose of setting up new showrooms is revenue expenditure. Expenditure incurred on civil and electrical works on leasehold premises is revenue expenditure and not capital expenditure. (A.Y. 2006-07)
Emdee Apparels v. ACIT (2012) 54 SOT 600 / 19 ITR 623 (Bang.)(Trib.)

S. 37(1) : Business expenditure - Illegal payments - Payments to municipality for violation of municipality law, not allowable as deduction
Assessee violated municipal laws by running shop in a residential premises. He was therefore required to pay certain amount towards annual conversion charges to civic agency for carrying out commercial activities besides one-time charges for parking and registration of commercial property. Assessee claimed said amount as revenue expenditure. Amount having been paid for violation of Municipal laws for misuse of property would not be allowable in view of Explanation 1 to section 37(1). (A.Y. 2008-09)
Arun Kumar Gupta (HUF) v. ACIT (2012) 20 ITR 727 / (2013) 54 SOT 509 (Delhi)(Trib.)

S. 37(1) : Business expenditure - Stock option - Not allowable as business expenditure as the loss being notional
Assessee claimed Rs. 3.69 crores in respect of employee cost it incurred to reward its employees by giving them employees' stock option scheme; employee cost being difference between fair market

value of shares offered to employees on date of grant of option and prices at which they were offered to employees. Assessing Officer, however, denied said claim on ground that expenditure had been incurred for increasing share capital of assessee. Following orders of Tribunal in cases of VIP Industries [IT Appeal Nos. 7242 & 1004 (Mum.) of 2008] Ranbaxy Laboratories Ltd. v. Addl. CIT (2010) 39 SOT 17 (Delhi)(URO)(Trib.) and PVR Ltd. [IT Appeal No. 1897 (Delhi) of 2010] wherein it was held that by issuing shares at below market price, same does not result into incurring of any expenditure rather it results into short receipt; that such loss amounts to notional loss which is not allowable under Income-tax Act, order of Assessing Officer was to be upheld. (A.Y. 2006-07)
Mahindra & Mahindra Ltd. v. Dy. CIT (2012) 54 SOT 146 (URO)(Mum.)(Trib.)

S. 37(1) : Business expenditure - Warranty liability - Assessee has to provide scientific basis - Matter remanded
Assessee claimed allowance for warranty liabilities to the tune of Rs. 44.20 crores. Assessing Officer denied same on ground that assessee did not furnish method of calculation of provision for warranty. Since in instant case assessee did not provide any material with regard to warranty liability, issue was to be remitted back to file of Assessing Officer to be decided as per guidelines framed by Supreme Court in Rotork Controls India (P.) Ltd. v. CIT (2009) 314 ITR 62 / 180 Taxman 422 .Matter remanded. For claiming allowance for warranty liability one has to furnish a fair, reasonable and scientific basis to Assessing Officer, and to arrive at conclusion that assessee is following a reasonable and scientific method, facts and figures of earlier years are essential. (A.Y. 2006-07)
Mahindra & Mahindra Ltd. v. Dy. CIT (2012) 54 SOT 146(URO) (Mum.)(Trib.)

S. 37(1) : Business expenditure - Capital or revenue - Premium on redemption of foreign currency convertible bonds is revenue in nature
Assessee paid premium of Rs. 5.39 crores on redemption of 'foreign currency convertible bonds'. Assessing Officer disallowed payment of said premium on ground that FCCBs were convertible into shares and therefore, could not be construed as borrowing; that they increased capital base of company and, therefore, expenditure incurred thereupon was capital in nature. Following judgments of Crane Software International Ltd. (IT Appeal nos. 741 and 742 (Bang.) of 2010, CIT v. Secure Meters Ltd. (2010) 321 ITR 611 / (2008) 175 Taxman 567 (Raj.) and CIT v. ITC Hotels Ltd. (2011) 334 ITR 109 / (2010) 190 Taxman 430 (Karn.) expenditures incurred in connection with FCCBs were to be treated as revenue in nature. (A.Y. 2006-07)
Mahindra & Mahindra Ltd. v. Dy. CIT (2012) 54 SOT 146 (URO)(Mum.)(Trib.)

S. 37(1) : Business expenditure - Capital or revenue - Know-how - Depreciation - Expenditure on know how capital and expenditure on tools is revenue [S. 32]
Assessee incurred expenditure of Rs. 1.08 crores in connection with development of Euro IV compliant engine, under an agreement with an foreign entity. Said expenditure was claimed as business expenditure. Assessing Officer, however, treated said expenditure to be capital in nature being incurred for acquiring technical know-how. Accordingly, Assessing Officer allowed depreciation on said expenditure under section 32(1)(ii). Since on facts, under terms of agreement with foreign entity, technical know-how were to remain with assessee and final product was to be exclusive property of assessee, decision of Assessing Officer in allowing depreciation under section 32 was as per law. However, expenditure on tools and spares to tune of Rs. 40.39 lakh were revenue in nature. (A.Y. 2006-07)
Mahindra & Mahindra Ltd. v. Dy. CIT (2012) 54 SOT 146 (URO)(Mum.)(Trib.)

S. 37(1) : Business expenditure - Capital or revenue - Expenditure on acquisition of entities is capital in nature

Assessee was a manufacturer of tractors, jeeps and motor vehicles. It incurred expenditure of Rs. 7.97 crores on acquisition of foreign and Indian entities under acquisition agreements. Since on facts expenditure incurred for acquisitions was not for preserving and maintaining existing asset of assessee, rather it was incurred for securing tangible or intangible property and corporeal and incorporeal rights of acquired entities, it was capital in nature. Order of Assessing Officer was confirmed. (A.Y. 2006-07)
Mahindra & Mahindra Ltd. v. Dy. CIT (2012) 54 SOT 146 (URO)(Mum.)(Trib.)

S. 37(1) : Business expenditure - Bank charges to lead mangers is revenue in nature Following the judgment in India Cement Ltd. v. CIT (1966) 60 ITR 52 (SC), issue as to expenditure incurred for bank charges to the lead manager was to be decided in favour of assessee by holding that said charges were revenue in nature. (A.Y. 2006-07)
Mahindra & Mahindra Ltd. v. Dy. CIT (2012) 54 SOT 146 (URO)(Mum.)(Trib.)

S. 37(1) : Business expenditure - Bonus shares - Stamp duty - Revenue in nature
Following the judgment of the Supreme Court in the case of CIT v. General Insurance Corpn. (2006) 286 ITR 232 / 156 Taxman 96, issue as to allowability of expenditure incurred on stamp duty and registration for issue of bonus shares was to be decided in favour of the assessee, by holding same to be revenue in nature. (A.Y. 2006-07)
Mahindra & Mahindra Ltd. v. Dy. CIT (2012) 54 SOT 146 (URO)(Mum.)(Trib.)

S. 37(1) : Business expenditure - Foreign currency convertible bonds - Revenue in nature
Following the order of the Tribunal dated 29-10-2009 in ITA/7845/Mum/2004 which was passed in assessee's own case for the assessment year 1997-98, issue as to allowability of expenditure incurred for issue of foreign currency convertible bonds was to be decided in favour of assessee, by holding that same was revenue in nature. (A.Y. 2006-07)
Mahindra & Mahindra Ltd. v. Dy. CIT (2012) 54 SOT 146 (URO)(Mum.)(Trib.)

S. 37(1) : Business expenditure - Provision for pending labour demand - Revenue expenditure
Following earlier order of the Tribunal in assessee's own case, issue as to allowability of provision for pending labour demand was to be decided in favour of assessee. (A.Y. 2006-07)
Mahindra & Mahindra Ltd. v. Dy. CIT (2012) 54 SOT 146 (URO)(Mum.)(Trib.)

S. 37(1) : Business expenditure - Entrance fee to various clubs - Revenue in nature
Issue of allowability of entrance and membership fees of various clubs, which was disallowed by the Assessing Officer on ground of its being capital in nature giving enduring benefit, was to be remitted to the Assessing Officer for reconsideration by taking note of judgments of Gujarat State Export Corporation Ltd. v. CIT (1994) 209 ITR 649 / (1995) 80 Taxman 568 (Guj.) and New India Extrusions (P.) Ltd. v. ACIT (2011) 10 taxmann.com 165 / 46 SOT 14 (Mum.)(URO). (A.Y. 2006-07)
Mahindra & Mahindra Ltd. v. Dy. CIT (2012) 54 SOT 146 (URO)(Mum.)(Trib.)

S. 37(1) : Business expenditure - Capital or revenue - Software expenditure - Held to be revenue
Tribunal held that in view of decisions of CIT v. Asahi India Safety Glass Ltd. (2011) 203 Taxman 277 / 15 taxmann.com 382 (Delhi), CIT v. Raychem RPG Ltd. (2012) 21 taxmann.com 507 (Bom.) and Amway India Enterprises v. Dy. CIT (2008) 111 ITD 112 (Delhi)(SB), the software expenditure incurred by assessee were held to be revenue in nature. (A.Y. 2007-08)
R. R. Kabel Ltd. v Addl. CIT (2012) 54 SOT 374 (Mum.)(Trib.)

S. 37(1) : Business expenditure - Web site expenses - Held to be revenue in nature

Tribunal held that in view of decisions in Radial Marketing (P.) Ltd. v. ITO (IT Appeal No. 3868 (Mum.) of 2008, dated 19-5-2009), Polyplex Corpn. Ltd. v. ITO (2009) 176 Taxman 56 (Delhi)(Mag.) and CIT v. Indian Visit.com (P.) Ltd. (2009) 176 Taxman 164 (Delhi) website expenses were held to be allowable as revenue expenditure. (A.Y. 2007-08)
R. R. Kabel Ltd. v Addl. CIT (2012) 54 SOT 374 (Mum.)(Trib.)

S. 37(3) : Business expenditure - Guest House expenses - Expenditure incurred to accommodate touring employees is in the nature of guest house hence disallowance is justified
Assessee was not maintaining a separate guest house, but was accommodating touring employees in the house of the estate manager itself. Contention of the assessee that the expenditure in question being amounts reimbursed to the estate manager for the expenses incurred by him in accommodating touring employees is not covered by section 37(3) cannot be sustained since section 37(3) referred to inter alia, any expenditure incurred by an assessee on maintenance of any residential accommodation in the nature of guest house or in connection with travelling by an employee or any other person (including hotel expenses or allowances paid in connection with such travelling). It cannot be contended that reimbursement of expenses to the estate manager was not for providing accommodation to touring employees and hence, it would not come within the ambit of sub-section (3) of section 37. (A.Y. 1989-90 to 1990-91)
Parry Agro Industries Ltd v. JCIT (2012) 79 DTR 204 (Ker.)(HC)

S. 40(a)(i) : Amounts not deductible - Deduction at source - Non-resident - Commission - Agent - Business connection - Tax is not deductible at source [S. 195]
Assessee has paid sales commission to its holding company Eon Technology UK. The Court held that, when a non-resident agents operates outside the country, no part of income arises in India and since payment is remitted directly abroad and merely because an entry in the books of account is made in India, it does not mean that non-resident has received any payment in India, therefore, assessee is not liable to deduct tax at source hence, no disallowance can be made by applying the provision of section 40(a)(i). (A.Y. 2007-08)
CIT v. Eon Technology (P) Ltd. (2012) 343 ITR 366 / 246 CTR 40 / (2011) 203 Taxman 266 / 64 DTR 257 (Delhi)(HC)

S. 40(a)(i) : Amounts not deductible - Deduction at source - Non-resident - Installation and commissioning services integral part of supply and not assessable as 'fees for technical services' despite separate contract [S. 9(1)(vii)]
The assessee is engaged in the business of engineering and general contracting. In the revised return of income, assessee did not make a disallowance under section 40(a)(ia) in respect of installation charges to M/s. Mesto Automation SCADA Solutions Ltd. on the ground that the said amount was paid in relation to plant and machinery supplied by M/s. Mesto Automation SCADA Solutions Ltd. and the said amount not being chargeable to tax in India in the hands of said party as per the Explanation 2 to section 9(1)(vii), it was not liable to deduct tax at source from the said amount. There were two agreements; one for supply of equipment another for installation and commissioning work which itself made it clear that the installation and commissioning work are different from the supply of plant. The Tribunal held that, though there was a separate contract for supply and a separate one for installation and commissioning services, the said services held to be treated as 'ancillary and subsidiary as well as inextricable and essentially linked to the sale/supply of the equipment' and, therefore , was not chargeable to tax in the hands of the Canadian company as 'fees for technical services' consequently the disallowance under section 40(a)(i) was not sustainable. Installation and commissioning services are integral part of supply and not assessable as 'fees for technical services' despite separate contract. Appeal of revenue was dismissed. (A.Y. 2002-03)
Dy. CIT v. Dodsal Pvt. Ltd. (2013) 140 ITD 334/90 DTR 55 (Mum.)(Trib.)

S. 40(a)(i) : Amounts not deductible - Deduction at source - Non-resident - Royalty - Retrospective amendment of law - DTAA - India-Thailand - Due to retrospective amendment of law, No obligation for TDS as the law cannot compel a person to do something which is impossible to perform [S. 9(1)(vi), Art. 7]

The assessee is a company engaged in the business of financing, leasing, hire purchase, production and distribution of internet media and manufacturing of towels. In the said year the video channel started by the assessee became functional. In the course of Video channel business the assessee entered in to an agreement with M/s. Shan Statelite Public Co. Ltd. (SSA). During the year the assessee paid the amount for the facility of up linking and telecasting programmes, broad casting and telecasting ,the consultation charges to SSA in foreign exchange without deduction of tax at source. The payment was made on the certificate issued by the Chartered Accountant, that the said payment constituted business income of that non-resident party and since they did not have a Permanent Establishment (PE) in India, business income earned by them was not chargeable to tax in India in accordance with the Article 7 of DTAA between India and Thailand, and thus, no tax at source was therefore deductible. The Tribunal following the judgment of Ahmedabad Tribunal in the case of Sterling Abrasive Ltd dated 23-12-2010 held that the assessee cannot be held to be liable to deduct tax at source relying the subsequent amendments made in the Act with retrospective effect. Further, the Tribunal relied on the legal maxim 'Lex non cogit ad impossibia' meaning thereby that the law cannot possibly compel a person to do something which is impossible to perform, and on the decision of Hon'ble Supreme Court in the case of Krishna Swamy S. PD and another v. UOI and other (2006) 281 ITR 305 where in the said legal Maxim was accepted by the Hon'ble Court. Thus, Tribunal accordingly held that amount paid by the assessee to SSA was not taxable in India in the hands of SSA either under section 9(1)(vii) as per the legal position prevalent time and the assessee therefore was not liable to deduct tax at source from the said amount paid to SSA and there was no question of disallowing the said amount by invoking section 40(a)(i). In view of above the addition confirmed by the Commissioner(Appeals) was deleted. (A.Y. 2004-05)

Channel Guide India Ltd. v. ACIT (2012) 139 ITD 49 / 20 ITR 438 / (2013) 83 DTR 321/153 TTJ 432 (Mum.)(Trib.)

S. 40(a)(i) : Amounts not deductible - Deduction at source - Non-resident - Assessee deducted tax at source when the amount was credited hence no disallowance can be made on the ground that no tax was deducted at the time of payment [S. 195]

The assessee had entered into a research and know how agreement with AB Sandvik Coromant Sweden during A.Y. 1991-92. The Assessing Officer held that as the duration of agreement being five years the appellant is entitled to deduction of 1/5 of the amount for five years. The assessee deducted the tax on entire amount payable to the party concerned including the future installment payable. For the A.Y. 1994-95 the assessee had claimed the deduction of Rs. 42,89,872/- which included the fourth installment and exchange fluctuation loss of Rs. 8,82,234/-. The Assessing Officer disallowed the exchange fluctuation loss of Rs. 8,82,234/- on the ground that loss pertaining to earlier year. Commissioner(Appeals) directed the Assessing Officer to allow the loss subject to deduction of tax at source. The Assessing Officer held that as the tax was not deducted at source in respect of exchange fluctuation as there is violation of section 40(a)(i), which was upheld by the Commissioner(Appeals). The Tribunal held that as the tax was deducted at source when such income was actually credited to account of foreign party as per the prevailing foreign exchange rate, subsequently when such income was actually paid by foreign concern, same would not again invite deduction at source as per section 195(1). Accordingly the disallowance made by the Assessing Officer was deleted. (A.Y. 1994-95)

Sandvik Asia Ltd. v. JCIT (2012) 49 SOT 554 / 146 TTJ 644 (Pune)(Trib.)

S. 40(a)(i) : Amounts not deductible - Deduction at source - Non-resident - Interest [S. 2(28A), 195]

Usance interest is charged in connection with import of raw material. Usance interest paid to non-resident for availing 180 days credit facility on the value of goods imported was interest paid in respect of debt incurred and constituted interest within the meaning of section 2(28A), hence non deduction of tax therefrom under section 195(1) attracted disallowance under section 40(a)(i). Same cannot be considered as part of value of goods. (A.Y. 2002-03)

Uniflex Cables Ltd. v. Dy. CIT (2012) 78 DTR 118 / 150 TTJ 290 (Mum.)(Trib.)

S. 40(a)(i) : Amounts not deductible - Deduction at source - Outside India - Non-resident - DTAA - India-Russia - Activity carried on outside India - Amount remitted not liable to deduct tax at source [S. 195]

Remittance to Russian advertising company through Swiss parent company. Entire advertisement activity had been carried out outside India. DTAA with both Russia and Switzerland. Neither Russian company nor Swiss company having PE in India, amount remitted could not be taxed in India, hence no question of TDS. Disallowance of expenditure by invoking section 40(a)(i) was not sustainable. (A.Y. 1998-99 & 1999-2000)

Dy. CIT v. Sandoz (P) Ltd. (2012) 80 DTR 129 / 137 ITD 326 (Mum.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Retrospective - TDS amendment to give extended time for payment is retrospective

The assessee deducted tax at source from paid charges between the period 1.4.2005 & 28.4.2006 though it paid the TDS in July and August 2006. The TDS was deposited after the end of the F.Y. though before the due date of filing of the return of income. The Assessing Office invoked section 40(a)(ia) and held that as the TDS had not been paid on or before the last day of the previous year, the deduction was not admissible. The Tribunal allowed the assessee's claim. On appeal by the department, the High Court had to consider whether the amendment to section 40(a)(ia) by the F.Y. 2010 w.e.f. 1.4.2010 to provide that the TDS has to be paid on or before the due date for filing the ROI was prospective or retrospective. The High Court held dismissing the department's appeal:

In Allied Motors (P) Ltd. v. CIT (1997) 224 ITR 677 (SC) & CIT v. Alom Extrusions Ltd. (2009) 319 ITR 306 (SC), the Supreme Court held that the amendments to the aforesaid provision (section 43B) have retrospective application. Also, in R. B. Jodha Mal Kuthiala v. CIT (1971) 82 ITR 570 (SC), the Supreme Court held that a provision which was inserted as remedy to make a provision workable requires to be treated with retrospective operation so that reasonable deduction can be given to the section as well. In view of the authoritative pronouncement of the Supreme Court, this Court cannot decide otherwise. Hence the appeal is dismissed.(ITA no 302 of 2011 dt 23-11-2011)

CIT v. Virgin Creations (Cal.)(HC) www.itatonline.org

Editorial:- Special Judgement in Bharti Shipyard Ltd. v. Dy. CIT (2011) 132 ITD 53 (Mum.)(SB)(Trib.), may not be good law, requires reconsideration.

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Commission and brokerage - Failure to deduct tax liable to be disallowed [S. 37(1)]

Profit on sale of agricultural land by dividing and sub-dividing it into small plot of land immediately after acquiring it was assessable under the head business income and not exempt as sale of agricultural land, therefore the commission and brokerage paid on sale of such land was also disallowable under section 40(a)(ia) of the Act on account of failure to deduct tax at source on such payments made. (A.Y. 2005-06)

E. V. Mathai & Sons v. CIT (2012) 72 DTR 163 (Ker.)(HC)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Payment to contractors -Form No. 15-I - Once the assessee obtained Form No. 15-I from the sub-contractors whose contents are not disputed or whose genuineness is not doubted then the assessee is not liable to deduct tax from the payments made to sub-contractors. Once assessee is not liable to deduct tax under section 194C then disallowance under section 40(a)(ia) cannot be made [S. 194C]

The second Proviso to section 194C read with Rule 29-D provides that no tax need be deducted at source if the sub-contractor produces a declaration in Form 15-I that he does not own more than 2 goods carriages and the assessee (payer) furnishes a declaration in Form 15-J to the CIT on or before 15th June of the F.Y. The assessee obtained Form 15-I from the sub-contractors but did not file Form 15-J with the CIT within the prescribed due date. The Assessing Officer & CIT(A) held that as there was a breach of the requirement of section 194-C, the assessee ought to have deducted TDS under section 194-C and as it had failed to do so, the expenditure had to be disallowed under section 40(a)(ia). On appeal by the assessee, the Tribunal (order included) reversed the lower authorities. On appeal by the department to the High Court, held dismissing the appeal:

Once the assessee obtained Form No.15-I from the sub-contractors whose contents are not disputed or whose genuineness is not doubted then the assessee is not liable to deduct tax from the payments made to sub-contractors. Once assessee is not liable to deduct tax under section 194C then disallowance under section 40(a)(ia) cannot be made. The assessee's breach of the requirement to furnish details to the income tax authority in the prescribed form within prescribed time may attract other consequences but cannot result in a section 40(a)(ia) disallowance. (A.Y. 2006-07)(ITA no 1182 of 2011 dt 1/10/2012)

CIT v. Valibhai Khanbhai Mankad (2013) 216 Taxman 18 (Guj.)(HC)

Editorial:- Judgment of Tribunal Valbhai Khanbhai Mankad v. Dy. CIT (2011) 56 DTR 89 / 46 SOT 469 / 139 TTJ 70 (Ahd.)(Trib.) is affirmed.

S. 40(a)(ia) : Amount not deductible - VSAT and Lease Line charges - Payment made to Stock Exchange was not for technical services hence provisions of section 194J r.w.s. Explanation 2 of section 9(1)(vii) is not applicable. The assessee was not liable to deduct Tax at Source [S. 9(1)(vii), 194J]

The following two questions were raised before the High Court by the revenue:

"(A) Whether on the facts and in the circumstances of the case and in law the Hon'ble Tribunal was justified in holding the VSAT and Lease Line charges paid to the Stock Exchange by the Assessee Company were allowable as a deduction from taxable Income even though the Assessee Company had failed to deduct TDS thereon?

(B) Whether on the facts and in the circumstances of the case and in law the Hon'ble Tribunal was justified in holding that VSAT and Lease Line charges paid to the Stock Exchange by the Assessee Company were not paid in consideration of technical services rendered by the Stock Exchange within the meaning of Section 194J read with Explanation 2 to Section 9(1)(vii) of the Income tax Act.?"

The Court held that as regards first two questions are concerned, the findings of fact recorded by the ITAT is that VSAT and Lease Line charges paid by the assessee to Stock Exchange were merely reimbursement of the charges paid / payable by the Stock Exchange to the Department of Telecommunication. Since the VSAT and Lease Line charges paid by the assessee do not have any element of income, deducting tax while making such payments do not arise. Hence, question Nos. (A) and (B) cannot be entertained.

The Income Tax Commissioner Mumbai City v. Angel Capital & Debit Market Ltd. ITA (L) No. 475 of 2011, dt. 28/07/2011 (Bom.)(HC) (unreported)

Editorial:- ITA No. 5560/M/2009, A.Y. 2006-07, Bench "D" Dated 29/10/2010 Dy. CIT v. Angel Capital & Debit Market Ltd.

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Special Bench verdict that section 40(a)(ia) applies only to "amounts payable" stayed

In Merilyn Shipping & Transports v. ACIT (2012) 146 TTJ 1 (Vizag), the Special Bench held by a majority that as section 40(a)(ia) refers to "amount payable", only the outstanding amount or the provision for expense as of 31st March (and not the amount already paid during the year) is liable for disallowance if TDS is not deducted. It was held that this interpretation was necessary as the Finance Bill proposed the disallowance to apply to any "amount credited or paid" but this was changed to "amount payable" in the Finance Act. On the department's appeal to the High Court, the High Court has vide order dated 8.10.2012 directed "interim suspension" of the Special Bench's verdict. (I.T.T.A .M.P. no 908 of 2012 in I.T.A.T.no 384 of 2012 dt 8-10-2012)

CIT v. Merilyn Shipping & Transports (AP) (HC) www.itatonlinne.org

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Reimbursement of expenses - Clearing and forwarding agent - Disallowance cannot be made [S. 172, 194C, 195]

Reimbursement of payment towards sea freight transport, CCI charges, steam freight charges and REPO container charges made by the assessee to C&F agents who have already made the payment on behalf of the assessee is covered under section 172 and not by section 194C or 195 and the agent having already deducted TDS from the transportation charges and shipping bill before making these payments to the principal which have been reimbursed by the assessee, assessee was not liable to deduct tax at source from such payments and consequently, same could not be disallowed by invoking the provisions of section 40(a)(ia). (A.Y. 2005-06)

ACIT v. Minpro Industries (2012) 65 DTR 113 / 143 TTJ 331 (Jodh.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - VSAT and transaction charges - Even if payee has paid tax, payer not eligible for deduction

For A.Y. 2007-08 & 08-09, the assessee paid VSAT & transaction charges without deduction of TDS. The Assessing Officer held the payment to be "fees for technical services" & disallowed the payment under section 40(a)(ia) for want of TDS under section 194J though the CIT(A) allowed the claim by relying on Skycell Communications Ltd. and another v. Dy. CIT (2001) 251 ITR 53 (Mad.). Before the Tribunal, the assessee argued that though the merits were covered against it by CIT v. Kotak Securities Ltd. (2012) 340 ITR 333 (Bom.), the deduction had to be allowed because (i) section 40(a)(ia) was not a 'tax-levying' provision but was merely to ensure that tax was paid by either the payer or the payee. As the payee had already paid the taxes, the bar in section 40(a)(ia) did not apply in line with Hindustan Coca Cola Beverage Ltd. v.CIT (2007) 293 ITR 226 (SC) and (ii) in accordance with Kotak Securities, as the department had not objected to the non-deduction of TDS on transaction charges in the past, there was no justification for invocation of section 40(a)(ia). Held by the Tribunal:

The argument, that since the payee has already paid due tax on the income, section 40(a)(ia) cannot be invoked, is not correct. The law in Hindustan Coca Cola Beverage Ltd. v. CIT (2007) 293 ITR 226 (SC) that if the payee is assessed, the tax cannot be recovered from the payer was in the context of section 201 and pursuant to Circular No. 275/201/95 - IT dated 29-1-1997. In the absence of such circular in case of disallowance under section 40(a)(ia), the principle laid down cannot be adopted for section 40(a)(ia). As regards the principle that the department had accepted the position in the past, the defense is available for A.Y. 2007-08 but not for A.Y. 2008-09.

ACIT v. DICGC Ltd. (2012) 14 ITR 194 (Mum.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Interest - Commission -Short deduction of tax at source provisions of section 40(a)(ia) cannot be applied [S. 192, 194J]

Assessee firm of Chartered Accountants had employed 18 consultants for a period of two years. During the period the assessee firm paid salary to consultants and deducted the tax at source under section 192. The Assessing Officer held that as there was no employer and employee relation the nature of payment being forrofessional services the provision of section 194J will be applicable.

Assessing Officer invoked the provision of section 40(a)(ia) and disallowed the entire payment. The Tribunal held that the assessee has deducted the tax at source under section 192, hence, the provisions of section 40(a)(ia) do not apply, as the said provisions can be invoked only in the event of non-deduction of tax at source but not for lesser deduction of tax. Accordingly the order of Commissioner(Appeals) confirmed. (A.Y. 2006-07).

Dy. CIT v. Chandabhoy & Jassobhoy (2012) 49 SOT 448 (Mum.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Sub-contractor - Amendment by Finance Act, 2010 is retrospective hence no disallowance can be made if payment is made before the due date of filing of return

Payment made to sub-contractor from April, 2007 to February, 2008 the tax was deducted at source on March 27, 2008 and May 12, 2008. The Assessing Officer disallowed the expenses on the ground that the Tax deducted at source ought to have been deposited on or before 31-3-2008. The Commissioner(Appeals) also confirmed the disallowance. In appeal before the Tribunal, it was contended that the due date of payment was to be considered in accordance with the amended provisions with effect from April 1, 2010, which has to be treated as retrospective with effect from April 1, 2005, as the payment was made before due date of filing of return, no disallowance can be made. The Tribunal held that the disallowance was held to be not justified. (A.Y. 2008-09)

Sanjay Kumar Pradhan v. ACIT (2012) 14 ITR 150 (Cuttack)(Trib.)

Editorial:- Special Bench of Mumbai Tribunal in Bharati Shipyard Ltd. v. Dy. CIT (2011) 11 ITR 599 (Mum.)(SB)(Trib.) is distinguished.

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Commission - Failure to deduct tax at source on commission to franchisees under section 194H, the amounts will not be allowable as deduction [S. 194H]

The assessee an individual who is running a business as a liaison officer for the London Institute of Technology & Research, UK. During relevant assessment year the assessee made payment of commission to various parties. Assessing Officer held that as the tax was not deducted at source under section 194H provisions of section 40(a)(ia) was held applicable hence disallowed the commission. On appeal the Commissioner(Appeals) deleted the disallowance on the ground that since the assessee did not receive the professional fee component from the liaison office as his income the provisions of section 194H is not applicable. On appeal by the revenue, the Tribunal held that amount paid to franchisees / Commission agents was for advertisement campaign and other services etc. for the courses offered by the LITR, UK and therefore, the same falls within the meaning of "commission" since the assessee failed to deduct tax at source, the Assessing Officer was justified in disallowing the payment of commission under section 40(a)(ia). (A.Y. 2005-06 & 2006-07)

ACIT v. Edroos Syed Mohammed Zakir (2012) 67 DTR 236 / 146 TTJ 100 / (2011) 47 SOT 199 (Mum.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Contractor - Sub-contractor - As provisions of section 194(C)(2) has no application to the facts - Disallowance cannot be made by invoking section 40(a)(ia) [S. 194C(2)]

The assessee, an individual is management consultant and is engaged in conceptualizing and organizing conferences and seminars in the field of management. The assessee received sponsorship from various sponsors, for which tax was deducted at source. Assessee had made payments for printing, stationery charges of auditorium advertisement charges etc. Assessing Officer held that as the turnover of assessee exceeded the prescribed limit, he should have deducted tax at source in respect of payment made by the assessee. The Tribunal held that the arrangement entered with the sponsor does not amount to the assessee having undertaken to work of organizing the conference. Just because the assessee is subjected to tax deducted under section 194C(1), and the assessee claimed

credit in respect of taxes deducted by the persons making the payments to the assessee, rightly or wrongly or due to correct application of law or by abundant caution, this claim cannot prejudice the stand of assessee that the provisions of section 194(C)(2) is not applicable. On the facts, the Tribunal held that section 194C(2) has no application and therefore provision of section 40(a)(ia) do not come in to play. The Tribunal held that provisions of section 194C(1), cannot be applicable to the relevant period because it is only as a result of the amendment of Finance Act, 2008, w.e.f. 1st June, 2008, that individuals were covered under section 194C(1). (A.Y. 2005-06)

Raju L. Bhatia (Dr.) v. JCIT (2012) 134 ITD 615 (Mum.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Contractor - Sub-contractor - Where lorries and trucks are hired for its own use TDS is not required to be deducted hence amount cannot be disallowed [S. 194C]

On the facts of the case, the assessee has hired the Trucks/lorries for transporting of the consignment booked by it under its own supervision and control with all responsibility and liabilities. Therefore hiring of Truck and lorries cannot be called to be work as per definition given in explanation 3 of section 194C of the Act, hence the assessee is not liable to deduct tax at source. (A.Y. 2005-06)

Kranti Road Transport (P) Ltd. v. ACIT (2012) 50 SOT 15 (Visakha.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Commissioner - Brokerage - Derivatives are securities therefore tax at source is not deductible [S. 194H]

Tribunal held that as per definition of derivative in section 2 sub section (ac) read with Section 2 of sub-section (h)(ia) the derivates are securities and therefore covered by the exception provided in Explanation (1) to Section 194H. Hence the brokerage paid cannot be disallowed under section 40(a)(ia). (A.Y. 2005-06)

Dy. CIT v. Noble Enclave & Towers (P) Ltd. (2005) 50 SOT 5 (Kol.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Professional fees - MICR clearing charges are reimbursement expenses - Assessee not liable to deduct tax at source under section 194J - Service charges paid in connection with rented house - Tax required to be deducted under section 194I

Assessee is engaged in banking business and a sub member of clearing house of another bank. Bhagyodaya Co-operative Bank Ltd. was a clearing house agent of assessee. Assessee paid certain amount for rendering the services of clearing agent without deduction of tax at source. Assessee claimed that its MICR clearing charges were recovered by clearing house from Bhagyodaya Co-operative Bank Ltd. and while making payment of said clearing charges Bhagyodya Co-operative Bank deducted tax at source and in support letter was filed. The Tribunal held that the payment of clearance charges were recovered from the assessee as reimbursement by assessee, the assessee is not required to deduct tax at source under section 194J, accordingly disallowances were deleted. The Tribunal held that service charges in connection with part of fixtures of a rented house, being part of rent, as the tax was not deducted under section 194I, disallowance under section 40(a)(ia) is justified. (A.Y. 2007-08)

The Karnavati Co-operative Bank Ltd. v. Dy. CIT (2012) 134 ITD 486 / 144 TTJ 769 / 14 ITR 175 / 68 DTR 41 (Ahd.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Reimbursement of expenses - Reimbursement simplicitor - Provisions of section 194J cannot be applicable - Hence no disallowance can be made [S. 194J]

The assessee a firm of solicitors and advocates had made payments to various lawyers for their professional services, but had not deducted tax at source under section 194J. The Assessing Officer disallowed such payments by applying the provisions of section 40(a)(ia). The

Commissioner(Appeals) also confirmed the disallowance. On appeal to Tribunal, it was contended that the amounts paid to lawyers were reimbursed from clients and no deduction was claimed in respect of said payments. The Tribunal held that as the payments to outside lawyers were not claimed as deduction, no disallowance can be made under section 40(a)(ia) of the Income-tax Act. The matter was set aside to verify the facts. (A.Y. 2006-07)

Sharma Kajaria & Co v. Dy. CIT (2012) 50 SOT 282 / 68 DTR 142 / 145 TTJ 1 (Kol.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Interest - Payment of disputed amount with interest as per court order - Provisions of section 194A is not applicable - Interest cannot be disallowed [S. 194A]

The assessee claimed as deduction in respect of interest paid to one of creditor as per the court decree settling the dispute. The assessee claimed the interest as deduction. The Assessing Officer disallowed the interest on the ground that as tax was not deducted at source under section 194A, the provision of section 40(a)(ia) is applicable. On appeal, the Commissioner(Appeals) also confirmed the disallowance. On appeal, following the order of High Court in Madhusudhan Shrikrishna v. Emkay Exports (2010) 188 Taxman 195 (Bom.)(HC), the Tribunal held that the assessee had no obligation to deduct tax at source in respect of interest paid to creditor as per court order. (A.Y. 2005-06)

Akber Abdul Ali v. ACIT (2012) 146 TTJ 57 (UO)(Mum.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Interest other than interest on securities - The assessee has neither credited the interest nor paid in relevant years Therefore as mandate of section 194A could not be attracted no disallowance can be made [S. 194A]

The assessee has claimed the deduction of interest expenditure for which no accounting entry was passed in books of account. The said claim was disallowed on the ground that the assessee has not deducted the tax at source under section 194A, which was confirmed in appeal by Commissioner(Appeals). On appeal to Tribunal, the Tribunal held that section 194A comes into play only when either amount is credited in books of account or interest is paid whichever is earlier. On facts the assessee had neither credited interest in books of account nor the interest was paid in relevant year, therefore the mandate of section 194A could not be attracted, therefore no disallowance could be made under section 40(a)(ia). (A.Y. 2005-06)

Pranik Shipping & Services Ltd. (2012) 135 ITD 233 / 70 DTR 417 / 146 TTJ 543 / (2013) 21 ITR 489 (Mum.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Non-jurisdictional High Court Judgment prevails over special bench decision - TDS paid before due date of filing of return - Amendment by FA 2010 w.e.f. 1.4.2010 is retrospective

For A.Y. 2005-06, the Assessing Officer made a disallowance of expenditure incurred by the assessee on the ground that the assessee had made the TDS payments under section 194C after the end of the year. Before the Tribunal, the assessee claimed that as the TDS had been paid before the due date of filing the ROI, no disallowance could be made as per section 40(a)(ia) amended by the FA 2010 w.e.f. 1.4.2010. The assessee relied on judgement of Calcutta High Court in the case of Virgin Creations and claimed that it had to be followed in preference to the contrary ruling of the Special Bench in Bharati Shipyard Ltd. (2011) 132 ITD 53 (Mum.). Held by the Tribunal: In Bharati Shipyard Ltd. the Special Bench held that the amendment to section 40(a)(ia) by the FA 2010 w.e.f. 1.4.2010 could not be held to be retrospective from A.Y. 2005-06 on the ground that the amendment was not remedial and curative in nature. However, the Kolkata Bench had taken a contrary view in Virgin Creations v. ITO and held that amendment by the FA 2010 was retrospective w.e.f. 1.4.2005. The view of the Kolkata Bench has been approved by the Calcutta High Court in CIT v. Virgin Creations. The question as to whether a verdict of the Special Bench should be followed or that of a non-jurisdictional High Court should be followed is answered in Tej International (P) Ltd. (2000) 69

TTJ 650 (Delhi)(Trib.) wherein it was held that in the hierarchical judicial system that we have in India, the wisdom of the court below has to yield to the higher wisdom of the Court above, and therefore, once an authority higher than this Tribunal has expressed its esteemed views on a an issue, normally, the decision of the higher judicial authority is to be followed. It was also held that the fact that the judgment of the higher judicial forum is from a non-jurisdictional High Court does not alter this position. Consequently, Virgin Creations is followed and it is held that the amendment to section 40(a)(ia) is retrospective from 1.4.2005 and any payment of TDS on or before the due date for filing the ROI is sufficient.

Piyush C. Mehta v. ACIT (2012) 52 SOT 27 / (2012) BCAJ Pg. 32, Vol. 44-A, Part 2, May, (Mum.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Precedent - Non-jurisdictional High Court prevails over special bench - TDS paid before due date of filing of return - Amendment by FA 2010 w.e.f. 1.4.2010 is retrospective

For A.Y. 2005-06, the Assessing Officer disallowed Rs. 47.26 lakhs under section 40(a)(ia) on the ground that the TDS had not been paid in time. The assessee claimed that the amendment to section 40(a)(ia) by the Finance Act 2010 w.e.f. 1.4.2010 to provide that no disallowance could be made if the TDS was paid on or before the due date specified in section 139(1) was retrospective in nature as held in CIT v. Virgin Creations and that the contrary ruling of the Special Bench in Bharti Shipyard Ltd. v. Dy. CIT (2011) 132 ITD 53 (Mum.) could not be followed. Held by the Tribunal:

In Virgin Creations the Calcutta High Court has passed a reasoned order and held that the amendment to section 40(a)(ia) is retrospective in nature. The binding nature of the decision of the Special Bench when a lone decision of non-jurisdictional High Court is available on the very same issue was examined in the Third Member decision in Kanel Oil & Export Ltd. (2009) 121 ITD 596 where it was held that where there is only a judgement of the non-jurisdictional High Court prevails over an order of the Special Bench even though it is from the jurisdictional Bench (of the Tribunal). As the Calcutta High Court's decision is the lone one on the issue whether section 40(a)(ia) is retrospective, it has to be followed in preference to the decision of the Special Bench of the Tribunal in Bharti Shipyard Ltd. Consequently, amounts in respect of which TDS is paid on or before the due date of filing the ROI is eligible for deduction. (A.Y. 2005-06)

Rajamahendri Shipping & Oil Field Services Ltd. v. ACIT (2012) 51 SOT 242 / 19 ITR 616 (Visakha.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - While interest paid by PE of foreign bank to H.O. is deductible in hands of PE, same interest is not taxable in hands of H.O.

The assessee, a Japanese bank, carrying on business through a PE in India, paid interest of Rs. 5 crores to its H.O. & other branches. The assessee, in computing the profits assessable to tax in India, claimed that while the interest received by the H.O. & other branches from the PE was not chargeable to tax in India on the principle that the PE & H.O. were one & the same entity, the PE was entitled to claim a deduction under Article 7 of the DTAA. The Assessing Officer held that the PE & the H.O. were deemed to be separate entities and that while the interest received by the H.O. from the PE was taxable under Article 11, deduction for that interest could not be allowed to the PE under section 40(a)(i) as it had failed to deduct TDS. The CIT(A) followed the verdict of the Special Bench in ABN Amro Bank (2005) 98 TTJ 295 (Kol.) (partly affirmed in ABN AMRO (2011) 198 TM 376 and held that the interest was neither chargeable to tax nor allowable as a deduction. On appeal to the Tribunal, the matter was referred to a 5 Member Special Bench. Held by the Special Bench:

(i) On the question whether the interest paid by the PE to the H.O. is deductible, while such interest is not deductible under the Act because the payer & payee are the same person, Article 7(2) and 7(3) of the DTAA & its Protocol makes it clear that for the purpose of computing the profits attributable to the PE in India, the PE is to be treated as a distinct and separate entity which is dealing

wholly independently with the general enterprise of which it is a part and deduction has to be allowed for, inter alia, interest on moneys lent by the PE of a bank to its H.O.

(ii) On the question of taxability of the interest received by the H.O. from the PE, such interest is not taxable under the Act as both are, under the Act, the same person and not separate entities & one cannot make profit out of himself. The fiction created in Article 7(2) of the DTAA treating the PE as separate and independent entity does not extend to Article 11. Also, the interest paid by the PE is not interest paid in respect of debt claims forming part of the assets of the PE so as to attract Article 11(6). The DTAA, even assuming that it does create a liability, cannot be applied under section 90(2) as it is contrary to the Act and less favourable to the assessee (Question as to whether the interest paid by the PE should be netted off against the interest received, left open). (A.Y. 2003-04)

Sumitomo Mitsui Banking Corporation v. Dy. DIT (2012) 136 ITD 66 / 70 DTR 1 / 145 TTJ 649 / 16 ITR 116 (SB)(Mum.)(Trib.)

Antwerp Diamond Bank NV v. Addl. DIT (2012) 136 ITD 66 / 70 DTR 1 / 145 TTJ 649 / 16 ITR 116 (SB)(Mum.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Paid - Payable - TDS Disallowance applies only to amounts "payable" as on 31st March and not to amounts already "paid" during the year

The assessee incurred brokerage expenses of Rs. 38.75 lakhs and commission of Rs. 2.43 lakhs without deducting TDS. Of this only Rs. 1.78 lakhs was payable and the rest was paid. The Assessing Officer disallowed the entire expenditure under section 40(a)(ia). Before the CIT(A), it was argued that disallowance under section 40(a)(ia) could be made only of the amount "payable" and not of that which had already been "paid" though it was rejected. On appeal to the Tribunal, the matter was referred to the Special Bench. Held by the Special Bench:

Per the majority (S. V. Mehrotra, AM, dissenting):

When section 40(a)(ia) was proposed to be inserted by the Finance Bill 2004, it applied to any "amount credited or paid". However, when enacted by the Finance Act 2004, it applied only to "amount payable". The words "credited/paid" and "payable" have different connotations and the latter refers to an amount which is unpaid. The change in language between the Bill and the Act is conscious and with a purpose. The legislative intent is clear that only the outstanding amount or the provision for expense (and not the amount already paid) is liable for disallowance if TDS is not deducted. Also, section 40(a)(ia) creates a legal fiction by virtue of which even genuine and admissible expenses can be disallowed for want of TDS. A legal fiction has to be limited to the area for which it is created. Consequently, section 40(a)(ia) can apply only to expenditure which is "payable" as of 31st March and does not apply to expenditure which has been already paid during the year.

Per S. V. Mehrotra, AM:

The object of section 40(a)(ia) is to ensure that the TDS provisions are scrupulously implemented without any default. If a narrow interpretation is assigned to the term 'payable', the object with which section 40(a)(ia) was inserted would be frustrated. The Legislature could have never intended that only amounts payable at the end of the year should be disallowed but not the amounts paid during the year. The reason why the words "credited" or "paid" were dropped was because they came within the ambit of the term "payable" and would have been superfluous. As section 40(a) is applicable irrespective of the method of accounting followed by an assessee, the term 'payable' covered the entire accrued liability. Also section 40(a)(ia) is to be interpreted harmoniously with the TDS provisions as its operation depends solely on the provisions contained under Chapter XVII-B & it provides for one of the consequences of non-deduction of tax. In the backdrop of the TDS provisions, the term "payable" means the amount "payable" "on which tax was deductible at source under Chapter XVII-B". Consequently, section 40(a)(ia) applies to all expenditure which is actually paid and which is payable as at the end of the year. (A.Y. 2005-06)

Merilyn Shipping & Transports v. ACIT (2012) 136 ITD 23 / 70 DTR 81 / 146 TTJ 1 / 16 ITR 1 (SB)(Visakha.)(Trib.)
Peddu Srinavasa Rao (Intervener) (2012) 136 ITD 23 / 70 DTR 81 / 146 TTJ 1 / 16 ITR 1 (SB)(Visakha.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Contractor - Professional and technical fees - Payment made before due date of filing of return - Tax deducted was paid before due date of filing of return hence the disallowance cannot be made -Special Bench decision cannot be followed in view of High Court Judgment
In A.Y. 2005-06, the assessee made payments to contractors & for professionals & technical services. Though TDS was deducted, it was paid after the end of the F.Y. but before filing the ROI. The assessee pleaded that section 40(a)(ia), as amended by the FA 2010 w.e.f. 1.4.2010 to provide that no disallowance should be made if the TDS was paid before the due date of filing the ROI should be held to be retrospective. However, the Assessing Officer & CIT(A), rejected the claim by relying on Bharati Shipyard Ltd. v. Dy. CIT (2011) 132 ITD 53 (Mum.)(SB). On appeal to the Tribunal, Held allowing the appeal:
The issue involved has now been decided by the Calcutta High Court in CIT v. Virgin Creators against the Revenue. However, it is noteworthy that the Special Bench of ITAT Mumbai in the case of Bharati Shipyard Ltd. v. Dy. CIT (2011) 132 ITD 53 (Mum.) has taken a view that the amendment is prospective in nature and would apply accordingly. Respectfully following the decision of the Calcutta High Court in the case of Virgin Creators, the order of the CIT(A) is not sustainable and the assessee's appeal is allowed. (A.Y. 2005-06)
Alpha Projects Society P. Ltd v. Dy. CIT (Ahd.)(Trib.) www.itatonline.org

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Rent - Service charges of furniture and fixtures is in the nature of rent hence disallowance is justified
Payment made for using the part of the fixture of rented property was in nature of rent and the assessee was required to deduct the tax under section 194-I. The disallowance was justified under section 40(a)(ia) for not deducting the tax. (A.Y. 2007-08)
The Karnavati Co-op. Bank Ltd. v. Dy. CIT (2012) 134 ITD 486 / 144 TTJ 769 / 14 ITR 175 / 68 DTR 41 (Ahd.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Interest paid as per court order there is no obligation to deduct tax at source hence no disallowance can be made [S. 194A]
The Assessing officer disallowed interest, for failure to deduct tax at source payment of disputed amount with interest as per the court order.
The Tribunal held that the amount was paid in accordance with the decision of the High Court. The interest payable under the decree of the court was a judgement debt, therefore, he was not obliged to deduct tax at source. (A.Y. 2005-06)
Akber Abdul Ali v. ACIT (2012) 146 TTJ 57 (UO)(Mum.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Contract - Tax deducted is paid before due date of filing of return no disallowance can be made under section 40(a)(ia) [S. 194C]
The assessee made payments to contractors from April 2007 to February 2008. However, the TDS thereon was deducted (belated) in March, 2008 and paid before the due date for filing the ROI. The Assessing Officer disallowed the payments under section 40(a)(ia) though the CIT(A), relying on Bapusaheb Nanasaheb Dhumal, allowed the claim on the ground that as the TDS was (belatedly) deducted in March 2008, it could be paid before the due date for filing the ROI. On appeal by the department, Tribunal held dismissing the appeal:

(i) Though under section 194C, tax had to be deducted at the time of payment or credit, the assessee deducted TDS only in March. While the assessee has to face consequences for its failure to deduct TDS in time, no disallowance under section 40(a)(ia) can be made because clause (A) of the proviso to section 40(a)(ia) provides that if the tax is deducted during the last month of previous year and paid on or before the due date of filing the ROI, no disallowance shall be made (Bapusaheb Nanasaheb Dhumal v. ACIT (2010) 40 SOT 361 (Mum.) followed);
(ii) Section 40(a)(ia) was amended by the FA 2010 w.e.f. 1.4.2010 to provide that no disallowance shall be made if the TDS (for whichever month) is paid before the due date of filing the ROI. While in Bharti Shipyard Ltd. v. Dy. CIT (2011) 132 ITD 53 (Mum.)(SB), it was held that the amendment is not retrospective, a contrary view has been taken by the Calcutta High Court in CIT v. Virgin Creations. Considering the precedent in the judicial hierarchy, the judgement of the non-jurisdictional High Court prevails over a judgement of the Special Bench (Kanel Oil & Export (2009) 121 ITD 596 (Ahd.)(TM) followed). (A.Y. 2008-09)
ACIT v. M. K. Gurumurthy (2012) 52 SOT 84 (Bang.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Business Expenditure - Payment for supply of labour, can be assumed that there was a contract for supply of labour between the assessee and CDLB, hence, the provisions of Section 194C was clearly attracted
Payment made to CDLB towards stevedoring expenses being in the nature of the payment for supply of labour, it can be assumed that there was a contract for supply of labour between the assessee and CDLB and, therefore provisions of Section 194C was clearly attracted even though the labour hired by assessee through CDLB is considered to be in assessee's employment. Matter remanded to the file of CIT(A) as, CIT(A) did not deal with the said provisions. (A.Y. 2006 -07)
Dy. CIT v. Kamal Mukherjee & Co. (Shipping) P. Ltd. (2012) 145 TTJ 374 / 69 DTR 75 (Kol.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Works contract - Printing and supply of diaries, catalogues, etc., material used by the assessee, procured from other parties does not amount to works contract under section 194C [S. 194C]
Printing and supply of diaries, catalogues and folders by printers as per the requirements of the assessee by using materials procured from other parties did not amount to works contract within the meaning of Section 194C and, therefore assessee was not obliged to deduct tax at source from the payments made to the said printers and consequently, the payment could not be disallowed under section 40(a)(ia). (A.Y. 2007-08)
Dy. CIT v. Eastern Medikit Ltd. (2012) 135 ITD 461 / 71 DTR 241 / 146 TTJ 551 / 18 ITR 457 (Delhi)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Amendment by Finance Act 2010 is retrospective Tax deducted at source deposited before due date of filing of return - No disallowance can be made
For A.Y. 2008-09, the assessee made a deposit of TDS after the due date for payment but before the due date for filing the ROI. The assessee claimed that the amendment to section 40(a)(ia) by the FA 2010 w.e.f. 1.4.2010, which allows time for deposit of TDS upto the due date of the ROI, should be treated as being retrospective w.e.f. 1.4.2005. The Assessing Officer rejected the plea though the CIT(A) allowed it. Before the Tribunal, the department relied on Bharati Shipyard lTD v. Dy. CIT (2011) 132 ITD 53 (SB)(Mum.)(Trib.) where it was held that the amendment was not retrospective.
Held by the Tribunal dismissing the appeal:
Though in Bharati Shipyard 132 ITD 53 (Mum.)(SB), it was held that the amendment to section 40(a)(ia) by the FA 2010 w.e.f. 1.4.2010 cannot be treated to be retrospective, a contrary view has been taken by the Calcutta High Court in CIT v. Virgin Creations. As this is the sole High Court

judgement on the point, it has to be followed in preference to the view of the Special Bench. Accordingly, the amendment to section 40(a)(ia) by the FA 2010 is applicable retrospectively from 1.4.2005 and no disallowance under section 40(a)(ia) can be made if the TDS is paid on or before the due date for filing the ROI (Piyush C. Mehta v. ACIT ITA No. 1321/M/2009, A.Y. 2005-06 date 11/4/2012 and ACIT v. M.K. Gurumurthy ITA No. 717/Bang/2011, A.Y. 2008-09 DT. 10/5/2012 followed). (A.Y. 2008-09)(ITA NO .359/Delhi)/2011 dt 22-05-2012)

ITO v. Taru Leading Edge (P) Ltd. (Delhi)(Trib.) www.itatonline.org

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Non-resident - One non-resident to another non-resident - Hiring charges for transponder - Outright sale of television programme [S. 9(1)(vi), 195]

The assessee, a Mauritius company, made payment to Panamsat, USA, for hire of a "transponder satellite". The Assessing Officer held that the said hire charges constituted "royalty" and that the assessee ought to have deducted TDS under section 195 and that as it had not done so, the amount was to be disallowed under section 40(a)(ia). The Tribunal held that payment of hiring charges for transponder made by assessee a foreign company, to a US Company is not in the nature of royalty within the meaning of Indo-US DTAA as no technology is "made available" in the hiring of transponder and therefore assessee is not required to deduct tax at source under section 195. The Tribunal also held that payment has been made by one non-resident to another non-resident outside India on the basis of contract executed outside India. Accordingly addition was deleted. Similarly payment made by the assessee foreign company to another Mauriitian company being payment for outright sale of Television programmes and not merely for broad casting rights of such programmes, assessee was not required to deduct tax at source. The Tribunal also held that consideration paid for sale, distribution or exhibition of cinematographic films does not fall within the term " royalty" in view of explanation 2 to section 9(1)(vi), hence payments made by the assessee are not liable to deduct tax in India, since provision of section 195 is not applicable. (A.Y. 2002-03)

B4U International Holdings Ltd. v. Dy. CIT (2012) 74 DTR 162 / 18 ITR 62 / 52 SOT 545 / 148 TTJ 237 (Mum.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Production of feature film - Individual - Since the provisions of section 194C were not applicable to individuals prior to 1st April, 2007, the assessee is under no obligation to deduct tax at source hence no disallowance can be made [S. 194C, 194J]

The assessee who is an individual engaged in the business of production of cinematographic films made payments to director of film. The assessee deducted the tax for the A.Y. 2005-06 at 2.2% treating the said payment as payment to contractor. The Assessee contended that he is not liable to deduct the tax at source. By mistake he has deducted tax at source. The assessee should not be held liable for disallowance. The Assessing Officer held that the payments fall under the head fees for technical services and hence provision of section 194J is applicable. Hence the assessee should have deducted the tax at 5.23%. Hence he disallowed the payment by applying the provisions of section 40(a)(ia). In appeal Commissioner of Income-tax(Appeals) also confirmed the order of Assessing Officer. The Tribunal held that the payments made by the assessee falls under the expression "work", hence fall under the provisions of section 194C. Since the provisions of section 194C of the Act is not applicable to individuals prior to 1st April, 2007, the assessee was under no obligation to deduct tax at source for the period under consideration therefore disallowance made under section 40(a)(ia) of the Act cannot be sustained. (A.Y. 2005-06)

Nitin M. Panchamiya v. Addl. CIT (2012) 73 DTR 202 / 148 TTJ 96 / 50 SOT 468 (Mum.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Short deduction of tax - If there is short deduction of tax, assessee be declared as assessee in default under section 201 - No disallowance can be made by invoking section 40(a)(ia) [S. 194C, 194I, 201]

The assessee deducted the tax at source in respect of payment of equipment charges at 2.06%, treating the said payment as covered under section 194C. The Assessing Officer was of the opinion that equipment charges is in the nature of hiring and therefore the provisions of section 194I is applicable and hence the TDS is required to be deducted at 11.33%. As there was short fall in deduction of TDS the Assessing Officer invoked the provision of section 40(a)(ia) and disallowed the expenses. Commissioner(Appeals) upheld the disallowance. On appeal to Tribunal, the Tribunal held that if there is short fall of deduction due to difference of opinion as to the taxability of any item or nature of payments falling under various provisions of TDS, assessee can be declared to be assessee in default under section 201, but no disallowance can be made by invoking provisions of section 40(a)(ia). (A.Y. 2008-09)(ITA No. 6281/Mum/2011 dated 10-8-2012 Bench 'E')

EGS Survey P. Ltd. v. ACIT (2012) Income Tax Review - September - P. 90 (Mum.)(Trib.)

S. 40(a)(ia) : Amount not deductible - Deduction at source - Amounts payable on last date of previous year-Provision applied only to those amounts which were remaining payable as on the last day of the previous year

The provisions of section 40(a)(ia) applied only to those amounts which were remaining payable as on the last day of the previous year. So what had been paid during the relevant year would not be hit by section 40(a)(ia). (A.Y. 2009-10)

S. S. Warad v. Addl. CIT (2012) 19 ITR 35 (Bang.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Fees for professional fees

If the doctors to whom the payments are made are rendering services in respect of the principal activity of the assessee's nursing home, the firm would be professional firm. However, if the doctors are practicing independently in their respective areas of practice for a separate charge or are paid a fixed sum by the nursing home, it will partake the character of "business". Matter having not been considered in its correct perspective whether the assessee was carrying on profession or business vis-a-vis requirement of audit under section 44AB matter remanded for consideration afresh. (A.Y. 2007-08)

Sunil Chandak v. ITO (2012) 77 DTR 305 (Jodh.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Commission - Non-resident - Foreign agent - Service rendered outside India, no disallowance can be made [S. 9(1)(i), 195]

If no operation is carried out by foreign non-resident agent in India, there would be no income deemed to accrue or arise in India hence no disallowance can be made for failure to deduct tax at source. (A.Y. 2006-07)

AIA Engineeing Ltd. v. Addl. CIT (2012) 50 SOT 134 / 78 DTR 473 / 150 TTJ 170 (Ahd.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Royalty - Deduction at source - Matter remanded [S. 9(1)(vi)]

Assessee made a payment for purchase of software from persons who were resident in India. It did not deduct tax at source while making said payments. According to Assessing Officer, payment in question was in nature of royalty because it was for a right to use software and, therefore, assessee ought to have deducted tax at source and since assessee had not so deducted tax at source, sum in question was disallowed under section 40(a)(ia). Matter remanded back to decide case afresh to consider whether amounts paid to Indian suppliers could be considered as royalty keeping in mind latest pronouncements of various higher judicial authorities on issue and nature of purchase and rights involved. (A.Y. 2008-09)

Sonata Information Technology Ltd. v. Dy. CIT (2012) 54 SOT 233/19 ITR 408 (Mum.)(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Resident - Interest - Short deduction of tax at source no disallowance can be made [S. 194C, 194I, 194J, 201]

The assessee is engaged in trading of agricultural products. During the course of assessment proceedings, from the tax audit report in Form No. 3CD the Assessing Officer noted that the tax auditor had quantified the amount of Rs. 40,41,233/- disallowable under section 40(a)(ia). However, in computation of income the assessee had added back only Rs. 20,16,778/-. The remaining amount of Rs. 20,24,455/- was therefore, disallowed by the Assessing Officer. Before the Commissioner(Appeals), the assessee submitted that the Assessing Officer ought to have allowed expenditure on which tax had been deducted and should have disallowed the expenditure on which no tax had been deducted. Alternatively, it was argued that proportionate disallowance of Rs. 15,75,239/- should have been made. The Commissioner(Appeals) holding that there was no scope for making proportionate disallowance under section 40(a)(ia), upheld the disallowance made by the Assessing Officer. On appeal to the Tribunal, the Tribunal held that, when there is shortfall in deduction of tax at source due to any difference of opinion as to taxability of any item or nature of payments falling under various TDS provisions, assessee can be declared to be an assessee-in-default under section 201 but no disallowance can be made by invoking provisions of section 40(a)(ia). Appeal of assessee was allowed. (A.Y. 2007-08)

UE Trade Corpn. (India) Ltd. v. Dy. CIT (2012) 54 SOT 596 (Delhi))(Trib.)

S. 40(a)(ia) : Amounts not deductible - Deduction at source - Charter charges - Rent paid and payable - Amount paid and no amount outstanding, no disallowance can be made - Amendment cannot be held retrospective [S. 194C, 194I, 197]

Assessee claimed deduction for charter hire charges payable to its sister concern 'SML'. Competent Authority granted certificate of tax exemption under section 197 permitting deduction of tax at nil rate in respect of charges credited after 3-11-2006. Assessing Officer held assessee liable for deduction of tax at source under section 194C and alternatively liable to deduction at source under section 194-I for period 13-7-2006 to 3-11-2006 and in absence of assessee having made any deduction of tax at source under section 194-I for that period Assessing Officer made disallowance under section 40(a)(ia). On appeal, the Commissioner(Appeals) held that section 194C could not be applied because of the view taken by the Tribunal in the preceding year. It was further held that as Explanation extending the scope of 'Rent' to machinery and plant etc. was inserted from 13-7-2006, the assessee was not liable to deduct tax at source on charter hire charges paid to 'SML' for the period 1-4-2006 to 12-7-2006 and, consequently, no disallowance was called for under section 40(a)(ia) for the said period. However, for the period from 13-7-2006 to 3-11-2006, the Commissioner(Appeals) held that there was no force in the contention of the assessee that since no credit was made during the relevant period in account of 'SML' and also no payment was made, the provisions of section 40(a)(ia) were not applicable. Assessee and department challenged the order of Commissioner(Appeals). The Tribunal held that since both credits and payment to SML without deduction of tax at source took place after receipt of above certificate, no disallowance of payment under section 40(a)(ia) could be made. Even otherwise disallowance under section 40(a)(ia) applies only to amounts 'payable' as at close of year and not to amounts already 'paid' during year and since amount of charter hire charges for period 13-7-2006 to 2-11-2006 were paid during year and no amount was payable at end of year, disallowance under section 40(a)(ia) could not be sustained. Followed special bench in case of Merliyan Shipping & Transports v. Addl. CIT (2012) 136 ITD 23 (Visakha.)(Trib.)(SB). Further section 194-I as amended with effect from 13-7-2006, could not be applied retrospectively to payments made by assessee to SML for period prior to 13-7-2006. Accordingly the appeal of assessee was allowed and department appeal was dismissed. (A.Y. 2007-08)

Underwater Services Co. v. ITO (2012) 54 SOT 178 (Mum.)(Trib.)

S. 40(a)(ii) : Amounts not deductible - Taxes - Sikkim Income Tax Manual, 1948 - Matter remanded

Assessee had entered into a contract with Finance Department, Government of Sikkim for printing and supply of lottery tickets. While making payment, an amount computed at 3 per cent had been deducted from bills of assessee towards income-tax under Sikkim Income Tax Manual, 1948. Assessee had claimed this TDS amount as an expense in Profit & Loss Account, which had been disallowed under section 40(a)(ii).Before it could be disallowed it had to be determined whether income tax deducted partook character of tax levied on profits of assessee and whether it was deducted on determination of profit or on rough estimate. Matter remanded. (A.Y. 2005-06, 2006-07 & 2008-09)

Dy. CIT v. Shree Nidhi Secure Prints (P.) Ltd. (2012) 54 SOT 211 (URO)(Hyd.)(Trib.)

S. 40(b)(v) : Amounts not deductible - Partner - Remuneration - Limits - Non-business income - For section 40(b)(v) limits, P&L A/c profits (including non-business income) have to be taken & not only "profits & gains of business" as computed under section 28 to 43D [S. 28 to 43D]

Section 40(b)(v) permits a firm to claim deduction of remuneration paid to a working partner upto certain limits of the "*book profit"*. The term "book profit" is defined in Explanation 3 to mean "*the net profit, as shown in the profit and loss account for the relevant previous year, computed in the manner laid down in Chapter IV-D …"*. The High Court had to consider whether the term "book profit" meant the profit as per the P&L A/c (*which included non-business income*) or the "*Profits & gains of business as computed under Chapter IV-D"*. Held by the High Court:

The said chapter nowhere provides that method of accounting for the purpose of ascertaining net profit should be the only income from business alone and not from other sources. Section 29 provides how the income from profits and gains of business should be computed and this has to be done as provided under section 30 to 43D. By virtue of section 5 that total incomes of any previous years includes all income from whatever source derived. Thus for the purpose of section 40(b)(v) read with the Explanation, there cannot be a separate method of accounting for ascertaining net profit and/or book-profit. The said section nowhere provides that the net profit as shown in the P&L A/c is not the profit computed under the head profit and gains of business. Following the principle laid down in Apollo Tyres Ltd. v. CIT (2002) 255 ITR 273 (SC), the Assessing Officer is not entitled to recompute the P&L profits. Even if income from other sources is included in the P&L A/c, to ascertain the net profit qua book-profit for computation of remuneration of the partners the same cannot be discarded. (A.Y. 1995-96 to 1998-99)

Md. Serajuddin & Brothers v. CIT (2012) 210 Taxman 84 / 80 DTR 46 (Cal.)(HC)

S. 40(b)(v) : Amounts not deductible - Partner - Remuneration - Firm - Commission to partners - Partnership deed did not provide for payment of any commission to partners in view of non obstinate clause contained under section 40(b), of the Act, any remuneration paid to partner in whatever manner, is not deductible as an expenditure under section 37(1) [S. 37(1)]

The assessee was a partnership firm. Two persons possessed Certificate of Diploma in Pharmacy. To carry on the business of drugs at least one person had to be qualified for selling the drugs. The firm paid commission to the aforesaid two partners, in their individual capacities for the services rendered by them by virtue of the specialized qualification they possessed. The Assessing Officer held that said amount could not be allowed as deduction at the hands of the firm in view of section. 40(b).

It was held that a partner is not entitled to receive remuneration for taking part in the conduct of the business under section 13 of the Partnership Act. This rule is subject to the contract to the contrary. In other words, if there is a contract between partners to receive remuneration for taking part in the conduct of the business, this rule is not applicable. Section 40(b) recognizes this rule. It provides for

making payment to a partner subject to the condition mentioned therein being fulfilled. The said conditions are:

i) The partnership deed i.e. contract between the parties should provide for such payment.

ii) The person to whom it is paid should be a working partner.

iii) Such payment should be within the limits prescribed in section 40(b)(v). (para. 12)

Therefore, any payment made to a partner if it is to be eligible for deduction under section 37 of the Act, should satisfy the aforesaid requirements. Otherwise, the amount paid to such partner cannot be deducted as expenditure under section 37.

Dr. Bidari Ashwini Hospital v. ITO (2012) 254 CTR 290 / 209 Taxman 303 / 347 ITR 679 (Karn.)(HC)

S. 40(b)(v) : Amounts not deductible - Partner - Remuneration - Firm - HUF - Commission payment to partners held to be not deductible

It was held that Commission paid to partners of firm who are representing their HUFs, for their personal qualifications, is disallowable under section 40(b) unless such partner is a working partner and partnership deed provides remuneration to him for services rendered. Otherwise in view of non obstante clause contained in section 40(b) any remuneration paid to a partner in whatever capacity, in whatever manner, is not deductible as an expenditure. (A.Y .2005-06)

Dr. Bidari Ashwini Hospital v. ITO (2012) 254 CTR 290 / 209 Taxman 303 / 347 ITR 679 (Karn.)(HC)

Srinath Drugs Distributors v. ITO (2012) 254 CTR 290 / 347 ITR 679 (Karn.)(HC)

Shree Gururaj Agencies v. ITO (2012) 254 CTR290 / 347 ITR 679 (Karn.)(HC)

S. 40(b)(v) : Amounts not deductible - Partner - Remuneration - Firm - Book profit - Interest income and profit on sale of assets should be considered though assessed under the head income from other sources

Even if the interest income, profits on sale of assets and other income form part of income from other sources but the same are included in the profit and loss accounts of the firm, these incomes should be considered while computing book profit for the purpose of computation of allowable remuneration to partners under section 40(b) of the Act. (A.Y. 1995-96 to 1998-99)

Md. Serajuddin & Brothers v. CIT (2012) 80 DTR 46 / 210 Taxman 84 (Cal.)(HC)

S. 40(b)(v) : Amount not deductible - Partner - Remuneration - Partnership deed - Remuneration - Partnership deed need not quantify partner's remuneration, hence disallowance cannot be made

The assessee's partnership deed provided that the partners would be paid remuneration / salary "according to the standards and norms fixed by the relevant provisions of the Income Tax Act, 1961". The Assessing Officer disallowed the claim for deduction of the salary paid to the partners under section 40(b)(v) on the ground that as the deed did not quantify the amount of remuneration. This was reversed by the CIT(A) and Tribunal. On appeal by the department, Held dismissing the appeal:

The Tribunal finding that "The quantification of the remuneration was apparent from clause 8 of the partnership deed which provided that the remuneration would be payable as per norms fixed by the Income-tax Act. The requirement in law is that remuneration should have been authorized and the amount of remuneration shall not exceed the amount specified in section 40(b)(v) which uses the word 'authorised' and not the word 'quantify'. It is a finding of fact which cannot be interfered with by this Court

CIT v. The Asian Marketing (2012) 254 CTR 453 / 79 DTR 49 (Raj.)(HC)

S. 40(b)(v) : Amounts not deductible - Firm - Remuneration to partner - Disallowance of salary on estimate without comparative study, held to be not justified

The assessee-firm paid salary of Rs. 2.20 lakhs per annum to one of its partners. The Assessing Officer restricted the salary at Rs. 36,000/-. The Commissioner(Appeals) looking into the qualification and age factor of the partner restricted the disallowance to Rs. 1 lakh. On appeal, Tribunal held that the Assessing Officer and the Commissioner(Appeals) had estimated the salary of the partner without considering any comparative case or without laying any foundation for such estimation itself. Therefore, there was no ground for restricting the salary paid to the partner at Rs. 1.20 lakhs per annum as against the claim of Rs. 2.20 lakhs. The Assessing Officer was to allow the claim of the salary paid to the partner at Rs. 2.20 lakhs per annum. (A.Y. 2005-06)

S. B. Agencies v. ACIT (2012) 20 ITR 507 / (2013) 141 ITD 669 (Kol.)(Trib.)

S. 40(b)(v) : Amounts not deductible - Partner - Remuneration - Firm - Salary to partners - Remuneration paid to working partner was disallowed as the authorisation was not accordance with the provision

The deed of partnership stated that the remuneration has to be computed as per Explanation 3 to section 40(b). The Tribunal held that where the authorisation in the partnership deed is such that correct quantification of the remuneration payable to the working partner cannot be done, it cannot be construed as a type of authorization which would satisfy the requirement of section 40(b), therefore, the disallowance of remuneration was upheld. (A.Y. 2007-08)

ACIT v. Madeena Constructions (2012) 134 ITD 67 / 67 DTR 1 / 14 ITR 25 / 144 TTJ 137 (TM)(Chennai)(Trib.)

S. 40(ba) : Amounts not deductible - Association of persons - Interest - Payment to trustees and their relatives - As trustee of assessee-trust not Assessing Officer, hence no disallowance

During assessment proceedings Assessing Officer found that major expenditure claimed by assessee was payment of interest to trustees and their relatives. Assessing Officer applied provisions of section 40(ba) and disallowed interest paid to directors/trustees holding that assessee was liable to be assessed as an Assessing Officer and, hence, interest paid could not be allowed as a deduction. It was held that, since, trustees of assessee-trust could not be described as members of Assessing Officer, impugned disallowance made by Assessing Officer was to be deleted. (A.Y. 2007-08)

ITO v. Kodagu Academy for Education & Culture (2012) 139 ITD 221 (Bang.)(Trib.)

S. 40(c) : Amounts not deductible - Company - Reimbursement of medical expenses -Part of salary - Personal use of motor car - Not perquisite value as per Rule 3 [Income-tax Rules - Rules 3]

Following the ratio in Ceat Tyres of India Ltd. v. CIT (1994) 121 CTR 80 (Bom.)(HC) reimbursement of medical expenses form part of salary / remuneration for computing disallowance under section 40(c). Following the ratio in CIT v. British Bank of Middle East (2001) 251 ITR 217(SC), it was held that for quantifying disallowance under section 40(c) expenditure incurred by the company towards the personal use of motor cars provided to the Directors was to be considered and not the perquisite value as per Rule 3 of the Income-tax Rules. (A.Y. 1983-84)

Mather & Platt (I) Ltd. v. CIT (2012) 210 Taxman 509 / 79 DTR 12 (Bom.)(HC)

S. 40A(2) : Expenses or payments not deductible - Excess or unreasonable - Trust - Excess or unreasonable - Payments made to trust - Provisions of section 40A(2) was not attracted

The Trust is neither a company, nor firm, nor HUF, nor an Assessing Officer within the meaning of cl. (v) of section 40A(2)(b) and therefore, the provision of section 40A(2) is not attracted to the payments of lease rent by the assessee company (lessee) to the lessor-trust even though the company is owned and controlled by the trustees of the trust and their family members. (A.Y. 1994-95 to 1999-2000, 2004-05, 2005-06 & 2007-08)

Shanker Trading (P) Ltd. v. CIT (2012) 76 DTR 40 / 208 Taxman 526 / 254 CTR 44 (Delhi)(HC)

S. 40A(2) : Expenses or payments not deductible - Excess or unreasonable - Excessive or unreasonable payment of consultancy charges -Disallowance was set aside

Assessee paid Rs. 88.98 lakhs to MMPL as consultancy charges under an agreement for the latter's advice concerning day to day conduct of management of the assessee company in respect of setting up and monitoring of distribution and marketing management, and manufacturing of 'R' products according to R's internationally applicable specifications and standards. Assessing Officer allowed Rs. 30 lakhs as directors remuneration and disallowed Rs. 58.98 lakhs under section 40A(2), holding it as unreasonable and excessive. The Tribunal held that, in order to determine whether the payment is not sustainable, the Assessing Officer has to first give a finding that the payment made is excessive. If it is found to be so, then the Assessing Officer has to determine what constitutes the fair market value of the services rendered and disallow the difference between what is claimed and what is fair market value. No such exercise was undertaken by the Assessing Officer. Further, annual cap of Rs. 30 lakhs payable to managerial personnel applied to public limited companies, and not to companies such as the assessee. Disallowance rightly set aside. (A.Y. 2005-06 & 2006-07)

CIT v. Modi Revlon (P) Ltd. (2012) 78 DTR 342 (Delhi)(HC)

S. 40A(2) : Expenses or payments not deductible - Excess or unreasonable - Expenditure on foreign education and travelling of son of managing director - Disallowance was not justified.[S. 37(1)]

Expenditure incurred by the assessee company on foreign education and travelling expenses of the son of its managing director who was a trainee of the management of the company and has joined the company after coming back from USA cannot be treated as expenditure of personal nature as the company has been benefited by his higher education and training and, therefore, the impugned expenditure cannot be disallowed under section 40A(2). (A.Y. 2001-02 & 2004-05)

CIT v. U. P. Asbestos Ltd. (2012) 79 DTR 105/(2013) 260 CTR 194 (All.)(HC)

S. 40A(2) : Expenses or payments not deductible - Excess or unreasonable - Payment of brokerage to relatives held to be not deductible

Assessing Officer found that the assessee has not shown payment of brokerage to anybody other than his son U and daughter in law Smt. S and that this has been done to divert his income to his family members which would have otherwise become taxable in his own hands. Income was also diverted as U and Smt. S. were having huge brought forward losses. Assessing Officer, CIT(A) and the Tribunal disallowed the payment of brokerage by applying section 40A(2)(b). It was held that in view of concurrent finding which are based upon facts of the case and material on record, there is no infirmity in the order of Tribunal.

Shanti Lal Jain v. CIT (2012) 254 CTR 229 / 72 DTR 255 (Raj.)(HC)

S. 40A(2) : Expenses or payments not deductible - Excess or unreasonable - Interest - Interest paid by assessee is not in excess of fair market value and wholly and exclusively for the purpose of business, disallowance was deleted

As there was no material with the Assessing Officer to show that the payment of interest made to sister concern was in excess of fair market value and interest paid was wholly and exclusively for the purpose of business. Hence, disallowance was deleted. (A.Y. 2002-03 to 2004-05)

Bharti Airtel Ltd. v. ACIT (2012) 145 TTJ 161 / (2010) 48 DTR 416 / 41 SOT 175 (Mum.)(Trib.)

S. 40A(2) : Expenses or payments not deductible - Excessive or unreasonable - Disallowance can be made only if the payment made was excess of market price

Disallowance under section 40A(2)(b) can be made only to extent payment for services is excessive or unreasonable vis-a-vis market price of such services, but what is essentially required is that market

price of these services is established and then amount paid in excess of such market price is to be disallowed. During year, assessee paid salary to his son at rate of Rs. 20,000/- per month and claimed deduction of Rs. 2.40 lakhs as business expenditure. Assessing Officer found that assessee's son rendered services but opined that assessee had paid excess salary to his son. He, therefore, estimated salary of son at rate of Rs. 5,000/- per month and disallowed a sum of Rs. 1.80 lakhs under section 40A(2)(b). Since no findings were given by Assessing Officer that payment made by assessee was excessive or unreasonable vis-a-vis market price, estimate of salary made by Assessing Officer at rate of Rs. 5,000/- per month was against express provisions of section 40A(2)(b). Disallowance of Rs. 60,000/- under section 40A(2)(b) would meet ends of justice. (A.Y. 2007-08)
Vinod Kumar v. JCIT (2012) 137 ITD 48 / 19 ITR 246 (Chd.)(Trib.)

S. 40A(3) : Expenses or payments not deductible - Cash payments exceeding prescribed limits - Unavoidable circumstances - Financial crises may be "exceptional or unavoidable circumstance" for cash payment
The assessee made payments exceeding Rs. 10,000/- in cash and claimed that a disallowance under section 40A(3) read with Rule 6DD(j) & Circular No. 220 dated 31.05.1997 could not be made as a payment by cheque, etc. was not possible due to "exceptional or unavoidable circumstances", etc. The Tribunal rejected the assessee's claim on the ground that the assessee's explanation that the payees would not accept cheques as they had been dishonoured on earlier occasions was "fantastic and fanciful" as in such case the assessee could have deposited cash and obtained bank drafts. It was also held that the assessee had not explained how it obtained the cash for making the payments & if the amounts were borrowed, there was a violation of section 269SS. On appeal by the assessee to the High Court, held reversing the Tribunal: Section 40A(3) & Rule 6DD(j) have been incorporated in the Act to check the incurring of bogus and fictitious expenses to non-existing parties. In the present case, there is no dispute on the identity of the payee and genuineness of the transaction. The only question is whether the assessee has been able to establish "exceptional or unavoidable circumstances" why the payment made in cash. The assessee was not doing well in its business and was facing liquidity and financial crunch. The assessee's explanation that payments were made in cash as preparation of a bank draft or issue of cheque would have resulted in a missed opportunity or failure of a good business deal with third parties is acceptable because there were earlier cases of bounced cheques and when a party is facing liquidity problem, it can get difficult as third parties are reluctant to accept cheques and insist on cash payments. Arranging funds is also a problem and not easy. Also, the cash was obtained from a known party and the Assessing Officer had not made any addition on that score. Accordingly, disallowance under section 40A(3) was not justified.
Basu Distributor Pvt. Ltd. v. ACIT (2012) 206 Taxman 45 (Mag.)(Delhi)(HC)

S. 40A(3) : Expenses or payments not deductible - Cash payments exceeding prescribed limits - Stock-in-trade - Union - Provision of section 40A(3) is applicable to payment made for purchase of stock-in-trade - Payment made to union cannot be treated as payment to producers of milk in terms of section rule 6DD(f)
Assessee has made cash payments to Hoshiarpur District Co-operative Milk Producers Union Ltd. As per bye laws of Society no individual producers of milk can be a member of a said society, only a registered milk producers society and the State Government can be a producers of Milk, hence, the payment made by the assessee to the said society cannot be treated as payment made to producers of milk in terms of Rule 6DD(f), there for disallowance was justified. Further the provisions of section 40A(3) is also applicable for purchase of stock-in-trade as the same also amounts to expenditure.
Chanchal Dogra (Smt) v. ITO (2012) 67 DTR 108 / 247 CTR 616 (HP)(HC)

S. 40A(3) : Expenses or payments not deductible - Cash payments exceeding prescribed limits - Single payment was not in excess of Rs. 20000/-, disallowance cannot be made - Amendment in 2009 adding the word "aggregate" is prospective

The assessee had made payments not in excess to Rs. 20000/- in cash different dates but Assessing Officer disallowed the expenses under section 40A(3). Addition was confirmed by the Tribunal. On appeal to the High Court, the Court held that Single payment was not in excess of Rs. 20,000/-, disallowance cannot be made. Amendment in 2009 adding the word "aggregate" is prospective and not retrospective. (A.Y. 2004-05)

Kiran Jaiswal v. ITO (2012) 75 DTR 15 (All.)(HC)

S. 40A(3) : Expenses or payments not deductible - Cash payment exceeding limits - If building constructed was not for personal use the disallowance will be justified if the cash payment were made exceeding the prescribe limit

The assessee constructed the building for business and leasing. The Assessing Officer disallowed the cash expenses. On appeal Tribunal deleted the disallowances. On appeal by the revenue the Court held that, when the assessee was putting up construction not for self occupation, but for business of selling a portion of building and leasing over the premises the cash payment exceeding the limit prescribed under section 40A(3) has to be disallowed. Accordingly the appeal of revenue was allowed. (A.Y. 1996-97)

CIT v. Sanu Family Trust (2012) 209 Taxman 529 (Karn.)(HC)

S. 40A(3) : Expenses or payments not deductible - Cash payment exceeding limits - Depositing in suppliers account is liable to be disallowed [Income-tax Rules, 1962 - Rule 6DD]

The assessee instead of paying cash to the suppliers deposits the same in their bank accounts. Provision of section 40A(3) were held to be attracted and payments are liable to be disallowed. (A.Y. 1993-94 & 1995-96)

CIT v. Venkatadhri Constructions (2012) 80 DTR 363 / (2013) 255 CTR 385 (Mad.)(HC)

S. 40A(3) : Expenses or payments not deductible - Cash payment exceeding limits - Airports Authority - Payments to agent - Disallowance cannot be made [Income-tax Rules, 1962 - Rule 6DD(k)]

Payments to Airports Authority of India in accordance with directions of Authority, falls under exceptions specified in Rule 6DD(k) hence disallowance was not justified. (A.Y. 2005-06 to 2007-08)

SRC Aviation P. Ltd. v. Dy. CIT (2012) 13 ITR 600 (Delhi)(Trib.)

S. 40A(3) : Expenses or payments not deductible - Cash payment exceeding limits - Advance - Disallowance cannot be made in respect of advance for purchase of land

Advance made to purchase land was received back by assessee as the deal could not materialize, payment made for purchase of land cannot be disallowed under section 40(A)(3). (A.Y. 2006-07)

Yamuna Prasad Peshwa v. Dy. CIT (2012) 65 DTR 330 / 143 TTJ 615 (Jodh.)(Trib.)

S. 40A(3) : Expenses or payments not deductible - Cash payment exceeding limits - Purchase of land - No Banking facilities - Disallowance cannot be made [Rule 6DD(e)(g)(j)&(k)]

The cash payments made by assessee colonizer and developers for purchase of land to farmers residing in villages, where there is no banking facilities and made cash payments after banking hours as indicated by the time of payment mentioned in the cash vouchers, there was an exceptional circumstances for making cash payments which fall under the exception clause in Rule 6DD and therefore, the impugned payments could not be disallowed under section 40A(3). (A.Y. 2006-07 & 2007-08)

Shree Salasar Overseas (P) Ltd. v. Dy. CIT (2012) 66 DTR 9 / 150 TTJ 496 / 144 TTJ 4 (UO)(Jaipur)(Trib.)

S. 40A(3) : Expenses or payments not deductible - Cash payments exceeding prescribed limits - Liability incurred up to the A.Y. 2008-09

If the liability for an expense is incurred upto A.Y. 2007-08 and the payment is made in a subsequent year i.e. 2008-09 the provisions of section 40A(3) as applicable in the year in which liability was incurred should be applied. Payment by a crossed cheque in A.Y. 2008-09 in respect of liability of A.Y. 2004-05 could not be disallowed in A.Y. 2008-09 by applying amended provisions of section 40A(3). (A.Y. 2008-09)

Tushar A. Sanghvi (HUF) v. ITO (2012) 136 ITD 394 / 76 DTR 90 / 149 TTJ 205 (Ahd.)(Trib.)

S. 40A(3) : Expenses or payments not deductible - Cash payments exceeding prescribed limits - Applicability of amended provision - Expenditure incurred for which liability has been incurred in A.Y. 2008-09 or in any subsequent year, not to A.Y. 2007-08

Amended provisions of section 40A(3) and 40A(3A) are applicable in respect of those expenditure for which liability has been incurred in A.Y. 2008-09 or in any subsequent year but it cannot be made applicable to the liability incurred upto A.Y. 2007-08. (A.Y. 2008-09)

Anandkumar Rawatram Joshi v. ITO (2012) 149 TTJ 197 / 76 DTR 82 (Ahd.)(Trib.)

S. 40A(3) : Expenses or payments not deductible - Cash payment exceeding prescribed limits - Gold jewellery - Payments adjusted against sales made, there is no violation - The expenses cannot be disallowed [Income-tax Rules - Rule 6DD]

Assessee company is manufacturing gold jewellery through one of its sister concerns. In so far as purchases of old ornaments effected from its own customers, explanation of assessee was that such purchases were effected on a condition that they purchased new jewellery from assessee. As per assessee, though such purchases were treated as cash purchases in its cash book, there was no payment in cash ever made, but, these were adjusted against sales effected to such parties by assessee. Assessing Officer finding that payments effected in cash against a number of purchases exceeded Rs. 20,000/-, disallowed those purchases under section 40A(3). Since payments were effected to customers on account of adjustment resulting out of an exchange of old jewellery with new jewellery, assessee's case got covered under clause (d) of rule 6DD .Even otherwise, since it was a case of only credit purchase and at time of effecting sales, entries were made in a reverse manner for adjusting against credit, such transactions could not be considered as violative of section 40A(3), just for a reason that contra entries appeared in cash book., Therefore, impugned disallowance made by Assessing Officer was to be deleted. (A.Y. 2008-09)

Dy. CIT v. Kirtilal Kalidas Jewellers (P.) Ltd. (2012) 54 SOT 529 (Chennai)(Trib.)

S. 40A(9) : Expenses or payments not deductible - Bonus to employees - Contribution - Reimbursement - Section applies to contribution and not to reimbursement, matter set aside to be decided de nova. [S. 37]

The assessee claimed deduction under section 37, in respect of welfare expenses towards providing education to its employees' children. The payment was by way of reimbursement towards the deficit which the school incurred during the relevant accounting period. The Court observed that, the interpretation of section 40A(9) of the Act clearly brings out a dichotomy between 'contribution' and 'reimbursement'. Section 40A(9) of the Act was inserted by Finance Act No. 2 of 1984. The explanatory memo to the Finance Bill 1984, indicates the reasons why the word 'contribution' finds place in section 40A of the Act. It appears that the section 40A(9) of the Act was inserted as a measure for combating tax avoidance. On the facts of the case as there was no clear finding recorded by the Tribunal, the matter was set aside to Tribunal with the direction to decide the matter de nova

and refrained from going into the scope and applicability of section 40A(9) of the Act, when proper foundation of facts has not been laid. (A.Y. 1985-86 to 1992-93)
Sandur Manganese and Iron Ores Ltd. v. CIT (2012) 349 ITR 386 / 253 CTR 6 / 77 DTR 233 (SC)

S. 40A(9) : Expenses or payments not deductible - Bonus to employees - Contribution to schools for education of employees' children [S. 37(1), 80G]
The Supreme Court held that there is a difference between reimbursement and contribution. Matter is remitted to the Tribunal for de novo consideration by bifurcating the payments made by the assessee company between payments made to the school promoted by it for the education of its employees' children and other schools. If the Tribunal comes to the conclusion that the amount has been reimbursed, the quantified amount has to be certified by a chartered accountant to enable the assessee to make the claim. (A.Y. 1994-95)
Kennametal India Ltd. v. CIT (2012) 77 DTR 236 / 253 CTR 10 / (2013) 350 ITR 209 (SC)

S. 41(1) : Profits chargeable to tax-Remission or cessation of trading liability - Income - Accrual - On waiver of loan section 41(1) is not attracted
For the application of section 41(1), the condition precedent is that there should be an allowance or deduction in the assessment for any year in respect of loss, expenditure or trading liability incurred by assessee hence the section 41(1) is not attracted to waiver of loan liability since no allowance or deduction was claimed in respect of the same. (A.Y. 2003-04)
CIT v. Compaq Electric Ltd. (2012) 66 DTR 38 / 249 CTR 214 / 204 Taxman 58 (Mag.)(Karn.)(HC)

S. 41(1) : Profits chargeable to tax - Remission or cessation of trading liability - Amounts not allowed as deduction in earlier years cannot be assessed as income - Explanation 1 to section 41(1), is applicable in relation to A.Y. 1997-98 onwards and cannot have retrospective effect
During the year the assessee had written back certain amount representing, unclaimed salaries, wages, and bonus, credit balances unclaimed by the suppliers, credit balances unclaimed by customers, unclaimed cheques, excess dividend and excess provision made for doubtful debts in its books of account. Assessing Officer treated as income of the assessee. In appeal, Commissioner(Appeals) deleted the addition which was confirmed by the Tribunal. On appeal by the revenue the High Court held that, where the amount not allowed as deduction the same cannot be assessed as income under section 41(1). As regards unclaimed salaries, wages and bonus and unclaimed suppliers and customers balances could not amount to cessation of liability as Explanation 1 to section 41(1), which provides that unilateral act of assessee by way of writing off such liability in its accounts would be considered as remission or cessation of liability, will apply in relation to assessment year 1997-98 and subsequent years and it does not have any retrospective effect. Departmental appeal was dismissed. (A.Y. 1995-96)
CIT v. Mohan Meakin Ltd. (2012) 348 ITR 109 / 205 Taxman 43 / 69 DTR 397 (Delhi)(HC)

S. 41(1) : Profits chargeable to tax - Remission or cessation of trading liability - Unpaid liability - Unpaid liability cannot be added as assessee's income
During the assessment proceedings the Assessing Officer noticed that there were several advances which had not been repaid till date. As the assessee has not filed the confirmation letters the assessing officer treated the said amounts as income of assessee. On appeal, the Commissioner(Appeals) held that the credit balances remained static for past several years as the assessee has not proved that the liability of creditor subsisted, he confirmed the order of Assessing Officer. On further appeal to Tribunal, the Tribunal deleted the addition. On appeal by revenue, following the judgment of supreme Court in CIT v. Sugauli Sugar works (P) Ltd. (1999) 236 ITR 518 (SC), merely because the amount

remained un paid for a sufficient long time and it's required of revenue authorities to show that liability to pay creditor has ceased or remitted by creditors, accordingly the order of Tribunal confirmed. (A.Y. 2005-06)

CIT v. Hotline Electronics Ltd. (2012) 205 Taxman 245 (Delhi)(HC)

S. 41(1) : Profits chargeable tax - Remission or cessation of trading liability - Liability shown in balance sheet - Merely because the liabilities are outstanding for many years provisions of section 41(1) cannot be applied

During the course of assessment the Assessing Officer noticed that loans were very old and outstanding. The assessee failed to produce the confirmation and postal address. The Assessing Officer held that the liability have seized to exists and taxed under section 41, which was also confirmed by the Commissioner(Appeals). On appeal the Tribunal held that merely because the liabilities are outstanding it cannot be inferred that such liabilities have seized to exists. Accordingly the Tribunal allowed the appeal of assessee. On appeal to the High Court by revenue, the High also confirmed the view of Tribunal and held that merely because the liabilities are outstanding for last many years, it cannot be inferred that the said liabilities have seized to exists, hence section 41(1) cannot be applied. (A.Y. 2001-02 to 2003-04 & 2006-07)

CIT v. Nitin S. Garg (2012) 71 DTR 73 / 208 Taxman 16 (Guj.)(HC)

S. 41(1) : Profits chargeable tax - Remission or cessation of trading liability - Liability of creditors - Liability to creditors shown as outstanding for more than four years not assessable as income

The assessee is in the business of manufacturing of rice from paddy and also selling rice after purchasing the same from the local market .In the books of assessee the amount payable was shown as outstanding. The Assessing Officer asked the assessee to file confirmation. The assessee could not file the confirmation. The Assessing Officer treated the outstanding in their accounts as unexplained credits under section 68 of the Income-tax Act. On appeal the Commissioner(Appeals) held that the Assessing Officer was justified in assessing the amount under section 41(1) of the Income-tax Act. Before Tribunal it was argued that additions cannot be made under section 41(1). The Tribunal held that the applicability of section 68 was ruled out since no fresh amount was credited in the accounts of the creditors under consideration during the relevant accounting year. The Tribunal also held that since the liabilities were shown as outstanding in the balance sheet as on March 31, 2002, the onus had not been discharged, hence section 41(1) of the Act was not applicable. On appeal by revenue the High Court also up held the order of Tribunal and held that the liability shown as outstanding in balance sheet not assessable as income under section 41(1) though the liability to creditors were outstanding for more than four years. (A.Y. 2002-03)

CIT v. Shri Vardhman Overseas Ltd. (2012) 343 ITR 408 / 69 DTR 379 / 204 Taxman 524 (Delhi)(HC)

S. 41(1) : Profits chargeable to tax - Remission or cessation of trading liability - Waiver of loan - Business income - Loan taken on cash credit account used towards day to day business operation waived by bank is assessable as income [S. 28(iv)]

During the assessment proceedings the assessee realized that it had wrongly credited the total waiver of loan received from banks / financial institutions to the P& L account under the head miscellaneous income. In the course of assessment proceedings the assessee revised the claim by filing revised computation. The Assessing Officer rejected the claim on the ground that the assessee has not filed the revised return as per the provisions of section 139(5). On appeal the Commissioner(Appeals) accepted the claim of assessee and decided in favour of assessee. On appeal to the Tribunal by the revenue the appeal was partly allowed by the Tribunal. On appeal by the assessee to High Court the

Court held that loan taken by assessee on cash credit account used towards day to day business waived by bank is chargeable to tax under section 28(iv) as also under section 41(1).
Rollatainers Ltd. v. CIT (2012) 250 CTR 25 / 69 DTR 128 (Delhi)(HC)

S. 41(1) : Profits chargeable to Tax - Remission or cessation of trading liability - Brokerage - Brokerage liability outstanding written back in to profit and loss account no remission or cessation of liability in relevant A.Y.
The assessee is engaged in the business of share broking and also in shares. The assessee in the A.Y. 2004-05 written back into the profit and loss account outstanding brokerage and taxes were paid on it. The Assessing Officer for the A.Y. 2002-03 sought confirmation of outstanding brokerage, the assessee stated that the said brokerage was offered for taxation in the A.Y. 2004-05. However the Assessing Officer assessed the income for the A.Y. 2002-03. On appeal the Commissioner(Appeals) and Tribunal held that as there was no remission or cessation of liability under section 41(1) for the A.Y. 2002-03 addition was not justified. On appeal, High Court confirmed the order of Tribunal. (A.Y. 2002-03)
CIT v. Enam Securities P. Ltd. (2012) 345 ITR 64 / 75 DTR 258 / 208 Taxman 54 / 253 CTR 256 (Bom.)(HC)

S. 41(1) : Profits chargeable to tax - Remission or cessation of trading liability - Loan taken for capital purpose - Cessation of liability to repay loan taken for capital purposes is not assessable as income [S. 28(iv)]
The cessation of liability to repay the loan taken for purchase of a car is not assessable as income under section 41(1) in accordance with Mahindra and Mahindra Ltd. (2003) 261 ITR 501 (Bom.). Though in Solid Containers Ltd. (2009) 308 ITR 407 (Bom.) it was held that waiver of a loan taken for trading activity would become assessee's income and be subject to tax even if the assessee had never claimed a deduction for the loan, that decision is not applicable because there the loan was taken for "trading purposes" and not for purchase of a capital asset. In the alternative, the waiver of a loan is not taxable under section 28(iv) as that provision applies only when a benefit or perquisite is received in kind and not in cash. (A.Y. 2004-05)
CIT v. Xylon Holdings Pvt. Ltd. (2012) 211 Taxman 108 (Mag.)(Bom.)(HC)

S. 41(1) : Profits chargeable to tax - Remission or cessation of trading liability - Unpaid liability of salaries of employees which is time barred is chargeable to tax though said amount is shown as liability in the books of account of assessee
In the course of assessment proceedings the Assessing Officer noticed the unpaid liability pertaining to earlier years .The assessee was asked to substantiate the liability shown in the books of account. The assessee filed confirmation in respect of only 3 employees out of 170 employees. The Assessing Officer treated the said amounts as cessation of liability and brought to tax under section 41(1) of the Act .In appeal the assessee contended that the liability was outstanding in its books and therefore did not amount to cessation of liability. The Commissioner(Appeals) deleted the addition, which was confirmed by the Tribunal. Revenue filed an appeal to the High Court. Before the Court the assessee contended that though the claim is time barred, there is no limitation provided under Industrial Disputes Act and the assessee is acknowledging in the books of account. The Court held that this view is an abstract and theoretical one, and does not ground itself in reality. Interpretation of laws, particularly fiscal and commercial legislation is increasingly based on pragmatic realities, which means that even though the law permits the debtor to take all defences and successfully avoid liability, for abstract juristic purpose, he would be shown as debtor. In other words it, would be illogical to say that a debtor or employee, holding unpaid dues, should be given the benefit of his showing the amount as liability, even though he would be entitled to say that a claim for its recovery is time barred and continues to enjoy the amount. The second reason why the assessees contention is

un acceptable is because, w.e.f. 1st April, 1997 by virtue of Finance (No. 2) (Act, 1996, an explanation was added to section 41 .The expression "include" in the Explanation is significant; Parliament did not use the expression "means". Necessarily, even omission to pay, over a period of time, and the resultant benefit derived by the employer/assessee would therefore qualify as a cessation of liability, albeit by operation of law. Accordingly the High Court held that unpaid liability of salaries of employees, not claimed for past several years by erstwhile employees constituted profits chargeable to tax under section 41(1). (A.Y. 2006-07)

CIT v. Chipsoft Technology (P.) Ltd. (2012) 80 DTR 250 (Delhi)(HC)

S. 41(1) : Profits chargeable to tax - Remission or cessation of trading liability - Repayment of loan taken for purchase of a capital asset is not liable to tax [S. 28(iv)]

The assessee's liability to pay a loan taken towards the purchase of a car was taken over by the holding company. However, motor car continued to be a part of the assets of assessee and depreciation thereon was also claimed by it.

The Assessing Officer added back said amount to the income of the assessee being taxable under section 41(1). The Commissioner(Appeals) deleted the addition. The Tribunal held that the cessation of liability to repay a loan taken to purchase a capital asset did not result in a revenue receipt and it was not taxable under section 41(1) as said expenditure was not incurred in earlier years. On appeal High Court held that the issue arising in this case stand covered by the decision of the High Court in the matter of Mahindra & Mahindra Ltd. (supra). The alternative submission that the amount of loan written off would be taxable under section 28(iv) also came up for consideration before the Court and it was held that section 28(iv) would apply only when a benefit or perquisite is received in kind and has no application where benefit is received in cash or money In view of above, no substantial question of law arose for consideration. Amount written off would be taxable under section 28(iv) also came up for consideration before the Court and it was held that section 28(iv) would apply only when a benefit or perquisite is received in kind and has no application where benefit is received in cash or money In view of the above, no substantial question of law arose for consideration. Accordingly liability to repay a loan taken to purchase a capital asset does not result in a revenue receipt and it is not taxable under section 41(1). (A.Y. 1993-94)

CIT v. Xylon Holdings (P.) Ltd. (2012) 211 Taxman 108 (Mag.)(Bom.)(HC)

Editorial:- Solid Containers Ltd. v. Dy. CIT (2009) 308 ITR 417 / 178 Taxman 192 distinguished, Mahindra & Mahindra Ltd. v. CIT (2003) 261 ITR 501 / 128 Taxman 394 (Bom.) followed.

S. 41(1) : Profits chargeable to tax - Remission or cessation of trading liability - Income - Refund of value added tax cannot be assessed under section 41(1)

After refund is claimed by the assessee in the prescribed form, the Commercial tax authority has to accept or reject the claim. Value added tax refund is not an automatic refund, it is depended on the decision of the commercial tax authority who has to adjudicate the claim. It is not a benefit that accrued to the assessee during the year as the claim was not adjudicated by the commercial tax authority. (A.Y. 2007-08)

ITO v. Binayak Hi-Tech Engineering Ltd. (2012) 13 ITR 369 / 144 TTJ 53 (UO)(Kol.)(Trib.)

S. 41(1) : Profits chargeable to tax - Remission or cessation of trading liability - Income - Accrual - Conditional consent decree passed by Debt recovery Tribunal Income cannot be taxed during the year

For the A.Y. 2000-01, the Assessing Officer made addition of income under section 41(1), being the loan written off by Syndicate Bank in pursuance of an order passed by the Debt Recovery Tribunal. The Tribunal held that it was clear from the order passed by the Debt Recovery Tribunal that only on fulfilling certain conditions which were spread over a period of time, the assessee would derive the benefit. The payments to be made by the assessee over a period of three years. The Bank gave the

"No dues" certificate only in October, 2003. Hence, income if any from the consent decree could not be brought to tax in the A.Y. 2000-01 as the assessee had not obtained any benefit during the year, either by way of any liability in that year. (A.Y. 2001-02 & 2004-05)
Maini Shipping P. Ltd. v. ACIT (2012) 13 ITR 440 (Mum.)(Trib.)

S. 41(1) : Profits chargeable to tax - Remission or cessation of trading liability - Unclaimed liability which is more than one year, addition cannot be sustained [S. 68]
Unclaimed liabilities standing in the books of the assessee for more than one year being old liabilities, credits were not made in the relevant year and therefore, addition under section 41(1) or 68 cannot be sustained. (A.Y. 2007-08)
Dy. CIT v. Eastern Medikit Ltd. (2012) 135 ITD 461 / 71 DTR 241 / 146 TTJ 551 / 18 ITR 457 (Delhi)(Trib.)

S. 41(1) : Profits chargeable tax - Remission or cessation of trading liability - Waiver by creditor - Amount not claimed as deduction in earlier years Waiver by creditor - Amount not be treated as deemed business income
The condition in section 41(1) is an absolute condition that the amount must have been claimed as deduction during the earlier A.Y.. In the instant case the assessee had not claimed expenditure in any of the earlier years, the provisions of section 41(1) could not be invoked to bring the amount to tax which had been waived by the creditor. Therefore, the addition under provisions of section 41(1) was liable to be deleted. (A.Y. 2003-04)
M. R. Banu (Smt) v. Dy. CIT (2012) 15 ITR 662 (Chennai)(Trib.)

S. 41(1) : Profits chargeable to tax - Remission or cessation of trading liability - Liability shown in books of account - Even in respect of time barred debts provision of section 41(1) cannot be applied
The Assessing Officer noticed that the liability shown in the balance sheet are more than one year hence brought to tax by applying the provisions of section 41(1) of the Act. In appeal Commissioner of Income-tax (Appeals) also confirmed addition. The Tribunal held that even in respect of time barred debt provision of section 41(1) cannot be applied. On the facts the liabilities were only of one year old therefore addition confirmed by the Commissioner of Income-tax(Appeals) were deleted . (A.Y. 2005-06)
Nitin M. Panchamiya v. Addl. CIT (2012) 73 DTR 202 / 148 TTJ 96 / 50 SOT 468 (Mum.)(Trib.)

S. 41(1) : Profits chargeable to tax - Remission or Cessation of liability - Liabilities of four months - All liabilities were maximum 4 months old, 95% of the unclaimed balances arose only during the last four months. It was held that the Assessing Officer was not justified in writing back to the income of the assessee for the same year
Section 41 is applicable in the year in which there was a remission or cessation of a trading liability incurred in an earlier year. It was recorded that all liabilities of the assessee were maximum 4 months old and 95% of the unclaimed balances arose only during the last four months. The Assessing Officer was not justified in writing back to the income of the assessee for the same year. Thus addition was deleted as the department had not brought on record any evidence to establish that there was any remission or cessation of liability. (A.Y. 2005-06)
Dy. CIT v. Bax Global India P. Ltd. (2012) 17 ITR 414 (Delhi)(Trib.)

S. 41(1) : Profits chargeable to tax - Remission or Cessation of Liability - Blocked account to reserve account - Amount in transferred from inter-branch transaction blocked accounts to reserves through P&L a/c, as the primary condition of sum being allowed as deduction in earlier years not fulfilled, hence provisions of section 41 could not be invoked

The amount was lying in the accounts which were known as inter-branch account. It was expected that all these inter-branch accounts should get squared up on consolidation. Due to human error of accounting or lack of proper advice from different branches, the amount in question remained either in debit or credit in different inter branch accounts and the bank had admittedly not reconciled for over a long period of time. It was held that in case of such sum section 41 could not be invoked as department failed to prove that sum in question forming part of so- called inter-branch transaction was earlier allowed as deduction. (A.Y. 2005-06)

Punjab National Bank v. Addl. CIT (2012) 17 ITR 462 (Delhi)(Trib.)

S. 41(1) : Profits chargeable to tax - Remission or cessation of liability - Addition of unsecured loan to income - Nothing to suggest that any benefit either by way of remission or cessation of any liability obtained - Unsecured loans continually admitted in balance sheet is not trading liability hence section 41(1) is not attracted

Unless there is cessation or remission of liability by creditor, liability subsists and assessee having not unilaterally written back accounts of creditors in its profit and loss account, provision of section 41(1) are not attracted. In the instant case, Assessing Officer added amount of unsecured loans to assessee's income by invoking section 41(1) on ground that these were barred by limitation. It was held that since there was nothing to suggest that assessee obtained any benefit either by way of remission or cessation of any liability and unsecured loans were continually admitted by assessee in its balance sheet and, moreover, these were not trading liability and hence section 41(1) was not attracted to instant case. (A.Y. 2008-09)

ACIT v. Samrat Rice Mills (P.) Ltd. (2012) 54 SOT 1 (Delhi)(Trib.)

S. 41(1) : Profits chargeable to tax - Remission or cessation of liability - Gift - Existence of both personal relationship and business relationship cannot convert a 'gift' into a 'remission of trading liability', unless situation warrants so

Assessee, trading in textiles, had received certain sum as gift from his maternal uncle by way of book entry, i.e., by crediting his capital account and debiting business account of donor. It was noticed that assessee owed almost similar amount to donor. Despite filing of uncle's letter confirming payment of gift, Assessing Officer opined that said gift was cessation/remission of trading liability as per section 41(1). It was held that since assessee's business was in healthy condition, business consideration warranting remission of liability for survival of business was totally absent and personal consideration for giving gift weighed more. Existence of both personal relationship and business relationship cannot convert a 'gift' into a 'remission of trading liability', unless situation warrants so. Hence section 41(1) could not be invoked. (A.Y. 2007-08)

ACIT v. Rajesh Kumar (2012) 54 SOT 28 (Cochin)(Trib.)

S. 43(1) : Actual cost - Depreciation - Written down value - Though Expl. 10 to section 43(1) does not apply to loan waiver, treatment in books of reducing amount waived from asset cost means that WDV has to be reduced [S. 32]

The assessee received a loan of Rs. 5,277 crores from the Steel Development Fund in earlier years. In A.Y. 2000-01, a substantial part of the loan was waived. In its books of account, the assessee reduced the cost of the assets by the amount of loan waived and claimed depreciation on the reduced figure. However, the assessee claimed that for income-tax purposes, the waiver did not impact the WDV of the assets and that depreciation had to be allowed on the original figure. The Assessing Officer, CIT(A) & Tribunal (included in file) decided the issue against the assessee by relying on Explanation 10 to section 43(1) inserted by the F (No. 2) Act 1998 w.e.f. 1.4.1999. On further appeal to the Tribunal, Held reframing the question:

Explanation 10 to section 43(1) does not cover the case of waiver of the loan. It covers only the grant of a subsidy or reimbursement by whatever name called. Though the assessee's case may not fall

under Explanation 10, the waiver of the loan amounted to the meeting of a portion of the cost of the assets under the main provision of section 43(1) because of the treatment given by the assessee in its books of account in reducing the cost/WDV of the assets by the amount of the loans waived. The real nature of a transaction can be understood by reference to the contemporaneous act of the parties, which throws considerable light on their true intention and their understanding of the transaction. The assessee understood the receipt of the loans as having been given towards meeting a part of the cost of the assets and the waiver cannot have a different effect on such intention. PJ Chemicals Ltd. (1994) 210 ITR 830 (SC), which holds, (pre Explanation 10) that a subsidy given as an incentive for industrial growth cannot be reduced from the cost of the assets under section 43(1), does not apply to the facts. (A.Y. 2000-01 to 2003-04)

Steel Authority of India Ltd. v. CIT (2012) 348 ITR 150 / 206 Taxman 574 / 80 DTR 345 (Delhi)(HC)

S. 43(1) : Actual cost - Written down value - Succession of firm by company - Without invoking Explanation 3 to section 43(1) the Assessing Officer cannot replace the actual cost by WDV as appearing in the books of transfer of firm [S. 47(xiii)]

Partnership firm "Prakash Chemical Agency" has transferred all its assets to Prakash Chemicals Pvt. Ltd. i.e. the assessee. WDV as per the books of account of firm were Rs. 19,84,311/-. Assessee company had taken over said firm, 'cost' in books of account were taken at Rs. 82,51,157/-. The assessee claimed the depreciation on the "actual cost" on which the assets were acquired by the firm. The Assessing Officer held that the assessee is entitled to claim depreciation on the WDV as shown by the erstwhile firm. In appeal the Commissioner(Appeals) allowed the claim of assessee by observing that in the case of demerger, amalgamation transfer from holding company to subsidiary company the legislature has specifically indicated that the "actual cost" of the transferred capital asset would be the same as WDV in the books of the transferor company .However, in the case of transfer of capital assets of firm to company such a provision is not introduced. On appeal the Tribunal held that the Assessing Officer has not invoked Explanation 3 to section 43(1) he was not justified to disturb actual cost as recorded in books of account of assessee-company on date of its acquisition of assets and liabilities of erstwhile firm. Even otherwise in view of the fact that rest of explanation through which Assessing Officer could have disturbed 'actual cost' was not applicable, substitution of 'actual cost' as replaced by Assessing Officer for purpose of allowing depreciation was not justified. (A.Y. 2003-04 to 2005-06)

Dy. CIT v. Prakash Chemical Agencies (P) Ltd. (2012) 136 ITD 222 / 75 DTR 91 / 148 TTJ 480 (Ahd.)(Trib.)

S. 43(5) : Speculative transaction - Non convertible security debentures - Commodities - Shares - Capital loss - Transactions relating to non-convertible security debentures would not come within definition of speculative transaction and loss there from could be claimed as capital loss

The assessee claimed loss suffered on transfer of Non-convertible secured debentures as a capital loss. The Assessing Officer treated the said loss as speculation loss under section 43(5). In appeal Commissioner(Appeals) also confirmed the order of Assessing Officer. On appeal to the Tribunal it was held that the loss is allowable as capital loss. On appeal by the revenue, the High Court held that transaction relating to non -convertible security debentures would not fall within the definition of "Speculative transaction" as there was actual and constructive delivery. Further expression 'commodity' 'shares' and 'stocks' used in section 43(5) does not include non-convertible secured debentures purchased or before allotment. Pending allotment, non-convertible portion does not exists and the transaction relating to the partial non convertible security debentures will not come within the expression "commodity" or "shares" or "stocks". And since there was no allotment the question of purchase or sale will not arise. The Court up held the order of Tribunal. (A.Y. 1993-94)

CIT v. New Ambadi Estates (P) Ltd. (2012) 206 Taxman 286 / 250 CTR 75 / 69 DTR 166 (Mad.)(HC)

S. 43(5) : Speculative transaction - Derivatives - Futures and options - Business loss - Transaction before 25th Jan., 2006 - Net income after setting off loss can only be assessed as business loss [S. 28(i)]

Assessee has offered a sum of Rs. 3,27,687/- arising out of F&O transactions under the head 'Short term capital gains'. Assessing Officer held that as per provisions of section 43(5)(d) profits from transaction in F&O was assessable under the head 'Business' and not 'Capital gains'. As regards the loss amounting to Rs. 1,35,889/- was allowed to be carried forward as speculation loss. On appeal the Commissioner(Appeals) confirmed the order of Assessing Officer. On appeal the Tribunal held that insertion of clause (d) in section 43(5) is applicable from A.Y. 2006-07 and even loss incurred before 25th Jan., 2006 should also be reckoned as only business loss. The Tribunal directed the Assessing Officer to assess the net profit from F&O at Rs. 3,27,687/- under the head business. (A.Y. 2006-07)

Pradeep Kumar Harlalka v. ACIT (2012) 65 DTR 157 / 143 TTJ 446 (Mum.)(Trib.)

S. 43(5) : Speculative transaction - Derivative - Hedging - Derivative instruments if not used as an hedging it will be assessed as profits and gains of business and hence section 43(5) is applicable

The assessee is a Private Ltd company which is in the business of corporate finance and share dealing. During relevant year the assessee claimed loss on account of derivative trade. The Assessing Officer has treated the said loss as speculative applying the provisions of section 43(5)(d). On appeal the Commissioner(Appeals) held that the activity being investment the loss is not speculative in nature. On appeal by revenue the Tribunal held that the assessee was involved in day to day operation of share trading activity, the Assessing Officer is justified in treating the loss as speculative. (A.Y. 2005-06)

Dy. CIT v. Noble Enclave & Towers (P) Ltd. (2005) 50 SOT 5 (Kol.)(Trib.)

S. 43(5) : Speculative transaction - Derivatives - Loss on account of derivative trading transaction carried out electronically on screen based system and through recognized stock exchange is not disallowable as speculative

The assessee filed a return claiming business loss emanating from derivative trading in futures and options and setting it off against the business profit. The Assessing Officer disallowed the claim. It was held that the assessee complied with the conditions with the provisions of section 43(5)(d) of the Act, by carrying out derivative transactions electronically on screen based system and through recognized stock exchange. The assessee had maintained each and every record of the documentation provided by the sub-broker like trade conformation report, bills etc. Thus, relying on the intention of Section 43(5)(d) and Memorandum explaining provisions of finance bill, 2005 the claim of assessee could not be disallowed. (A.Y. 2008-09)

Vibha Goel (Smt) v. JCIT (2012) 16 ITR 418 (Chd.)(Trib.)

S. 43(5) : Speculative transaction - Actual delivery taken by agent - Purchase and sale of shares by the agent of the assessee, loss on the transaction cannot be held to be speculative

Where the actual delivery of shares was not taken by assessee herself but was given or received by an agent of the assessee, it was held that loss from such transaction was not a speculative loss within the meaning of section 43(5). (A.Y. 2008-09)

Dy. CIT v. S. Thilagavathy (Dr.) (2012) 17 ITR 506 (Chennai)(Trib.)

S. 43(5) : Speculative transaction - Derivative trading in commodity - Recognised stock exchange - Notification treating MCX as "recognised stock exchange" on 22.5.2009 to be

treated as retrospective and applying since 1.4.2006. [Rule 6DDA, 6 DDB, Income- tax Rules, 1961]

Proviso to section 43(5)(d) inserted w.e.f. 1.4.2006 provides that a derivative transaction on a recognized stock exchange shall not be a "speculative transaction". MCX Stock Exchange was notified as a recognized stock exchange on 22.5.2009. Though the recognition came later, MCX has to be treated as a recognized stock exchange w.e.f. 1.4.2006 because the provisions providing for recognition are purely procedural and will have retrospective effect. (A.Y. 2007-08)

ACIT v. Arnav Akshay Mehta (2012) 53 SOT 581 (Mum.)(Trib.)

S. 43(5) : Speculative transaction - Derivative trading of shares - Allowed to be set off against commodity trading

Assessee carried out derivative trading of shares in National Stock Exchange and Bombay Stock Exchange. He earned income from such transactions. He also suffered loss from commodity trading. As per Notification No. 02/2006 [SO 89E], dated 25-1-2006, which is not applicable with retrospective effect from 1-4-2005 and decision of Ahmadabad Bench of Tribunal rendered in case of Tejas K Shah v. ITO (IT Appeal No. 2255 (Ahd.) of 2010, dated 17-9-2010), income of assessee for period up to 24-1-2006 was in nature of speculative income and same could be adjusted against speculative loss suffered by assessee. (A.Y. 2006-07)

ACIT v. Vimal Vadilal Shah (HUF) (2012) 54 SOT 458 (Ahd.)(Trib.)

S. 43(6) : Written down value - Amalgamation of company - Amalgamated company

As per Expln. 2 to section 43(6) WDV of assets of the amalgamated company will be the WDV at the hands of the amalgamating company for the immediate preceding previous year arrived at after reducing the depreciation actually allowed in the said preceding previous year. Expln. 3 will have relevance for the purpose of finding out the WDV of the amalgamating company, which in turn, is that of the amalgamated company. (A.Y. 1994-95 & 1995-96)

EID Parry (India) Ltd. v. Dy. CIT (2012) 79 DTR 249 / 209 Taxman 214 / (2013) 256 CTR 104 (Mad.)(HC)

S. 43(6) : Written down value - Waiver of loan taken on purchase of assets - Depreciation is allowable on actual cost

Where an assessee purchases an asset by taking a loan from a related concern and claims depreciation thereupon and where subsequently such loan was waived and assessee treats such waiver as capital receipt not chargeable to tax and continues to claim depreciation on such asset, revenue cannot do anything to deny claim of depreciation as law has a lacuna in that regard. (A.Y. 2001-02 to 2007-08)

Akzo Nobel Coating India (P.) Ltd. v. Dy. CIT (2012) 139 ITD 612/(2013) 152 TTJ 774 (Bang.)(Trib.)

S. 43A : Rate of exchange - Foreign currency - Depreciation

Assessee was entitled to depreciation on additional liability for loan raised in foreign currency, due to fluctuation in change rate, notwithstanding the fact that there was no actual payment. Amendment to section 43A by Finance Act, 2002 w.e.f. 1st April, 2003, was not retrospective. CIT v. Woodward Governor India (P) Ltd. (2009) 312 ITR 254 (SC) followed. (A.Y. 1994-95 to 96-97 and 2002-03)

CIT v. Oswal Spinning & Weaving Mills Ltd. (2012) 77 DTR 228 (P&H)(HC)

S. 43B : Deductions on actual payment - Interest - Disallowance was not justified - Sick Industrial Companies (Special Provisions) Act, 1985 [S. 32, 41(1)]

Assessee took over a sick company under a scheme of a rehabilitation for emulated by the Board for Industrial and Financial Reconstruction. In the rehabilitation scheme the Board had observed that the Income-tax authorities may consider allowing deduction under section 43B of the Income-tax Act,

1961 of interest "payable" by the sick company to banks and financial institutions even though it had not been paid during the year. For the assessment years 1990-91 and 1992-93 the Commissioner(Appeals) did not allow the assessee's claim. The Tribunal allowed the claim relying on two circulars issued by the Board [Circular No. 523 dated 5-10-1988 (1988) 174 ITR (St) 1, & 576 dated 30-8-1990 (1990) 185 ITR (St) 48]. The Court held that the Scheme should be read keeping in mind the object of the provisions of SICA for rehabilitation measure in respect sick industry, therefore, the Tribunal is justified in allowing the deduction under section 43B. (A.Y. 1990-91 & 1992-93)

CIT v. Tube Investments of India Ltd. (2012) 341 ITR 199 / 204 Taxman 686 / 69 DTR 409 (Mad.)(HC)

S. 43B : Deductions on actual payment - Sales tax provision - Sales tax provision, which was paid before due date of filing of return, cannot be disallowed

The Court held that sales tax liability on or before due date of filing or furnishing the return of income for the relevant year could not be disallowed. (A.Y.1984-85)

Kishan Automobile v. CIT (2012) 66 DTR 465 (MP)(HC)

S. 43B : Deductions on actual payment - Interest on delayed payment of interest - Demand of tax not payable within the specified period includes payment of interest hence allowed

In light of provisions of Section 17A(2) of Himachal Pradesh General Sales Tax Act, 1968 it was held that when there is a demand of tax and that is not paid within the period, then interest is automatically payable. The Tribunal failed to consider the provision of Himachal Pradesh General Sales Tax Act, 1968 and merely based its conclusion on the term "any sum payable". Therefore the Hon'ble High Court allowed the claim of deduction by the assessee. (A.Y. 1989-90)

Shankar Trading Co. P. Ltd. v. CIT (2012) 342 ITR 81 (Delhi)(HC)

S. 43B : Deductions on actual payment - Constitutional validity - Section 43B(f), which allows deduction for leave encashment only on payment basis is ultra vires. In any event, it does not cover premium paid to insurer [S. 37(1), Constitution of India - Art. 226]

The assessee claimed deduction under section 37(1) for liability to pay, payment of, premium to LIC under the Group Leave Encashment Scheme policy. The Assessing Officer allowed the claim though the CIT revised the assessment under section 263 on the ground that under section 43B(f), leave encashment was allowable as a deduction only on payment basis. The Tribunal reversed the CIT on the ground that section 43B(f) had been held to be unconstitutional in Exide Industries Ltd. and another v. UOI (2007) 292 ITR 470 (Cal.) and that the assessment order was not erroneous. On appeal by the department to the High Court, Held dismissing the appeal:

(i) Section 43B was inserted by the FA 1983 to prevent assessees from claiming a deduction for a provision for statutory liabilities without actually paying the same. Leave encashment is not a statutory liability as held in Bharat Earth Movers v. CIT (2000) 245 ITR 428 (SC) and a deduction is allowable in respect of the accrued liability. To overcome the said decision, clause (f) was inserted in the year 2001 to allow deduction for leave encashment only on payment basis. In Exide Industries Ltd. and another v. UOI (2007) 292 ITR 470 (Cal.), clause (f) of Section 43B was held to be inconsistent with the object with which section 43B was inserted and thereby was held to be unconstitutional. As the department has accepted the judgement of the Calcutta High Court and not filed an appeal to the Supreme Court, it is not open to the Revenue to challenge its correctness in the case of another assessee as held in Berger Paints India Ltd. v. CIT (2004) 266 ITR 99 (SC).

(ii) Even assuming clause (f) of section 43B is valid, what is intended by it is to deny deduction for liabilities not actually incurred and to exclude provisions made against future liabilities from being granted a deduction. In the instant case it was not a provision for future liability which was claimed as a deduction. The assessee had insured itself against the liabilities that may arise on account of the

claims made by the employees towards leave encashment. The assessee being covered by a valid insurance policy and premium being regularly paid, incurs no liability towards leave encashment. The liability; being covered by a valid insurance policy, is solely that of the insurer. Even if section 43B(f) stands, in the case of the assessee, where the liability is borne by the insurer, there can be no situation wherein assessee could make a valid claim for deduction under section 43B(f) since the actual liability is not incurred in any of the years. The premium paid towards the renewal and continued validity of the insurance policy necessarily becomes business expenditure wholly and exclusively incurred for the business purpose and allowable as a deduction under section 37. (A.Y. 2005-06)
CIT v. Hindustan Latex Ltd. (2012) 74 DTR 212 / 209 Taxman 42 (Ker.)(HC)

S. 43B : Deductions on actual payment - Claim not made in the return [S. 139, 250, 251, 254(1)]
The assessee made claim under section 43B, in respect of payment of SEBI fees in the course of assessment proceedings.The Assessing Officer rejected the claim on the ground that he had no authority to allow any relief or deduction which had not been claimed in the return. In appeal before the Commissioner(Appeals) allowed the claim of assessee. In appeal by revenue the Tribunal also confirmed the Order of Commissioner(Appeals). On appeal to the High Court, the Court held that an assessee is entitled to raise additional grounds not merely in terms of legal submissions , but also additional claims which was not made in the return filed by it. (A.Y. 2004-05)
CIT v. Pruthvi Brokers & Shareholders Pvt. Ltd. (2012) 349 ITR 336 / 74 DTR 321 / 208 Taxman 498 / 252 CTR 151 (Bom.)(HC)

S. 43B : Deductions on actual payment - SEBI Registration fee paid under scheme of settlement, liability accrued in year 2001 discharged in year 2004 held deductible
Under the Securities and Exchange Board of India (Interest Liability Regularisation) Scheme, 2004, all the brokers of the BSE and the NSE were required to pay turnover fees at a prescribed rate for an initial period of five years. The brokers went to the court to get relief and the mater went to the Supreme Court which upheld the Scheme of the SEBI, holding the fees reasonable and valid. As a result thereof, the SEBI formulated a scheme of one time settlement which brokers could avail of if they paid the registration fee on the annual turnover fees along with 20 per cent of the total interest before a specified date, i.e, November 15, 2004. The assessee opted for the one time settlement and paid the amount. The Assessing Officer held that by making the payment in 2004, the assessee discharged its liability in the year 2004 though it accrued in the year 2001. The Assessing Officer allowed Rs. 10,14,847/- which represented the payment of the current year's liability. The Tribunal held that the entire amount was deductible. On appeal by the department, the High Court held dismissing the appeal, that the Tribunal was correct in law in allowing deduction of Rs. 3,84,01,630/- to the assessee being the SEBI registration fees.
CIT v. BLB Ltd. (2012) 347 ITR 139 (Delhi)(HC)

S. 43B : Deductions on actual payment - Bonus - Deposit in separate bank account - Deposit of amount in a separate account maintained by assessee did not satisfy the requirement of law under section 43B as to actual payment
There was a dispute between management and employees as regards percentage of bonus payable by assessee.In respect of admitted percentage of bonus payable as per settlement of dispute, assessee deposited amount in a separate bank account. It was held that the requirement of section 43B is an actual payment and not deemed payment and even creating an irrevocable trust would not satisfy requirement of law. Hence mere fact that assessee had quantified bonus payment and deposited in a separate account maintained by assessee did not mean that requirement of law under section 43B as to actual payment stood satisfied. Appeal of assessee was dismissed. (A.Y. 1997-98)
Thanjavaur Textiles Ltd. v. JCIT (2012) 210 Taxman 111 (Mad.)(HC)

S. 43B : Deductions on actual payment - Amendment retrospective - Provident fund and Employees State Insurance Contributions made after due date but before filing of return - Payments deductible

The Supreme Court in CIT v. Alom Extrusions Ltd. (2009) 319 ITR 306 (SC) has laid down that amendments to section 43B by the Finance Act, 2003, which were made applicable with effect from April 1, 2004, were curative in nature and, hence, would apply retrospectively with effect from April 1, 1988. The provident fund and employees State Insurance contributions to the extent of Rs. 12,36,139/- were paid by the assessee before filing of the return and proof of payment was submitted before the Assessing Officer. The Assessing Officer disallowed the claim holding that the payments were not made by the due date. It was held that the amounts were deductible.

CIT v. Manoj Kumar Singh (2012) 349 ITR 230 (All.)(HC)

S. 43B : Deductions on actual payment - Tax, duty, Cess or fees not actually paid - Electricity dues not fees & hence cannot be disallowed

The assessee had debited to the profit and loss account a sum of Rs. 1,67,10,388/- towards "power consumed". The expenditure had been included under the head of "manufacturing and other expenditure". Later, contrary to the agreement, the APSEB, raised a higher demand. The assessee filed a writ petition before the court challenging the action for the APSEB and the court while granting stay, directed the APSEB to raise the demand for the net amount after giving the benefit of 25 per cent and the assessee paid 75 per cent of the bill. The balance of Rs. 52,23,790/- was shown as liability in the books of account. The Assessing Officer held that electricity charges come within the ambit of section 43B of the Act with effect from April 1, 1989, and, therefore, could be allowed as deduction only on payment basis. Held, that the provisions of section 43B do not incorporate electricity charges. The assessee had not paid the disputed electricity charges of Rs. 52,23,790/- to the APSEB as it obtained stay from the court and as such, the provisions of section 43B of the Act would not be attracted to such unpaid electricity charges. Further, non-payment of such disputed electricity charges to the APSEB could not be termed as "fees" and the revenue had to allow deduction of the amount. (A.Y. 1991-92)

CIT v. Andhra Ferro Alloys P. Ltd. (2012) 349 ITR 255 (AP)(HC)

S. 43B : Deductions on actual payment - Entry tax - Welfare Cess - Failure to enclose with return documents - Disallowance is justified [S. 143(1)(a)]

The Assessing Officer had acted on the basis of the tax audit report and the documents which were enclosed with the return to make the disallowance in accordance with law. Therefore, the adjustment made by the Assessing Officer was appropriate and in accordance with the then applicable existing provisions. That in respect of entry tax, welfare cess, employers contribution to provident fund and interest paid to public financial institutions, there was failure on the part of the assessee to file the requisite documents as required under section 43B. (A.Y. 1989-90)

Abhishek Cement Ltd. v. UOI (2012) 349 ITR 1 (Delhi)(HC)

S. 43B : Deduction on actual payment - Contribution to Provident fund, ESI which was paid before due date of filing of return held as allowable

Deduction of PF, ESI, etc. paid subsequent to close of accounting period but before return was filed are to be allowed. (A.Y. 2000-01, 2001-02)

CIT v. Solar Exports (2012) 210 Taxman 520 (Karn.)(HC)

S. 43B : Deductions on actual payment - Sales tax - First proviso is applicable retrospectively from 1-4-1984 [S. 143(1)(a)]

Section 43B was inserted in the statute in 1-4-1984 and thereafter the first proviso was inserted by Finance Act, 1987 which came in to force with effect from 1-4-1988. Subsequently, Explanation (ii)

was added to the Finance Act, 1989 with retrospective effect from 1-4-1984. The first proviso to section 43B has to be treated as retrospective and should be read as a part of the Act with effective from 1-4-1984 itself. Therefore, first proviso to section 43B allowing payments made till due date for furnishing return, inserted by Finance Act, 1987, is applicable retrospectively from 1-4-1984. (A.Y. 1989-90)

Easter Industries Ltd. v. UOI (2012) 349 ITR 324 / (2013) 213 Taxman 56 (Mag.)(Delhi)(HC)

S. 43B : Deductions on actual payment - Arrears of salary - Not covered

Arrears of salary and other benefits payable to employees are not covered by section 43B. Therefore, where assessee incurred liability as a result of wage revision exercise mandated by an award, it was entitled to claim deduction thereof in relevant assessment year itself even though assessee agreed to pay wage arrears in three installments. (A.Y. 2000-01)

CIT v. Hindustan Times (2012) 211 Taxman 202 (Delhi)(HC)

S. 43B : Deductions on actual payment - Excise duty paid on suppressed sale - When income is estimated the excise duty paid on suppressed sales deemed to have been allowed as deduction, hence, separate deduction cannot be allowed

The assessee is carrying on business of manufacturing and selling of tobacco, but some sales have been kept outside the books by not paying excise duty. The Assessing Officer estimated the gross profit. The Assessee claimed the deduction under section 43B in respect of excise duty paid. The Tribunal held that when income is estimated on gross profit the excise duty deemed to have been allowed hence, excise duty paid on suppressed sales cannot be allowed as deduction under section 43B. The Tribunal also observed that as the sales are kept outside the books by unlawful means, i.e. payment of excise duty cannot be allowed. (A.Y. 1999-2000)

Chetna Zarda Company v. Dy. CIT (2012) 67 DTR 22 / 144 TTJ 401 (Mum.)(Trib.)

S. 43B : Deduction on actual payment - Employees provident fund - Before due date of filing of return - Contribution to employees provident fund, having been made before the date of filing of a return the payment was to be allowed as deduction

In the instant case, assessee contended that the assessee's contribution to the employees provident fund be allowed in view of second proviso to section 43B. It was held that the payment having been made before the date of filing of a return the payment was to be allowed as deduction under section 43B. (A.Y. 2001-02, 2002-03 & 2003-04)

KPMG India P. Ltd. v. Dy. CIT (2012) 17 ITR 569 (Mum.)(Trib.)

S. 43B : Deduction on actual payment - Disallowance of expenditure on exempt income - DTAA - India-Mauritius - Section 43B & section 14A disallowance can be made under Article 7(3) of the India-Mauritius DTAA [S. 14A, Article 7(3)]

The Tribunal had to consider two issues: Whether in view of Article 7(3) of the India-Mauritius DTAA, a disallowance under section 43B and section 14A was permissible while computing the assessee's income. Held by the Tribunal:

(i) Article 7(3) of the India-Mauritius DTAA provides that "in determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the business of the permanent establishment including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere". This is in contrast to the other DTAAs (e.g. India-USA DTAA) which provide that the deduction shall be "in accordance with the provisions of and subject to the limitations of the taxation laws of that State". As there is no limitation, the result is that all expenses incurred for the purpose of business of the permanent establishment have to be allowed as deduction and no disallowance under section 43B can be made. Neither Article 3(2) nor Article 23(1) make any difference to this interpretation;

(ii) However, the position with regard to section 14A is different because unlike other disallowance provisions which disallow deductible expenditure, section 14A contains a fundamental principle that any expenditure incurred in relation to an income not includible in total income, shall not be allowed as deduction. Section 14A, at the very threshold itself, snatches away the deductibility of expenses incurred in relation to an exempt income. It is not a case that the expenses are otherwise deductible but have become non-deductible due to the operation of section 14A. Rather, the expenses do not qualify for deduction at the very first instance in accordance with the principle that if an item of income is not chargeable under the Act, the related expenditure has to be ignored. (A.Y. 1999-2000)

State Bank of Mauritius Limited v. Dy. DIT (2012) 19 ITR 675 / 78 DTR 62 / 149 TTJ 708 (Mum.)(Trib.)

S. 43B : Deduction on actual payment - Service-tax - If liability to pay service tax does not exist, service tax cannot be said to be payable

Rigor of section 43B cannot be made applicable to service tax as firstly, service provider is never allowed deduction on account of service tax which is collected by it on behalf of government and is paid to government accordingly and secondly, liability to payment arises only after service provider has received payments and if there is no liability to make payments to credit of government because of non receipt of payment from receivers of service, it cannot be said that such service tax has become payable. (A.Y. 2007-08)

Pharma Search v. ACIT (2012) 53 SOT 1 / (2013) 82 DTR 303 (Mum.)(Trib.)

S. 43B : Deductions on actual payment - Sales tax Amnesty Scheme - Not allowed

During relevant assessment year assessee availed certain benefits under sales tax amnesty scheme in order to discharge unpaid sales tax dues of earlier financial years. Assessee claimed deduction of amount paid under amnesty scheme on payment basis under section 43B. It was held that unless in earlier years unpaid amount of sales tax at year-end was added to income, unpaid sales tax paid under amnesty scheme is current year could not be allowed. (A.Y. 2005-06)

Deepak Nitrite Ltd. v. Dy. CIT (2012) 139 ITD 213 (Ahd.)(Trib.)

S. 43B : Deductions on actual payment - Interest - converting interest due to equity shares of company, interest is not allowable as it is not actual payment

Assessee-company claimed deduction in respect of interest paid to bank by way of converting interest due into equity shares of assessee-company. The Tribunal held that such payment will not amount to actual payment, hence, disallowance of such payment under section 43B was justified. (A.Y. 2005-06)

ITO v. Glittek Granites Ltd. (2012) 53 SOT 575 (Kol.)(Trib.)

S. 43D : Public financial institutions - Interest - Interest accrued on NPA cannot be added as income of assessee

Assessee following mercantile system of accounting, it had neither credited in profit and loss account nor offered for taxation amount of interest that had accrued on non-performing assets (NPA). Assessing Officer held that assessee was required to credit accrued interest on NPA to its profit and loss account as per section 43D. He accordingly added accrued interest on NPA to income of assessee. The Tribunal held that in view of clear provisions of section 43D, Assessing Officer was wrong in adding accrued interest on NPA to income of assessee. Addition was deleted.

Karnavati Co-operative Bank Ltd. v. Dy. CIT (2012) 134 ITD 486 / 144 TTJ 769 (Ahd.)(Trib.)

S. 44 : Insurance business - Computation - Profit on Sale of investments cannot be brought to tax [Rule 5]

Profit on sale of investment in case of an assessee carrying on general insurance business cannot be brought to tax after omission of rule 5(b) of First Schedule. (A.Y. 2003-04)
ICICI Lombard General Insurance Co. Ltd. v. ACIT (2012) 54 SOT 538 / (2013) 82 DTR 379 / 154 TTJ 83 (Mum.)(Trib.)

S. 44B : Shipping business - Non-residents - Computation - DTAA - Indo-Swiss - Income is taxable in the country of residence and not in India [S. 90, Art. 7, 8]
In the absence of any specific article in the Indo Swiss DTAA dealing with taxability of profits derived from the operation of ships in international traffic, para 1 of Art. 22 o the DTAA is applicable to it; although the assessee, a Swiss Company, had a PE in India in the year under consideration, the ships i.e. the property in respect of which shipping income was earned by the assessee company being owned by it were not effectively connected with that PE, and therefore, the case of the assessee is not covered by para. 2 of Art. 22 and falls in para. 1 of the said article, consequently, income is taxable in the country of residence of the assessee company i.e, Switzerland and not in India. (A.Y. 2003-04)
ADIT (IT) v. Mediterranean Shipping Co. S.A. (2013) 21 DTR 300 / 56 SOT 278 / (2012) 79 DTR 233 / 150 TTJ 401 (Mum.)(Trib.)

S. 44AD : Civil construction - Computation - Interest on security deposit - Gross contract receipt above 40 lakhs - Provision is not applicable
The assessee is a civil contractor firm derived its income from contract work for Government departments. The Assessing Officer applied the provision of section 145(3) and calculated the net profit at the rate of 8 percentage of the gross receipt after consideration of expenses debited in the trading account depreciation and interest and salary paid to partners. In appeal the Commissioner(Appeals) held that the net profit of 6 percent of contract receipt, subject to conditions of section 40(b). The Commissioner(Appeals) held that interest of Rs. 3,11,956/- had to be assessed as income from other sources. On appeal the Tribunal disallowed the interest and depreciation. On appeal by the assessee to the High Court the Court held that the Tribunal as well as the authorities below had erred in holding that interest accrued on security deposits to the extent used for the purpose of securing contract work would be assessable as income from other sources. The interest income is to be assessed as business income. The Court also held that Tribunal and authorities below had been guided by the provisions of section 44AD, when the said section is clearly not applicable to the assessee as its gross contract receipts were above 40 lakhs. As per the circular dated 31st 1965, the gross profit should be estimated and deduction and allowances including the depreciation allowance should be separately deducted from the gross profit. If the net profit is required to be estimated, it should be estimated subject to the allowance for depreciation and depreciation allowance should be deducted there from. The High Court remitted the matter back to the Assessing Officer for passing a fresh order. (A.Y. 2003-04)
Shyam Bihari v. CIT (2012) 345 ITR 283/251 CTR 155/73 DTR 41 (Patna)(HC)

S. 44AD : Civil construction - Computation - Sub-Contract - Deduction at source [S. 40(a)(ia), 194C]
Assessee obtained a contract from NDMC for strengthening and resurfacing of roads. It claimed to have executed work by itself by purchase of material from RSGIPL and by using hired machinery. Assessing Officer found that the assessee had not debited such expenses that may support that it had executed any contract work. He opined that amount of purchase of material from RSGIPL was actually sub-contract amount .Since assessee had not deducted TDS while making payment of sub-contract amount to RSGIPL, same was disallowed under section 40(a)(ia). On appeal, assessee contended that even if it was assumed that RSGIPL was a sub-contractor, in that case also, value of material should be excluded for working amount liable for TDS and TDS under section 194C was to be deducted only on amount that is payable, and, not on amounts actually paid. Since it was admitted

by both authorities that RSGIPL was given a sub-contract work, ends of justice would be met if a fair and reasonable estimate was made in place of technicalities of applicability of section 40(a)(ia) and debate about words 'paid and payable', etc. therefore, taxable income was to be calculated by applying net profit rate of 6 percent to assessee's turnover. (A.Y. 2007-08)

Ecoasfalt SA v. Addl. DIT (IT) (2012) 54 SOT 465 (Delhi)(Trib.)

S. 44AE : Goods carriages - Computation - Presumptive income - No addition could be made by invoking section 56 on the ground that there were no withdrawals by the assessee [S. 56]

The assessee is proprietor of Nitin Freight Carrier, he is also director of Northern Alkalies (P) Ltd. He disclosed the income under section 44AE of the income-tax Act. The Assessing Officer made addition under section 56 on the ground that he is not able to show how he is meeting his daily expenses. On appeal the Commissioner(Appeals) and Tribunal has deleted the additions made under section 56. On appeal by the Revenue to High Court the court held that section 44AE being applicable, no addition could be made by invoking section 56 on the ground that there were no withdrawals by assessee. (A.Y. 2001-02)

CIT v. Nitin Soni (2012) 71 DTR 1 / 207 Taxman 332 (All.)(HC)

S. 44B : Shipping business - Computation - Slot charter - Voyage charter - DTAA - India-UK - Income from "slot charter" is exempt as income from "operation of ships" as per Article 9 [S. 90, Art. 9]

The assessee, a UK company, engaged in the international transportation of goods by sea, entered into Slot Hire Agreements with Orient Express Lines Mauritius ("OEL"), under which OEL provided container slot spaces to the assessee on its ships. Availing the slot hire facility, the assessee arranged for the transportation of the goods from ports in India to their international destinations. The assessee claimed that the income from the "slot hire charges" was exempt under Article 9 of the India-UK DTAA. The Assessing Officer rejected the claim on the ground that Article 9 dealt with "income from the operation of ships" and that slot hire charges were not covered. However, the CIT(A) and the Tribunal allowed the claim. On appeal by the department to the High Court, Held dismissing the appeal:

There is no distinction in principle between a slot charter and a voyage charter of a part of a ship. They are both in a sense charterers of a space in a ship. The phrase "operation of ships" in Article 9 must be understood in the context of the phrase "the business of operation of ships" in section 44B. As income from slot hire agreements falls within section 44B it must be held to be within the ambit of Article 9(1). Article 9 does not require the ship to be owned by the assessee. It merely requires the income to be "from the operation of ships in international traffic". A charter is certainly contemplated by Article 9 and an enterprise that controls the management/operation of the ship would be included in Article 9 even if it does not own the ship [DIT v. KLM Royal Dutch Airlines (2009) 178 Taxman 291 / (2010) 325 ITR 300 / (2008) 220 CTR 268 / 15 DTR 113 (Dellhi)(HC) followed] (A.Y. 2001-02, 2002-03)

DIT v. Balaji Shipping UK Ltd. (2012) 77 DTR 361 / 253 CTR 460 / 211 Taxman 535 (Bom.)(HC)

S. 44B : Shipping business - Computation - DTAA - India-Germany - Profits from participation of cargo and "slot arrangement" are not eligible for benefit of Article 8, therefore income earned by assessee through such business is taxable in India [S. 90, 115VB, 115VI]

The assessee is a non-resident company engaged in the operation of ships in international traffic. The assessee is a tax resident of Germany. The assessee filed the return of income declaring nil income. The Assessing Officer held that the income of the assessee shall be assessed under the provisions of section 44B of the Income-tax Act @ 7.5%. The Assessing Officer passed under section 144C(1) for the consideration of DRP. The DRP passed the order granting partial relief, consequently the

Assessing Officer passed the order. The assessee filed an appeal before the Tribunal. The Tribunal held that profits from participation of cargo under "slot arrangement" are not eligible for benefit of Article 8, since assessee, a Germany company is carrying on the business of operation of ships in India through an agent which concludes the cargo transportation of issuing bills of lading, it is having PE in India in terms of Article 5 of the DTAA and therefore, income earned by assessee through such business is assessable to tax in India; neither the Assessing Officer nor the DRP having undertaken the exercise of determining the profit attributable to the PE, matter is set aside to the Assessing Officer for de novo adjudication for this limited purpose in accordance with law. (A.Y. 2007-08)

Hapag-Lloyd Container Line Gmbh v. ADIT (2012) 51 SOT 299 / 146 TTJ 279 / 70 DTR 393 (Mum.)(Trib.)

S. 44B : Shipping business - Permanent establishment - DTAA - India-Swiss - Shipping profits not taxable in India even if there is a Permanent establishment (Art. 7, 8, 22)

The assessee, a Swiss company, earned shipping profits. Article 7 of the India-Swiss DTAA excluded shipping profits from its ambit. Article 22 of the DTAA provided that any other income not specifically dealt with would be taxable only in Switzerland and not in India. The assessee claimed that in accordance with Article 22, its shipping profits were taxable only in Switzerland. However, the department held, relying on Gearbulk AG 184 Taxman 383 (AAR), that as shipping profits had been "dealt with" in the DTAA, Article 22 would not apply and the income would be assessable under section 44B of the Act. It was also held that even if Article 22(1) applied, as the assessee's agent in India constituted a PE, the shipping profits were assessable to tax in India under Article 22(2). The CIT(A) accepted the assessee's stand that Article 22 of the DTAA applied to it. He further held that though the assessee's agent was its' PE, the income from the ships was not "effectively connected" with the PE as the ships were owned by the assessee and not by the agent. On appeal by the department, held by the Tribunal:

(i) Article 22(1) provides that items of income of a resident of Switzerland "which are not dealt with" in the foregoing Articles of the DTAA shall be taxable only in that State. The department's argument that by agreeing to exclude shipping profits from Article 8 as well as Article 7 of DTAA, it has been "dealt with" and, therefore, Article 22(1) shall not apply is not correct. The expression "dealt with" contemplates a positive action and it is necessary that the relevant article must state whether Switzerland or India or both have a right to tax such item of income. Vesting of such jurisdiction must positively and explicitly stated and it cannot be inferred by implication. It is also the view of the Competent Authorities in the letters exchanged that shipping profits would be governed by Article 22 & not section 44B of the Act (Gearbulk AG 184 Taxman 383 (AAR) not followed);

(ii) As regards Article 22(2), the agent did constitute a PE as it (the agent) was legally and economically dependent on the assessee and the assessee was managing and controlling some of its business operations in India through the said agent. However, the property in respect of which the shipping income was received by the assessee was not "effectively connected" with the PE. Economic ownership has to be taken as the basis or criteria to apply the concept of "effectively connected with". Since the economic ownership of the ships cannot be allocated to the PE but always remained with the assessee, it cannot be said that the property in the said ships is "effectively connected" with the PE in India (Sumitomo Mitsui Banking Corp followed). (A.Y. 2002-03)

ADIT (IT) v. Mediterranean Shipping Co. S.A. (2013) 21 DTR 300 / 56 SOT 278 / (2012) 79 DTR 233 / 150 TTJ 401 (Mum.)(Trib.)

S. 44BB : Mineral oils - Turnkey project - Installation of plat form outside India - DTAA - India-UAE - Even a "Turnkey" contract has to be split into various components - The work of installation of the platform done inside India does not fall under section 44BB because the

activity cannot be regarded as a "facility in connection with the prospecting for, of extraction or production of, mineral oils [S. 90, Art. 5]

The assessee entered into a contract with ONGC for fabrication and installation of on-shore and off-shore oil facilities and pipelines. The assessee claimed that though the contract was one, it had to be sub-dividend into two parts, one for designing, fabrication and supply of material and the other for installation and commissioning of the project. It was claimed that the work relating to the former was carried out exclusively in Abu Dhabi and hence no income relating to receipts for that part of the contract was liable to tax in India as there was no PE in India. The Assessing Officer & DRP rejected the claim on the basis that (a) the contract was a "turnkey" one where the entire risk of completion & commissioning was on the assessee & it was not divisible into different components, (b) the assessee had a project office in India which was a PE, (c) the assessee had a Dependent Agent PE, (d) there was a "construction and installation PE" under Article 5(2)(h) & (e) ownership of the equipment transferred to ONGC only after issue of the certificate of acceptance of the entire work. It was also held that section 44BB was not applicable and the profit was estimated at 25% of gross receipts. On appeal by the assessee to the Tribunal Held:

(i) The assessee's project office in India constituted a PE. It also had a "Dependent Agent PE" and also a "construction and installation PE" under Article 5(2)(h);

(ii) However, though the contract was on a "turnkey" basis, it had to be regarded as an "umbrella contract" and as being a divisible contract because the consideration for various activities has been stated separately. Also, ONGC had the discretion to take only the platform erected by the assessee in Abu Dhabi without having installation thereof. The segregation of the contract revenues into offshore and onshore activities was made at the stage of awarding the contract. The total consideration was earmarked towards different activities and separate payment had to be made on the basis of work of design, engineering, procurement and fabrication. These operations had been carried out and completed outside India. The PE was in respect of the installation and commissioning work done in India and the activities carried outside India were not attributable to the said PE (Hyundai Heavy Industries 291 ITR 482 (SC), Ishikawajma-Harima Heavy Industries 288 ITR 408 (SC) & Dy. CIT v. Roxon OY (2006) 103 TTJ 891 (Mum.) followed);

(iii) The work of installation of the platform done inside India does not fall under section 44BB because the activity cannot be regarded as a "facility in connection with the prospecting for, of extraction or production of, mineral oils". (A.Y. 2007-08)

National Petroleum Construction Company v. ADIT (2012) 80 DTR 65 / (2013) 151 TTJ 47 / 20 ITR 545 (Delhi)(Trib.)

S. 44BB : Mineral oils - Reimbursement of service tax - No element of profit, hence not includible in total receipt

Receipts reimbursing fuel charge is part of presumptive income; while reimbursement of service tax is not being a statutory liability would not involve any element of profit and, accordingly, same could not be included in total receipts for determining presumptive income under section 44BB. (A.Y. 2008-09)

Sedco Forex International Drilling Inc. v. Addl. DIT (2012) 139 ITD 188 (Delhi)(Trib.)

S. 44BB : Mineral oils - Processing and interpreting raw seismic data for a UAE Co. - Income not from the Government or Indian concern is not covered under, sections, 44D, 44DA or 115A is assessed under section 44BB(1). [S. 44D, 44DA, 115A]

The applicant, formed in UK, was awarded a contract by a UAE company for processing and interpreting raw seismic data acquired by the UAE company on board its vessels during survey in Krishna Godavari basin under contract from ONGC. Revenue contended that the applicant is only a sub-contractor of a sub-contractor of ONGC engaged in exploration and extraction of oil and such a

sub-contractor is not entitled to rely on section 44BB(1) of the Act since the services provided cannot be said to be in connection with prospecting for oil.
The Authority observed that the income derived by the applicant is from a UAE company and not from the Government or an Indian concern. Hence the income cannot be brought within the purview of section 44D, 44DA, or 115A because they only speak of income by way of fees for technical services received from Government or an Indian concern. It accordingly ruled that since income derived by the applicant, is from an activity in connection with the prospecting for mineral oils and from a foreign company, the applicant would be entitled to claim to be assessed under section 44BB(1) of the Act.
Spectrum Geo Ltd., UK (2012) 252 CTR 13 / 75 DTR 148 (AAR)

S. 44BB : Mineral oils - Computation - Service tax is not part of "Gross Receipts" for purposes of section 44BB
The assessee offered its income to tax on gross basis under sub section (1) of section 44BB and 10% of the gross receipts was deemed to be income chargeable to tax. It however did not include the amount in the gross receipts, being the service tax received from its customers, while computing its total income. The Assessing Officer rejected the contention of the assessee and added the amount of service tax received by the assessee to its gross receipts to compute its total income. In appeal Commissioner(Appeals) decided the issue in favour of assessee. Revenue has filed appeal before the Tribunal. The Tribunal held that, section 44BB is a special provision, treating 10% of the aggregate amount specified in sub-section (2) of section 44BB as deemed profits and gains of the non-resident. The amount referred in sub-section (2) of section 44BB are the amounts (a) paid to the assessee (whether in or out of India) on account of the provision of services and facilities in connection with, or supply of plant and machinery on higher used, or to be used, in the prospecting for, or extraction or production of, mineral oils in India, etc. Service-tax is a statutory liability like custom duty and reimbursement of custom duty & service-tax paid by the assessee cannot form part of amount for the purpose of deemed profits under section 44BB as it does not involve any element of profit**.** Accordingly, it cannot be included in the total receipts for determining the presumptive income. Department appeal was dismissed. (A.Y. 2008-09)(ITA No. 698/Del/2012, Dt. 31-08-2012)
Dy. DIT v. Mitchell Driling International Pty Ltd. (2012) BCAJ Pg. 31, Vol. 44-B Part 2, November, 2012 (Delhi)(Trib.)

S. 44BB : Mineral oils - Computation - Non-residents - DTAA - India-Norway -Mobilization revenue was liable to tax in India (Art. 7)
Assessee-company was engaged in offshore activities in nature of seismic data acquisition, processing and interpretation. For such activities it had used a vessel. Assessee claimed that mobilization revenue from vessel attributable to operation of vessel beyond 200 nautical miles from Indian costline was not liable to tax in India as per Act as well as DTAA with Norway. Mobilization revenue was liable to tax in India, and was to be included as receipts for computing income under section 4BB. (A.Y. 2006-07)
EMGS Project Office v. Dy. DIT (IT) (2012) 54 SOT 474 (Delhi)(Trib.)

S. 44BB : Mineral oils - Computation - Business for prospecting /exploration, etc. - Non-residents - Matter remanded [S. 9(1)(vii), 44DA, 115A]
Assessee-company, incorporated in Norway, got seismic survey contract from Indian Companies. It filed its return of income estimating business profit at presumptive rate of 10 per cent under section 44BB. Assessing Officer viewed such receipts as fee for technical services being taxable under section 115A, read with section 9(1)(vii). Taking into consideration case of assessee that it had set up various project offices in India which constituted permanent establishment, issue was to be remitted

to file of Assessing Officer for adjudication afresh so as to determine whether amount received was taxable under section 44BB or 44DA. (A.Y. 2008-09)
PGS Exploration (Norway) AS v. Addl. DIT (IT) (2012) 54 SOT 479 (Delhi)(Trib.)

S. 44BB : Mineral oils - Computation - Non-resident - Income deemed to accrue or arise in India -Technical services - Royalties - DTAA - India-Singapore Article 5.5., 12.3(b), 12.4(a) [S. 90, 9(1)(vii)]
The applicant is a Singapore company. It was awarded a sub contract by L&T to execute the work of installation and construction services for Single Point Mooring in the waters of Mumbai High South field. For undertaking the construction work, vessels were mobilized to India. The assessee contended that contract with L& T is in connection with prospecting for or extraction or production of mineral oil and would constitute PE only if the services or facilities are provided for a period of more than 183 days in the fiscal year under article 5.5 of the DTAA and for computation of the period of 183 days shall be from the time the vessels of the applicant gain port clearance till the time the said vessels leave the shores of India. As the applicant would not have PE in India and no liability is attracted under section 44BB. The Authority for advance ruling held that the agreement with L&T falls within the ambit of section 44BB as the same deals with a case the assessee which is 'engaged in the business of providing services or facilities in connection with, or supplying plant and machinery on hire used or to be used, in the prospecting for or extraction or production of mineral oils'. The applicant has provided the services more than 183 days during the fiscal year, hence the applicant has a PE in India in terms of article 5.5 of the DTAA and falls within the ambit of section 44BB and not under as fees for technical services under the Act or under 12 of the DTAA regarding this contract. Even if part of income falls under 'Royalties' or 'Fees for Technical Services' there is no scope to assessee such receipts under these heads, once it is held that the income is from its oil exploration and production activities as envisaged under section 44BB, the applicant has to first exercise the option to get its income computed under section 44B(3). In view of above the entire mobilization demobilization revenue received by the applicant would be taxable in India. Payment received for installation and demobilization relates to use of equipment for undertaking installation work and falls under the definition of royalty. Installation is ancillary and subsidiary to use of equipment or enjoyment of right for such use, payment for installation would fall under definition of "fees for technical services". DTAA India-Singapore - Art. 12.3(b), 12.4(a).
Global Industries Asia Pacific Pte Ltd., In re (2012) 343 ITR 253 / 205 Taxman 273 / 248 CTR 127 / 68 DTR 153 (AAR)

S. 44BB : Mineral oils - Computation - Non-resident - Income deemed to accrue or arise in India - Technical services - DTAA - India-France - Activities undertaken by assessee providing geological and geophysical services for exploring mining potential derived in India from execution of projects would fall under the definition of fees for technical services hence assessable under section 115A and not under section 44BB(1) [S. 90, 9(1)(vii), 115A]
The assessee is a company, a tax resident of France, during the relevant A.Y. the assessee is engaged in the business of geological and physical services for exploring mining potential. The assessee filed the return of income under section 44B(1). The assessee opted for domestic law and not under Indo-France DTAA as the domestic law under section 90(2) which is more beneficial to the assessee. The Assessing Officer has applied the domestic law, however held that income of assessee is taxable under section 9(1)(vii) and not under section 44BB(1), he accordingly computed the income at 10% by applying the provisions of section 115A. The DRP also concurred with the view of Assessing Officer. On appeal to the Tribunal, the Tribunal held that (1) Activities undertaken by assessee of seismic survey, processing of 3D seismic data and submission of report in desired media as also providing services of personnel skill will clearly fall under definition of 'fees for technical services' covered in first limb of Explanation 2 to section 9(1)(vii) hence decided in favour of revenue. (ii)

Provisions of section 44BB(1) conveys no meaning independent of section, in case of non-resident where provisions of section 42, or section 44D or 44DA or section 115A or section 293A are applicable for purpose of computing profits or gains or any income referred to those sections, proviso to section 44BB(1) will be applicable and provisions of section 44BB(1) will not be applicable (iii) With effect from 1-4-2004 fee for technical services, which is not connected with permanent establishment of business or fixed place of profession in India, will be taxable under section 115A(1)(b)(iv). Activities undertaken by assessee i.e. providing geological and geophysical services for exploring projects for prospecting mineral oil deposits in India form execution of exploration projects for prospecting mineral oil deposits in the off shore waters under four contracts with ONGC and one contract with ENI. UK, would fall under definition of 'fees for technical services' covered in first limb of Explanation 2 to section 9(1)(vii)(v). Since receipts were not connected with PE in India fee for technical services rendered in connection with prospecting for or extraction or production of mineral oil would be assessable under section 115A, thus the provisions of section 44BB(1) would not apply, accordingly the issue is decided in favour of revenue. (A.Y. 2007-08)
CGG Veritas Services, SA v. Addl DIT (2012) 50 SOT 335 (Delhi)(Trib.)

S. 44BB : Mineral oils - Computation - Non-Resident - Income deemed to accrue or arise in India - Business connection - Providing services or facilities in connection with prospecting for or extraction of mineral oil section 44BB is attracted [S .9(1)(i)]
The applicant approached the Authority for advance Ruling with the plea that it had entered in to a contract with ONGC for supply of manometer gauges, that the title to the goods passed outside India, that payment there for was received outside India and that the transaction of sale was not taxable in India. The Authority for Advance Ruling reframed the question and after examining the contract the Authority held that the contract has to be read as a whole. The purpose for which the contract is entered in to by parties is to be ascertained from the terms of contract. On the facts applicant a foreign company, having entered in to a contract with ONGC for "services for supply, installation and commissioning of 36 manometer gauges" for the purpose of installation of the gauges at certain sites to enable ONGC to carry on its operations, it is a composite indivisible contract for supply and erection of manometer gauges at sites within territory of India and, therefore, all payments received by the applicant under the composite contract have arisen to the applicant in India and income is chargeable to tax in India. The applicant is providing services or facilities in connection with prospecting for or extraction of mineral oil hence section 44BB is attracted.
Roxar Maximum Reservoir Performance WLL (2012) 349 ITR 189 / 250 CTR 4 / 71 DTR 108 (AAR)

S. 44BBA : Air craft - Non-residents - Computation - Income from ground handling and technical services rendered to other airlines at Indian airport not taxable in India under Section 44BBA
Following the decision of Lufthansa German Airlines v. Dy. CIT (2004) 90 ITD 310 (Delhi) it is observed that where assessee is engaged in the airline business, the income from ground handling and technical services rendered to other airlines at Indian airport would not be taxable in India under section 44BBA and same would be considered as profits from operation of aircraft in international traffic as per provisions of Article 8 of the DTAA. (A.Y. 2006-07)
Dy. DIT v. KLM Royal Dutch Airlines (2012) 50 SOT 578 (Delhi)(Trib.)

S. 44C : Non-resident - Head office expenditure - Laboratory expenses held to be fully allowable
Laboratory expenditure incurred by the Head office for Research and Development, which was attributable to the Indian branch was fully allowable and was not subject to the restriction in section 44C. (A.Y. 1981-82 & 1982-83)
John Wyeth & Brother Limited v. ACIT (2012) 139 ITD 178 (Mum.)(Trib.)

S. 44C : Non-resident - Head office expenditure - Administrative expenses - Amended provision of treaty - DTAA - Indo-UAE [S. 37(1), Art. 7]

Where an assessee does not have any business overseas the question of allocating a part of the expenditure to the business carried on in India cannot arise. If there is overseas business, the head office expenditure which is not entirely for the PE in India but also pertains to the foreign head office has to be restricted. View of the CIT(A) that the provisions of section 37(1) become redundant in view of the restrictions under s. 44C cannot be accepted. Clause (c) of section 44C states that so much of the head office expenditure as its attributable to the business of the assessee in India is to be allowed subject to a ceiling of upper limit as prescribed in section 44C. In the instant case, the ALP of the transaction as reported by assessee has been accepted by the TPO. Assessing Officer is directed to verify as to whether the allocation of common administrative expenditure for the year under consideration is on the same pattern as in the earlier year which has been accepted to be at arms's length by the TPO. By amendment of Art. 7(3) of the DTAA between India and UAE vide Notification No. 282 of 2007 dated 28th Nov., 2007, it was decided to incorporate that, for the purposes of determining the profits of PE, there shall be allowed deduction of expenses incurred for the purposes of the business of the PE including general administrative expenses but in accordance with the provisions and also subject to the limitations of the tax laws of that state. Applicability of the provisions of section 44C has been enforced, nevertheless w.e.f. 1st April 2008. (A.Y. 2004-05 to 2006-07)

Addl. DIT (IT) v. Dalma Energy LLC (2012) 78 DTR 219 / 150 TTJ 70 (Ahd.)(Trib.)

S. 44D : Foreign companies - Royalties - Computation - Fees for technical services -Payments for services is fees for technical services and not as services in connection with extraction of mineral oil, hence taxable under section 44D and not under section 44BB [S. 9(I)(vii), 44BB, 115A]

An agreement was entered in to between the non-resident company / assessee represented by ONGC and in terms of the said contract, non-resident company rendered services for inspection of the existing control system of three units of RR avon gas generator driven process, gas compressor at SHP platform and for utilizing services of engineer for Y2K roll over time at off shore installation. The Assessing Officer taxed the receipts at 15% as per the DTAA between India and Singapore under section 44D, read with section 115A treating that services rendered by the non-resident company was technical services, which was confirmed by the Commissioner(Appeals). In appeal before the Tribunal the Tribunal held that the amount is taxable under section 44B. On appeal by revenue the court held that payment for services is fees for technical services and not as services in connection with extraction of mineral oil. The amount is taxable under section 44D and not under section 44BB. Appeal of revenue was allowed. (A.Y. 2001-02)

CIT v. ONGC (2012) 343 ITR 267 (Uttarakhand)(HC)

S. 45 : Capital gains - Transfer - Issue of sale certificate - Lump sum paid towards interest-Sale of property by public action - Income from other sources - Assessable as capital gains after sale certificate issued by competent authority [S. 2(28A), 2, 47(v), 56]

The amount received by the official liquidator in terms of orders of company court, though referred to as interest, for the purpose of assessment of income-tax it was part of the sale consideration and therefore, could not be treated as income from other sources under section 56, the amount is assessable as capital gains under section 45. Possession of the mill was transferred to the purchaser by way of lease and not in terms of the Transfer of Property Act. Therefore, there was neither actual transfer nor artificial transfer of title on account of the transfer of possession. Such transfer of title took place only on payment of the entire amount by the purchaser and only after the sale certificate was issued by the competent court. (A.Y. 1995-96)

Cauvery Spinning and Weaving Mills Ltd. (In liquidation) v. Dy. CIT (2012) 340 ITR 550 / (2011) 238 CTR 55 / 50 DTR 218 (Mad.)(HC)

S. 45 : Capital gains - Agricultural land - Date of conversion - Date of permission for conversion treated as the cut-off date till then it is not capital asset hence no capital gains tax leviable [S. 2(14), 48]

The Tribunal held that the assessee retained its agricultural character till the date of the order permitting non-agricultural use and could be treated as capital asset only thereafter, therefore capital gains cannot be levied. High Court confirmed the view of Tribunal.

CIT v. K. Leelavathy (2012) 341 ITR 287 (Karn.)(HC)

S. 45 : Capital gains - Capital receipt - Non-compete fee - Consideration received under a non-competition agreement is only chargeable from 1st April, 2003 under section 28(va) as profits and gains of business, same cannot be charged under section 55(2)(a). Hence on facts held to be capital receipt not chargeable to tax

Assessee received the amount under non -compete agreement dated 9th Feb., 1988 for not to manufacture of carbon dioxide gas agreed, in lieu of consideration received not to engage in similar business in any capacity for a period of 10 years. Revenue contended that prior to 1st April 2003, such receipts were chargeable to tax under section 45, read with section 55. The Court held that section 55 is not charging section, the consideration paid to him was not for transferring any capital asset to purchaser nor the assessee has transferred any right to produce or manufacture any article, therefore, it would not fall under section 55(2)(a). It is only from 1st April 2003 the consideration received under non-compete agreement is chargeable to tax under section 28(va), as profits and gains of business. As the sum was received by the assessee before said amendment the said amount is not chargeable to tax. (A.Y. 1999-2000)

CIT v. K. Chandrakanth Kini (2012) 347 ITR 388 / 66 DTR 467 / 249 CTR 217 / (2011) 201 Taxman 69 (Karn.)(HC)

S. 45 : Capital gains - Short term capital loss disallowed - Tax avoidance - Tax planning - Transaction within four corners of law can be treated as "sham" and "colourable device" by looking at "human probabilities" - Court held that loss cannot be allowed

In A.Y. 2000-01 the assessee borrowed Rs. 48 crores from the G. K. Rathi group and used that to buy shares in three 100% subsidiary companies. Though the fair value of the shares was Rs. 24, the assessee paid Rs. 150 for each share. The amount received by the said subsidiary companies was transferred back to another company of the G. K. Rathi group. In A.Y. 2001-02, the said shares were sold for Rs. 5 each and a short-term capital loss was claimed and this was set-off against other long-term capital gains. The Assessing Officer, Commissioner(Appeals) & Tribunal rejected the transaction of investment into, and sale of, shares as a sham. On appeal by the assessee, Court dismissing the appeal, held that:

Whenever there are reasons to believe that the apparent is not real; then the taxing authorities are entitled to look into surrounding circumstances to find out the reality and apply the test of human probabilities. The judgement of the Supreme Court in Vodafone International v. UOI makes it clear that a colourable device cannot be a part of tax planning. Where a transaction is sham and not genuine, it cannot be considered to be a part of tax planning or legitimate avoidance of tax liability. It was clarified that there is no conflict between McDowell & Co. Ltd. v. GTO (1985) 154 ITR 148 (SC), UOI v. Azadi Bachao Andolan (2003) 263 ITR 706 (SC) & Mathuram Agarwal. On facts, as the purchase and sale of shares was found to be a sham, the loss cannot be allowed [Sumati Dayal v. CIT (1995) 214 ITR 801 (SC) followed] (A.Y 2001-02).

Killick Nixon Ltd. v. Dy. CIT (2012) Vol. 114 (4) Bom.L.R.2088 (Bom.)(HC)

S. 45 : Capital gains - Investment in shares - Whether the profit on sale of shares is assessable as business income or capital gains - Tribunal must examine the issue holistically as per the test laid down by High Court and Circular of CBDT

The assessee offered gains from sale and purchase of securities as "capital gains". The Assessing Officer assessed it as business profits on the ground that in the earlier years, it was offered as such. The CIT(A) & Tribunal accepted the assessee's plea on the ground that the securities were shown as "investments" in the accounts and in the earlier years, the STCG was offered as business profits as there was no difference in the tax rate. On appeal by the department, Held reversing the Tribunal:

There was a dispute whether in the earlier years, the gains were offered as business profits or as capital gains and the Tribunal had not given a clear finding. The Tribunal ought to examine the issue holistically keeping in mind the parameters/tests laid down in CIT v. Rewashanker A. Kothari (2006) 283 ITR 338 (Guj.) and CBDT's Circular No. 4 / 2007 dated 15th June, 2007 on when income from transactions in securities should be treated as "business profits" and when as "capital gains":

(a) Whether the initial acquisition of the subject-matter of transaction was with the intention of dealing in the item or with a view to finding an investment?;

(b) Why and how and for what purpose the sale was effected subsequently?;

(c) How the assessee dealt with the subject-matter of transaction during the time the asset was with the assessee. Has it been treated as stock-in-trade or as an investment in the balance sheet?

(d)How the assessee returned the income from such activities and how the department dealt with the same in the preceding and succeeding assessments?;

(e) Whether the deed of partnership or memorandum of association, if the assessee is a firm or a company, authorises such an activity?

(f) Most importantly, what is the volume, frequency, continuity and regularity of transactions of purchase and sale of the goods concerned.

CIT v. Sahara India Housing Corporation Ltd. (Delhi)(HC) www.itatonline.org

S. 45 : Capital gains - Investment in shares - Business profits - Quantum of shares cannot be the sole test to decide whether assessee is an investor or trader, on the facts the profits on sale of shares held as capital gains and not as business income [S. 28(i)]

The assessee offered LTCG of Rs. 2.59 crores and STCG of Rs. 5.53 crores on sale of shares. The Assessing Officer held that the LTCG & STCG were assessable as business profits on the ground that (a) the dividend was meager, (b) the assessee had undertaken risk by dealing in shares, (c) the holding period of most of the securities was very short, (d) the ratio of sales to purchases is was 1.77, (d) the sale and purchase transactions were frequent and (e) the scale of the activity of sale and purchase of securities was substantial. The CIT(A) upheld the taxability of STCG as business profits though the Tribunal deleted that as well. On appeal by the department, The High Court held dismissing the appeal:

To determine whether an assessee is an investor in shares or a dealer in shares, a pragmatic and common sense approach has to be adopted always keeping in mind commercial considerations. The tests have been laid down in Instruction No. 4/2007 dated 15.6.2007 & CIT v. Rewashanker A. Kothari (2006) 283 ITR 338 (Guj.) On facts, the Tribunal was right that the STCG was not assessable as business profits because (a) the assessee was a salaried employee, (b) He maintained two separate portfolios for investment and trading, (c) the shares were held for periods ranging from 2.4 months to 11 months, (d) though the quantum or total number shares was substantial, the transactions in question were only seven in number and the period of holding was not insignificant and small. While the quantum or total number may not be determinative but in a given case keeping in view period of holding may indicate intention to make investment, (e) substantial dividend income had been received, (f) the element of uncertainty and risk is always there in securities and this factor cannot be a determinative factor to decide whether the assessee is trading in shares or is an investor. Some investors do take risk, (g) The ratio of sales and purchase will always be in favour of sales when the

shares are sold and (h) in the earlier assessment years, transactions in the investment portfolio were accepted by the Assessing Officer. (A.Y. 2007-08)
CIT v. Vinay Mittal (2012) 208 Taxman 106 (Delhi)(HC)

S. 45 : Capital gains - Investment in shares - Business income - Despite speculation activity and short period of holding, shares gain is STCG & not business profits [S. 28(i)]
The assesseee, a textile consultant, offered LTCG of Rs. 19.97 crores and STCG of Rs. 1.71 crores. The Assessing Officer held that the LTCG and STCG had to be assessed as business profits on the grounds that (i) the assessee had engaged in speculation activities, (ii) the volume of shares was high, (iii) the frequency of purchase and sale was extremely high, (iv) the holding period for most of the scripts ranged from a few days to few months and in certain cases and (v) the dividend was meager. This was reversed by the CIT(A) & Tribunal on the basis that (a) the assessee had not only invested in shares but also maintained fixed deposits & PPF. Investments in shares were 75% of the total investments & the sales of shares was to balance the portfolio, (b) the LTCG shares were held for several years, (c) the STCG shares consisted of 7 scripts which gave rise to 93% of the STCG profits, (d) the shares were shown as investment in the balance sheet in the earlier years, (e) the assessee had not borrowed funds & (f) STT was paid. On appeal by the department to the High Court, Held dismissing the appeal:
The appellate authorities have come to a finding of fact after examining the relevant material that the assessee is an investor in shares and not a trader. This finding of fact is not perverse. As held in CIT v. Gopal Purohit (2010) 228 CTR 582 / (2011) 336 ITR 287 (Bom.)(HC) there is no bar for an assessee to maintain two separate portfolios, one relating to investment in shares and another relating to business activities involving dealing in shares. (A.Y. 2006-07)
CIT v. Suresh R. Shah (2012) 76 DTR 32 (Bom.)(HC)

S. 45 : Capital gains - Merger of company - Scheme of arrangement - Tax planning - Tax planning is legitimate if it is within the framework of the law [S. 391 to 394 of Companies Act, 1956]
A scheme of arrangement under section 391 to 394 of the Companies Act was entered into which provided that five private limited companies would be merged with Unichem Laboratories. Pursuant to the Scheme, (a) the entire undertaking of the transferor companies would stand vested with the transferee, (b) The shares held by the transferor companies in the transferee company would be cancelled & (c) shares of the transferee company would be issued to the shareholders of the transferor companies. The scheme was challenged by a shareholder on the ground that it was propounded to avoid capital gains tax that would have arisen if the transferor companies would have directly transferred their shares to the promoters and that it was a "colourable device to evade tax". Reliance was placed on McDowell and Co. Ltd. v. CIT (1985) 154 ITR 148 (SC), (1976) Wood Polymer (1974) 47 CC 597 (Guj.) & Groupe Industrial Marcel Dassault (AAR). Held by the High Court rejecting the objection:
In UOI v Azadi Bachao Andolan (2003) 263 ITR 706 (SC), it was held that McDowell cannot be read as laying down that every attempt at tax planning is illegitimate and must be ignored, or that every transaction or arrangement which is perfectly permissible under law, which has the effect of reducing the tax burden of the assessee, must be looked upon with disfavor. A citizen is free to act in a manner according to his requirements, his wishes in the manner of doing any trade, activity or planning his affairs with circumspection, within the framework of law, unless the same fall in the category of colourable device which may properly be called a device or a dubious method or a subterfuge clothed with apparent dignity. This was considered again in Vodafone International Holding B.V. v. UOI (2012) 341 ITR 1 (SC) and it was held that there is no conflict between McDowell and Azadi Bachao Andolan and reiterated that tax planning may be legitimate provided it is within the framework of law. On facts, the object of the scheme is to enable the Promoter to hold shares directly in the

transferee company rather than indirectly and not to avoid any tax. There is nothing illegal or unlawful or dubious or colourful in the Scheme and the same is a perfectly legitimate scheme and permissible by law. Therefore, the objection that the scheme is a tax avoidance device stands rejected.
In Re AVM Capital Services Private Limited (2012) Vol. 114 (4) Bom..L.R. 2533 (Bom.)(HC)

S. 45 : Capital gains - Business income - Sale of land - Sale of land by administrator is assessable as capital gains and not as business income [S. 28(i)]
A large tract of land of nearly 2500 acres of land was acquired about in the year 1923 by late F.F. Dinshaw who was solicitor. Upon the death of Mr. F.F. Dinshaw in the year 1936, there was no transaction involved for about sixty five years .There was no improvements in the said land. There was encroachment on the land. The part of land was sold to protect the corpus and the resulting expenditure due to litigation. The Assessing Officer assessed the sale consideration as business income. In appeal the Tribunal held that the sale consideration is assessable as capital gains. On reference by the revenue the Court affirmed the finding of Tribunal and held that sale of land by Administrator of estate, which land had devolved on the assessee by testamentary succession, lying for almost sixty five years and sold for to protect the corpus and the resulting expenditure due to litigation, gave rise to capital gains and not business profits. Order of Tribunal in ACIT v. Administrator of the Estate of Late E. F. Dinshaw (1993) 47 ITD 232 (Bom.)(Trib.), affirmed. (A.Y. 1987-88 to 1989-90)
CIT v. Administrator of the Estate of Late E. F. Dinshaw (2012) 345 ITR 529 / 72 DTR 49 / 208 Taxman 193 (Mag.)(Bom.)(HC)
S. 45 : Capital gains - Business income - Investment in shares - Tests laid down to distinguish shares gains as LTCG/STCG v. business profits. [S. 28(i)]
The assessee offered the gains from buying and selling shares as LTCG/ STCG. The Assessing Officer held that the assessee was "*dealing heavily in shares*" with *high frequency and magnitude* and that the gains were assessable as business profits. This was reversed by the CIT(A) and Tribunal. On appeal by the department to the High Court, Held dismissing the appeal:
In CIT v. Rewashanker A. Kothari (2006) 283 ITR 338 (Guj.) six objective tests have been laid down to distinguish between capital gains and business profits on sale of shares. From this, it is clear that where number of transactions of sale and purchase of shares takes place, the *most important test* is the volume, frequency, continuity and regularity of transactions of purchase and sale of the shares. However, where there is repetition and continuity, coupled with magnitude of the transaction, bearing reasonable proportion to the strength of holding, then an inference can be drawn that activity is in the nature of business. Learned counsel for the revenue from the records could not demonstrate that there were large number of transactions which had frequency, volume, continuity and regularity and fell within the tests laid down by the Division Bench of this Court. Consequently, the income earned by the assessee from trading in shares under the head long term capital gain / short term capital gain was correctly shown.(ITA Nos 77&78 of 2010 dt 27-06-2012)
CIT v. Vaibhav J. Shah (HUF) (Guj.)(HC) www.itatonline.org

S. 45 : Capital gains - Tradeable warrants - Cost of acquisition - Gains on sale of tradeable warrants is not assessable as capital gains [S. 55(2)(aa)]
For the A.Y. 1993-94, on sale of the tradeable warrants which was held as investment, the assessee claimed that the profits arising there from, were not taxable as the tradeable warrants did not have any cost of acquisition. The Assessing Officer held that the income earned on sale of tradeable warrarnts is liable to capital gains tax, which was confirmed by Commissioner(Appeals). On appeal, Tribunal allowed the claim of assessee. On appeal by revenue, the Court up held the order of Tribunal and held that clause (aa) of section 55(2) of the Income-Tax Act, 1961, which was inserted by the Finance Act, 1995, with effect from April 1, 1996, to the effect that cost of acquisition attributable to trading warrants shall be statutorily deemed to be nil with effect from April 1, 1996. Since the assessment

year involved was the A.Y. 1994-95 that is prior to the insertion of clause (aa) of section 55(2) the income was not assessable to tax as capital gains. (A.Y. 1994-95)
CIT v. Crown Estates P. Ltd. (2012) 346 ITR 1 (Bom.)(HC)

S. 45 : Capital gains - Set off loss - Sale to group company - Colourable device - Tax avoidance - Transaction of "sale" of "pledged" shares at loss to a group company with object to set-off loss against gains is not a "colourable transaction" [S. 2(47), 4]
The assessee earned capital gains on sale of certain shares. To offset the gains, the assessee sold shares of another company, which were pledged to IDBI, to a group company, at a loss. The Assessing Officer & CIT(A) treated the transaction of sale to the group company as a "colourable device" & rejected the loss on the ground that as the shares were pledged, they could not have been sold. However, the Tribunal allowed the assessee's claim. On appeal by the department to the High Court, held that the Revenue's argument that the transaction was a "colourable device" and a "paper arrangement" is not acceptable because (i) there is no provision which prevents an assessee from selling loss making shares with a view to offset the loss against other gains and (ii) the transaction with the group company was at the fair value. The fact that the shares were pledged and could not be registered in the purchaser's name did not establish that transaction was a contrived one. Assessee sold certain shares at loss during the previous year and sold some shares at profit, by itself, would not mean that this was a colourable device. (A.Y. 1993-94)
ACIT v. Biraj Investment Pvt. Ltd. (2012) 210 Taxman 418 / 86 DTR 69 (Guj.)(HC)

S. 45 : Capital gains - Transfer - Amalgamation - Tax avoidance scheme –Certain transfers to be void- Scheme of arrangement is not a "tax avoidance scheme" [S. 281,S. 391, 392, 393, 394 Companies Act, 1956]
Vodafone Essar Gujarat Ltd. ("transferor") filed a Petition under section 391 to 394 of the Companies Act, 1956 to transfer its 'Passive Infrastructure Assets' to Vodafone Essar Infrastructure Ltd. ("transferee") free of liabilities and encumbrances. The corresponding liabilities were not to be transferred. No consideration was payable by the transferee nor were any shares to be allotted to the members of the transferor. Post de-merger, the transferee was to be made a substantially owned company of a new company to be formed by all or some of the shareholders of the transferee. Thereafter, the transferee was to be amalgamated/ merged into Indus Towers Ltd. The application was opposed by the income-tax department on the ground that since no consideration was involved, the transaction was ultra vires. It was also claimed that the transaction did not fall within the ambit of sections 391 to 394 but was a simple transfer between two separate entities to evade legitimate taxes which would be payable if the transaction was effected as a simplicitor transfer. It was also claimed that the Scheme was solely for purposes of avoiding tax. The Company Judge came to the conclusion that the transferee was a paper company and that the sole object of the Scheme was to avoid tax on income in excess of Rs. 3,500 crore and also stamp duty and VAT to the tune to Rs. 600 crores. He accordingly refused to sanction the arrangement. On appeal by the Company, Held reversing the Company Judge:
(i) The Scheme cannot be said to have no purpose or object and that it is a mere device/subterfuge with the sole intention to evade taxes. While it is true that the Scheme may result into tax avoidance, it cannot be said that the only object of the Scheme is tax avoidance.
(ii) The Revenue's argument that the transfer is void for want of consideration is not acceptable because it is not a party to the transaction. Even a consideration of one rupee can be said to be a valid consideration and it is not necessary that consideration is always a monetary consideration. In a reconstruction there is a give and take and mutual/reciprocal promises and obligations, which can be said to be consideration for each other. Even the most trifle benefit can be consideration so as to avoid the impact of section 25 of the Contract Act.

Vodafone Essar Gujarat Ltd. v. Dept. of Income-tax (2012) 76 DTR 241 / (2013) 353 ITR 222 /216 Taxman 187 (Mag.)(Guj.)(HC)

S. 45 : Capital gains - Government Securities - Exemption - DTAA - India-Cyprus - Gains arising from sale of Government Securities is exempt as per Article 14(4) of the DTAA [S. 90, Article 11(4), 14(4)]

The Assessee sold the Government Securities and claimed the gain as exempt from capital gain tax. The Assessing Officer held that the gains in transactions of Government Securities has to be assessed as interest within the meaning of Article 11(4) of the DTAA hence taxable in India. In appeal the additions were deleted by the Commissioner of (Appeal), which was confirmed by Tribunal. On appeal by revenue the Court up held the view of the Tribunal by holding that Article 14(4) is applicable hence gain is exempt from tax. (A.Y. 2001-02)

DIT v. Credit Suisse First Boston (Cyprus) Ltd. (2012) 209 Taxman 234 / 76 DTR 215 / 253 CTR 190 / (2012) Vol. 114(5) Bom.L.R. 2783 / (2013) 351 ITR 323 (Bom.)(HC)

S. 45 : Capital gains - Business income - Purchase and sale of shares - Chartered Accountant - Amount assessable as capital gains and not assessable as business income [S. 28(i)]

In the accounting year relating to A.Y. 2001-02, the assessee, a Chartered Accountant, had derived income from his profession and also from purchase and sale of shares shown as short term and long term capital gains and also interest. He had also shown income from speculation business. Though the assessee had purchased and sold other shares and units of mutual funds, this solitary transaction had been disputed by the Assessing Officer mainly because the assessee had purchased the shares from borrowed funds obtained at a high rate of interest. Another reason for holding that the transaction was an adventure in the nature of trade or business was that the shares were held by M till the entire loan was paid and were initially purchased in the name of M in terms of the agreement between the assessee and M. According to the Assessing Officer, since the assessee had not obtained physical possession of the shares at the relevant time, the assessee was not the owner of the shares. The Commissioner(Appeals) treated the receipt as capital gains and deleted the disallowance of interest. The Tribunal upheld the order. The High Court dismissing the both the Tribunal as well as Commissioner(Appeals) had recorded concurrent findings of fact to the effect that the assessee had disposed of most of the shares held by him after more than a year or two; the investment made in the shares of H was not very high; the assessee had not repeated the transactions of purchase and sale of shares of H, the assessee had not shown the shares as stock in trade; after the shares were sold, the assessee made investments under the provisions of section 54EC in the bonds of NABARD and the profit of purchase and sale of shares or investment in mutual fund was always shown on capital account, that is, capital gains either short term or long term, and that the same was accepted as such in earlier years. The transaction did not amount to an adventure in the nature of trade. (A.Y. 2001-02)

CIT v. Niraj Amidhar Surti (2012) 347 ITR 149 / 48 DTR 33 (Guj.)(HC)

S. 45 : Capital gains - Deeming fiction - Sale consideration accruing or arising or received in different years, chargeable to tax in year which transfer takes place - Transfer of share holdings through share purchase agreement. Merely because the agreement provides for payment of the balance of consideration upon the happening of certain events, it cannot be said that the income has not accrued in the year of transfer. Order of Tribunal was up held [S. 48]

The assessee had transferred his shareholding through a share purchase agreement dated 15-2-2006. The overall sale consideration was Rs. 86.25 lakhs. However, in this year the assessee received only an amount of Rs. 60 lakhs. The balance amount was to be received in three succeeding years subject to fulfilment of certain conditions. The assessee claimed that in the relevant A.Y. only an amount of Rs. 60 lakhs was liable to be considered for the purpose of levy of capital gains tax. The Assessing Officer held that whole sale consideration of Rs. 86.25 lakhs was subject to capital gains tax under

section 45. It was held that there was no material on the record or in the agreement suggesting that even if the entire consideration or part is not paid the title to the shares will revert to the seller. In that sense the controlling expression of 'transfer' in the instant case is conclusive as to the true nature of the transaction. The fact that the assessee adopted a mechanism in the agreement that the transferee would defer the payments would not in any manner detract from the chargeability when the shares were sold. The tenor of the Tribunal's order is that the entire income by way of capital gains is chargeable to tax in the year in which the transfer took place. This is what is stated in section 45(1). Merely because the agreement provides for payment of the balance of consideration upon the happening of certain events, it cannot be said that the income has not accrued in the year of transfer. Order of Tribunal was up held. (A.Y. 2006-07)

Ajay Guliya v. ACIT (2012) 209 Taxman 295 (Delhi)(HC)

Editorial:- Refer ACIT v. Ajay Guliya (2012) 138 ITD 134 (Delhi)(Trib.). It was held that in view of deeming fiction contained in section 45(1) whole of sale consideration accruing or arising or received in different years was chargeable under head 'capital gains' in year in which transfer of shares had taken place.

S. 45 : Capital gains - Allotment letter - Under construction - Long term - Short term - Flat sold after three years from date of allotment of flat under construction but within three years from date of possession, held to be long term [S. 2(29A), 2(42B), 54]

The assessee was allotted a flat on 27-2-1982, thereafter on completion of construction of the same the assessee was handed over the possession on 15-5-1986 and the flat was sold on 6-1-1989. The assessee claimed the sale as a long term capital gain and invested the same in a another apartment and claimed deduction under section 54 of the Act. The Assessing Officer, CIT(A) and tribunal both held that the sale amounts to short term capital gain as the flat was sold within 36 months from the date the assessee received possession of the said flat. On appeal to the High Court by the assessee the High Court while allowing the appeal held that as per paragraph 2 of circular No. 471 dated 15-10-1986, 162 ITR (St) 41 issued by the board as to the nature of that right that an allottee acquires on allotment of flat, the allottee gets title to the property on the issuance of an allotment letter and the payments of installments was only a consequential action upon which the delivery of possession follows. The High Court therefore held that in the instant case the right of the assessee prior to the possession of the flat was a right in the property, and therefore in such a situation it cannot be held that prior to that date, the assessee was not holding the flat, and therefore held that the sale of the flat amounts to a long-term capital gain. (A.Y. 1989-90)

Vinod Kumar Jain v. CIT (2012) 344 ITR 501 / (2010) 46 DTR 185 (P&H)(HC)

S. 45 : Capital gains - Tenancy rights - Cost of acquisition being Nil - Relinquishment of tenancy rights is not chargeable to capital gains

As per agreement with landlord, the landlord agreed to rent out four existing floors to the assessee, and for three more under construction floors of the building, the assessee agreed to advance to the landlord a sum of Rs. 6 lakhs on which the landlord would pay interest @ 6 per cent p.a. Both sides agreed to certain fixed monthly rent on such rental properties. Tenancy did not have a fixed life. Period for which such advance would be made to the landlord was also not specified. Agreement is a composite agreement under which, besides other terms and conditions, the landlord and tenant agreed that the property would be rented out at a certain monthly rental. It is not possible to segregate a portion of the advance going towards the cost of acquisition of the tenancy rights and a portion going towards reduced rent, if any, Cost of acquisition of property is a payment made or deferred by the purchaser at the time of acquiring such property. Such price cannot be a fluctuating price depending on the period for which the advance is made or held by the landlord. There was thus no cost of acquisition and capital gains were not chargeable on relinquishment of tenancy rights by assessee. (A.Y. 1986-87)

Amora Chemicals (P) Ltd. v. CIT (2012) 78 DTR 375 / 211 Taxman 324 (Guj.)(HC)

S. 45 : Capital gains - Accrual - Pledge of shares - Sale of shares which was pledged, there being no transfer of shares but only pledge of shares for obtaining loan, which the loan was repaid no question of capital gain

Tribunal has on consideration of all facts concluded that there was no transfer of shares but only a pledge of shares for the purposes of obtaining a loan. Loan was repaid as evident from audited accounts. Evidence in the form of transaction statement of Demat account dated 24th Dec., 2004 was produced at the time of hearing showing the return of 50 crores shares of RI Ltd. to the assessee on 24th Oct., 2012 i.e. the date when the loan was returned by the assessee to one M-Besides, the finding of the Tribunal is a finding of fact and the Revenue has not been able to show that the same was in any manner perverse. There was thus no question of capital gains. (A.Y. 2004-05)

CIT v. Reliance Communication Infrastructure Ltd. (2012) 79 DTR 198 / 254 CTR 251 / (2013) 212 Taxman 177 (Bom.)(HC)

S. 45 : Capital gains - Genuineness of transaction - Share transaction with tainted share broker would not lead to bogus transaction capital gains declared by the assessee was accepted as genuine

The assessee, in the return of income claiming that he purchased certain shares of various companies and those shares were sold after a period of 12 months and, therefore, the share transactions of the assessee resulted into a long term capital gains. Assessing Officer found that there was unusual rise in price of shares of some of companies and, thus, SEBI had ordered enquiry. In said enquiry, it was found that some share brokers carried out share transactions in violation of norms of SEBI regulations. Since assessee also entered into share transactions with one of such brokers, the Assessing Officer held that assessee's share transactions were bogus. On appeal, the Commissioner(Appeals) held that purchase of shares was shown by assessee in his balance sheet for last five years and genuineness of books of account was never questioned. Further, payment for purchase of shares was made through bank and it was verified from bank statement. Whether in aforesaid circumstances, merely because assessee bonafidely entered into share transactions with one of tainted share brokers would not lead to inference that those transactions were bogus .capital gain declared by assessee in his return was to be accepted. On appeal by revenue, the Tribunal confirmed the order of Commissioner(Appeals). On appeal to High Court also confirmed the order of Tribunal.

CIT v. Arun Kumar Agarwal (HUF) 210 Taxman 405/(2013) 85 DTR 219 (Jharkhand)(HC)

S. 45 : Capital gains - Business income - Investment in shares - Gains on shares held in investment portfolio not assessable as business profits [S. 28(i)]

The assessee was maintaining separate portfolios for shares in the trading account and for those in the investment account. This was accepted by the department in the earlier years. In A.Y. 2007-08, the assessee sold all the shares in the investment portfolio and offered the gains to tax as long-term and short-term capital gains. The Assessing Officer held that as the volume (Rs. 52 crores) and frequency of transactions was large, the LTCG & STCG were assessable to tax as business profits. The CIT(A) and Tribunal (order attached) reversed the Assessing Officer by relying on CBDT Circular No. 4 of 2007 dated 15.06.2007 [(2007) 291 ITR (St.) 35]. On appeal by the department to the High Court, held dismissing the appeal:

The intent and purport of Circular No. 4 of 2007 dated 15.06.2007 is to demonstrate that a tax payer could have two portfolios, namely, an investment portfolio and a trading portfolio. In other words, the assessee could own shares for the purposes of investment and/or for the purposes of trading. In the former case whenever the shares are sold and gains are made the gains would be capital gains and not profits of any business venture. In the latter case any gains would amount to profits in business. This has been made clear by the CBDT circular in the remaining portion of the circular itself. On facts, the

finding of the CIT(A) & Tribunal that the short term capital gains and long term capital gains were out of the investment account and were not related to the trading account does not call for any interference. (A.Y. 2007-08)

CIT v. Avinash Jain (2013) 214 Taxman 260 /84 CCH 18(Delhi)(HC)

S. 45 : Capital gains - Computation - Full value of consideration - Actual consideration -On facts it was held that the addition was justified Difference between ostensible consideration and real consideration

Value of land in question, after change of land use so as to enable construction of a commercial building and payment of conversion charges, development charges, etc., was agreed by KSPP Ltd. and FFI Ltd. at Rs. 6.35 crores as per MOU. As against total worth of SPP Ltd. as Rs. 6.35 crores, SB and PB had paid Rs. 5 crores, including loan liabilities. Assessing Officer added Rs. 60 lakhs on account of brokerage and commission and difference of Rs. 75 lakhs added by Assessing Officer. It was held that action of Assessing Officer was justified on the facts of the case. If the Revenue is able to show from the material available to the Assessing Officer that actual consideration was more than the ostensible consideration disclosed by the assessee, the presumption of correctness of the consideration stands duly displaced and the Assessing Officer would be justified in taking a view that the difference between the ostensible consideration and the real consideration reflected the amount which was paid by the purchaser to the seller, but was not reflected in the account books of the parties. (A.Y. 2003-04)

CIT v. Karan Khandelwal (2012) 254 CTR 143 (Delhi)(HC)

CIT v. Sunil Bedi (2012) 254 CTR 143 (Delhi)(HC)

S. 45 : Capital gains - Investment in shares - Business income - Sale of investment was held to be assessable as capital gain [S. 28(i)]

As per main object of assessee-company it was an investment company to buy, invest, acquire and hold shares, stocks, etc. To implement objects of said company, two of directors gifted their shares in another company to assessee company and some of these shares were subsequently sold and assessee. Company treated receipt as capital gain but Assessing Officer treated it as business income. The Court held that merely because company earned profits by selling some shares that would not mean that assessee-company was engaged in share trading. Accordingly the Court held that the Assessing Officer was unjustified in treating income from solitary sale of shares as business income. (A.Y. 1999-2000)

CIT v. Nadatur Holdings and Investments (P.) Ltd. (2012) 210 Taxman 597 (Karn.)(HC)

S. 45 : Capital gains - Transfer - Part performance of contract - Assessee held to be liable to capital gain tax as per tripartite agreement [S. 2(47), 53A of the Transfer of Property Act, 1882]

Assessees agreed to sell their plots of land to a company 'E'. They after receiving entire sale consideration entered into an agreement dated 23-10-1991 with 'E' for sale of land. They also executed a general power of attorney dated 5-11-1991 in favour of 'E'. Under power of attorney, 'E' was authorised to sell aforesaid land in part or full and to receive sale consideration on behalf of assessees 'E' was also authorized to take possession of land and administer same. Subsequent to execution of power of attorney, assessees entered into a tripartite agreement dated 27-10-1994 with one 'S' and 'E' as a confirming party; wherein they agreed to convey balance of 83.96 per cent undivided share of aforesaid land in favour of 'S'. Said agreement pointed out that confirming party 'E' was entitled to market existing incomplete constructions together with 16.04 per cent undivided share in land to third parties. Accordingly sale deed was executed in favour of 'S' through power of attorney 'E'. Assessees did not admit capital gains tax liability on sale consideration of Rs. 90 lakhs paid by 'S' on plea that land was handed over to 'E' in year 1991. The Assessing Officer held that 83.96 percent of the undivided share of land was sold by the assessee and the other land owners in

favour of 'S'. Thus the assessee were to be assessed on capital gains arising under the consideration for the sale of the assesee's interest of 83.96 percent of the undivided share. On appeal Commissioner (Appeals) up held the order of Assessing Officer. On appeal to the Tribunal the Tribunal held that there is no justification for assessing the 83.96 percent of the undivided share. On appeal by revenue the court held that since assessees could not produce any material to show that in pursuance of sale agreement dated 23-10-1991 they had put 'E' into possession of land, provisions of section 53A would not apply to instant case one and only agreement on which assessees had divested their interest to extent of 83.96 per cent of undivided share in land in favour of 'S' was agreement dated 29-10-1994 and 'E' acted only as a power of attorney holder on behalf of assessees. Therefore, assessees were liable to capital gains tax on sale proceeds under tripartite agreement. Accordingly, the appeal of revenue was allowed. (A.Y. 1993-94, 1995-96)

CIT v. P. Srinivasan (2012) 211 Taxman 479 (Mad.)(HC)

S. 45 : Capital gains - Business income - Investment in shares - Rule of consistency -Profit on sale of shares is assessable as capital gains [S. 28(i)]

Assessee is buying and selling shares in a large scale at high frequency and the period of holding was also not very long. Assessing Officer taxed the income as business income. The Tribunal held that once the Assessing Officer has accepted the transaction of shares as investment in earlier year and also in subsequent year, in the absence of any glaring material change in facts and circumstances, Assessing Officer ought to have maintained consistent view on issue. The Tribunal held that income arising from purchase and sale of shares held as investment would be assessable as capital gain and not as business income. (A.Y. 2005-06, 2006-07)

Sunil Kumar Ganeriwal v. Dy. CIT (2012) 134 ITD 179 (Mum.)(Trib.)

S. 45 : Capital gains - Business income - Investment in shares - Rule of consistency is to be followed and assessable as capital gains [S. 28(i)]

Following the rule of consistency the Tribunal held that the profit on sale of shares has to be assessed as short term capital gains and not as business income. (A.Y. 2005-06)

S. K. Finance v. Dy. CIT (2012) 13 ITR 236 (Mum.)(Trib.)

S. 45 : Capital gains - Business income - Investment in shares - Rule of consistency - Profit on sale of shares is assessable as capital gains [S. 28(i)]

The assessee had consistently shown in past several years the share trading income as capital gains, either short term or long term or both and that had not been challenged by the Department. There was no material on record to hold that the assessee had deviated from the accepted nature of transaction or adopted a different method of share transaction more akin to business transaction. As far as the period of holding of an investment was concerned, the accepted legal position was that a decision had to be taken by the assessee himself as to reap the maximum benefits. The profit on sale of shares cannot be assessed as business income. (A.Y. 2006-07)

ACIT v. Gargi Shitalkumar Patel (Smt.) (2012) 13 ITR 386 (Ahd.)(Trib.)

S. 45 : Capital gains - Business income - Investment in bonds, mutual funds and other securities - Short term - Profit on sale of shares is assessable as capital gains and cannot be treated as business income - Principle laid down [S. 28(i)]

Assessee company was engaged in business of dealing in auto spare parts and investment in bonds, mutual funds and other securities. Assessing Officer treated share transactions as business activity and assessed as business income. The Tribunal held that the assessee has not borrowed funds for purchase of shares, further value of shares at close of year had been taken at cost and not market price or cost whichever is lower, which showed that shares were not treated as stock-in-trade. In earlier assessment year, purchase of shares by assessee had been treated as investment. Tribunal applied 11

principles to determine whether the sale of investment is capital gain or business income. Accordingly the Tribunal directed the Assessing Officer to treat the sale as investment as capital gains and not as business income. (A.Y. 2006-07)

D & M Components Ltd. v. ACIT (2012) 49 SOT 224 (Delhi)(Trib.)

S. 45 : Capital gains - Business income - Investment in shares - Surplus is assessable as capital gains [S. 28(i)]

Assessee is carrying on the business of marketing and distribution of books and magazines. He had income from purchase and sale of shares. During the year the Assessing Officer found that there were large number of transactions of purchase and sale of shares. Assessing Officer held the income as business income. On appeal Commissioner(Appeals) held that transactions resulted into short term capital gains and not business profits. On appeal by revenue the Tribunal held that as the department has accepted the assessee as investor in earlier years and latter years, coupled with fact that bulk of profit had arisen from sale of bonus shares the order of Commissioner(Appeals) is confirmed. (A.Y. 2007-08)

ACIT v. Om Prakash Arora (2012) 134 ITD 217 / 146 TTJ 730 (Delhi)(Trib.)

S. 45 : Capital gains - Development agreement - Handing over of possession - Business income - Transfer - Assessable as capital gains in the year transferee is willing to perform the obligation as per the contract- Transfer of Property Act Section 53A [S. 2(47)(v), 28(i)]

On the facts the Tribunal found that developer had violated essential terms of agreement which tend to subvert the relationship established by the development agreement with the assessee. There was no progress in the development agreement for the relevant assessment year, even the municipal sanction for development was not obtained in the relevant year. Handing over the possession of the property is only one of the conditions, section 53A of the Transfer of Property Act but it is not the sole and isolated condition and it is necessary to go in to whether or not the transferee was willing to perform its obligation under the consent terms. On the facts of the case provisions of section 2(47)(v) will not apply in the assessment year under consideration and the capital gains would not be taxed in the A.Y. The Assessee was showing income from the land holding as agricultural income. Land which was acquired in September, 1996 was sold during the A.Y. 2004-05. There was no regular activity of purchasing and selling of land, therefore profit on sale of the land was assessable as capital gains and not as business income. (A.Y. 2006-07)

K. Radhika (Mrs) & Ors. v. Dy. CIT (2012) 65 DTR 250 / 149 TTJ 736 (Hyd.)(Trib.)

S. 45 : Capital gains - Sale of shares - ESOP - Short term - Long term - The date on which option to buy the shares is granted, could not be treated as 'date of acquisition of shares' - Gains will be short term [S. 2(42A)]

Assessee is an employee of Johnson & Johnson Ltd. an India based subsidiary of Johnson & Johnson, Inc USA. During the year the assessee received the consideration in respect of sale of stock option shares received by him. The assessee treated the same as long term capital gain and claimed exemption under section 54EA. Assessing Officer held that the holding period for these share to be considered from the date of exercising the stock option to the sale of the shares, which was less than twelve months, hence the gain on these shares to be treated as short term capital gains. The Commissioner(Appeals) held that, the assessee has taken constructive delivery hence treated as long term capital gains. Tribunal reversed the finding of Commissioner (Appeals) and held that the date on which option to buy the shares is granted, could not be treated as 'date of acquisition of shares'. As per broker's statement, the assessee was not the owner of these shares before the shares were sold and entries, to that extent, were mere notional in nature, therefore impugned gains cannot be taxed under the head 'long term capital gains'. As the shares were held for less than 12 months, the gains will be short term capital gains. (A.Y. 1998-99)

ACIT v. Pramod H. Lele (2012) 66 DTR 134 / 143 TTJ 721 / (2011) 47 SOT 363 (Mum.)(Trib.)

S. 45 : Capital gains - Transfer of development rights - TDR is "improvement" of land and if it has no cost, then, even if the land has a "cost", no part of the gain on transfer of land is taxable

The assessee transferred "Development Rights" being the FSI and the "right to load TDR" on the land. While the right to construct on the land by consuming FSI was a capital asset which was acquired at a cost, the right to load TDR arose pursuant to the DC Regulations, 1991 without payment of any cost. The said right to "load TDR" was an improvement to the "capital asset" held by the assessee. If the "cost of improvement" of an asset is not determinable, capital gains are not chargeable. The result was that even the consideration attributable to the FSI (which had a cost) was not assessable to tax [Principle laid down in Jethalal D. Mehta v. Dy. CIT (2005) 2 SOT 422 (Mum.)(Trib.) & Maheshwar Prakash-2 Co-op. Hsg. Society Ltd. (2008) 24 SOT 366 (Mum.)(Trib.) in the context of transfer of only TDR followed](ITA NO 3053 /Mum/2010 dt 8-2-2012).

Ishverlal Manmohandas Kanakia v. ACIT (Mum.)(Trib.) www.itatonline.org

S. 45 : Capital gains - Sale of shares - Statement of broker - Addition as undisclosed source is not justified [S. 69]

Assessee had purchased the shares more than one year before date of sale and purchase which was accepted as genuine, the Assessing Officer was not justified in making addition of sale proceeds of such shares as undisclosed income of the assessee merely on the basis of statement of the broker that he was issuing accommodation entries. (A.Y. 2002-03 & 2006-07)

Dalpat Singh Choudhary v. ACIT (2012) 143 TTJ 500 / 65 DTR 148 (Jodh.)(Trib.)

Dy. CIT v. Dalpat Singh Choudhary (2012) 143 TTJ 500 / 65 DTR 148 (Jodh.)(Trib.)

S. 45 : Capital gains - Joint venture - Assignment of land - Assignment of land to joint venture with another company - Capital gains cannot be charged for the relevant year

As per joint venture agreement the assessee company has agreed to provide its land for the development of the joint venture and the assessee company is getting 50 percent rights in the developed property. The extinguishment of its 50 percent right over the land is compensated by its 50 percent right in built up area. The joint venture has not started the construction during relevant year. The commercial complex is a yet a proposed project. The Tribunal held that, a transfer is contemplated only in case of an existing property. In the present case the property is only in the nature of mutual rights, in the project and development yet to happen. Therefore, there is no extinguishment of any right in the property. During relevant year only agreement is entered into hence, no capital gains is chargeable for the relevant year. (A.Y. 2007-08).

Vijay Productions (P) Ltd. v. Addl. CIT (2012) 134 ITD 19 / 66 DTR 314 / 144 TTJ 1 / 14 ITR 614 (TM)(Chennai)(Trib.)

S. 45 : Capital gains - Accrual - Disputes between share holders - Till final decision the capital gains cannot arise

There was disputes between two groups and the matter is pending before the Supreme Court. The amount was deposited in fixed deposit as per interim order of Supreme Court. The Tribunal held that till the dispute is settled capital gains could not be taxed as the capital gains has not accrued. (A.Y. 2007-08)

Dy. CIT v. Ashwani Chopra and Others (2012) 143 TTJ 759 / (2011) 59 DTR 171 (Amritsar)(Trib.)

S. 45 : Capital gains - Business income - Investment in shares - Profit from sale of mutual funds and shares is assessable as capital gains and not as business income [S. 28(i)]

The assessee is an Insurance agent. He declared the profit on sale of mutual funds and shares as business income. The Assessing Officer assessed the profit as business income, which was confirmed by Commissioner(Appeals). On appeal the Tribunal held that the profit is assessable as short term capital gains, considering the following factors (a), the average length of holding of shares was more than 125 days (b) he had not borrowed any amount from outsider on loan to investment in shares (c) he had only deployed funds with a long term view as amounts were only borrowed from family members having liquid capital available with them (d) the primary business activity pursued by the assessee was that of an insurance agent (e), no intraday transactions in shares and securities, there was no trading in future and options (f) percentage of gains of less than 30 days was only 5.13 percent. Accordingly the Tribunal held that the gain is assessable as short term capital gains. (A.Y. 2006-07)
Dev Ashok Karvat v. Dy.CIT (2012) 50 SOT 167 (Mum.)(Trib.)

S. 45 : Capital gains - No cost of acquisition - Ancestor land - Compensation received from municipal corporation is not taxable
The assessee received Inami land from his ancestors for service of 'Dargah'. Subsequently the municipal corporation acquired the said land and paid compensation to assessee. Assessing Officer was of the view that income arising from aforesaid transaction was liable to tax under section 45. In the present case since land was acquired by assessee's ancestors free of cost for maintenance and services of Dargah, any element of cost in acquisition of aforesaid land was in conceivable. The ITAT therefore held that the transaction in question was outside the purview of section 45. (A.Y. 2005-06)
ITO v. Pashu Mohammed Zainuddin (2012) 50 SOT 45 (URO)(Pune)(Trib.)

S. 45 : Capital gains - Agricultural land - Land purchased for agricultural purpose, held for long period and shown as asset in balance sheet is Liable to capital gain tax on sale and not as business income [S. 28(i)]
The assessee is a company engaged in the business of purchase and sale of land. Where the assessee purchased the land which was used for agricultural land, showed it as asset in the balance sheet and held it for a long period. It was held by the Tribunal that consideration received on the sale of such land be taxable as Capital Gain and not as Profit from Business and Profession. (A.Y. 2006-07)
Addl. CIT v. Delhi Apartment P. Ltd. (2012) 135 ITD 441 / 147 TTJ 451 / (2013) 23 ITR 217 (Delhi)(Trib.)

S. 45 : Capital gains - Investment in shares - Though the assessee borrowed the money, gains on shares assessable as STCG & not business profits [S. 28(i)]
The assessee earned gains from shares of which Rs. 7.61 crores was out of delivery-based transactions and offered as STCG while Rs. 4.26 crores was out of futures & options and offered as business profits. The Assessing Officer & CIT(A) assessed the STCG as business profits on the ground that (a) there was no LTCG, (b) there was no dividends, (c) there were hundreds of transactions during the year, (d) the assessee had borrowed interest-bearing funds for purchase of shares & (e) the average holding period was 41 days. On appeal by the assessee, the Tribunal held allowing the appeal:
In the books, the delivery based transactions were accounted as investment and a distinction from the non-delivery transactions is maintained. The transactions were with a limited number of companies (8) and the average number of transactions in one month were 8. The CBDT Circular permits the assessee to deal in the shares of one scrip and treat some as trading and some as a capital investment. The fact that the assessee borrowed funds for investing in shares cannot constitute a factor as in none of the case laws or CBDT circular it has been held that borrowings will not be allowed in investment transactions. Investment in capital assets can also be carried out by use of borrowed funds. There is no bar notified by the law, judicial pronouncement or CBDT Circular. (A.Y. 2006-07)
Narendra Gehlaut v. JCIT (2012) 52 SOT 255 (Delhi)(Trib.)

S. 45 : Capital gains - Capital loss - Genuineness of loss on sale of distressed assets - As the transactions held to be sham the loss was held to be not allowable

The assessee had given security of shares as guarantee for a loan taken by one Mr. Subhash Chopra from Cholamandalam Finance & Investment Co. Ltd. Since, Mr. Chopra defaulted, the assessee had paid a sum 2 of Rs. 50,40,000/- and got released the shares pledged. After getting released the shares the assessee entered in to an agreement with a company to sell this loan as distress asset only for a sum of Rs. 4,50,000/-. Despite the summons issued the parties never appeared before the Assessing Officer. The Assessing Officer held that the entire exercise was to reduce the short term capital gains hence the loss cannot be allowed as loss on sale of distressed asset. The Tribunal also confirmed that loss on account of guarantee for loan could not be allowed as the surrounding circumstances clearly prove that the entire exercise is a sham and fictitious exercise just to reduce the tax liability (A.Y. 2005-06)

Sudhakar Ram v. ACIT (2012) 72 DTR 187 / 49 SOT 90 / 150 TTJ 703 (Mum.)(Trib.)

S. 45 : Capital gains - Accrual - Joint venture - On facts transfer of property is complete on the date of entering in to joint venture agreement i.e. 12th July, 2005 [S. 2(47)(v), 48]

The assessee entered in to a joint venture development agreement with a builder dated 12th July, 2005 in which the consideration was fixed at Rs. 2,50,00,000/-. The document was registered later by way of confirmation deed dated 2nd July, 2007 in which the sale consideration was increased to Rs. 4,90,00,000/-. The assessee had ¼ share. According to the assessee as the joint venture agreement was registered in the A.Y. 2007-08 capital gains tax is leviable in the A.Y. 2007-08. The assessing Officer took the stand that the same is taxable in the year 2006-07 in which the transfer took place. The Assessing Officer also taxed the enhanced consideration in the A.Y. 2006-07. In appeal the Commissioner(Appeals) also confirmed the order of Assessing Officer.

On appeal to Tribunal, the Tribunal held that, as the builder has taken possession of property as per the joint venture agreement dated 12th July, 2005 the agreement fulfills the requirement of section 2(47)(v) and therefore "Transfer" in terms of section 2(47)(v) took place during the A.Y. 2006-07. Hence, the capital gain was rightly taxed in the A.Y. 2006-07. For the purpose of computation of capital gains the enhanced consideration to be taken in to consideration as per section 48 in the year of transfer i.e. 2006-07. (A.Y. 2006-07)

Mahesh Nemichandra Ganeshwade & Ors. v. ITO (2012) 73 DTR 1 / 147 TTJ 488 / 17 ITR 116 (Pune)(Trib.)

S. 45 : Capital gains - Compensation - Acquisition of land - Compensation received on acquisition of land is assessable as capital gains [S.2(IA),2(14)(iii)]

The Assessee received compensation received on acquisition of land under the land acquisition Act. Additional amount received was linked to the period when the Notification was issued till the date of actual possession. The Assessing Officer treated the sum so received as interest income. The Tribunal held that it was part of the compensation amount receivable and taxable as capital gains. (A.Y. 2007-08)

Ghanshyam Mudgal v. ITO(2012) 143 TTJ 60(UO)/(2012) BCAJ Pg. 43, Vol. 44-A Part 1, April 2012 (Jaipur)(Trib.)

S. 45 : Capital gains - Ownership of land - Firm - Partner - Capital gains assessable in the hands of partner

Assessee-firm had filed its return declaring certain income as long-term capital gains generated out of sale of land. Later on, assessee filed a revised return wherein it was explained that land sold actually belonged to 'J' a partner of assessee-firm, and, therefore, long-term capital gain was accountable in his hands. Assessing Officer took a view that capital gain was taxable in hands of Assessee firm and

not in hands of 'J' as individual on ground that land and buildings were shown in balance-sheet of firm as its assets and assessee-firm had claimed depreciation on buildings. On appeal, it was noted that one 'JM' had carried on a business. After death of JM, business was carried on by his four sons including 'J' by constituting assessee-firm. Land property in question belonging to estate of 'JM' was not specifically assigned to partnership firm either by act, deed or conduct as wives of partners were also co-owners. However, same was used by firm for business. Subsequently, at time of dissolution of firm, a release deed was executed whereby land in question came to share of 'J' after paying certain amount to other partners. It was thereafter 'J' sold land property. Thus on facts, it was apparent that property belonged to 'J' in his individual capacity and, therefore, capital gain arising on sale of said property was assessable to tax in his hands and not in hands of assessee-firm. (A.Y. 2007-08)

Dy. CIT v. South India Pulverising Mills (2012) 137 ITD 1 / 148 TTJ 694 / 76 DTR 57 (TM)(Chennai)(Trib.)

S. 45 : Capital gains - Transfer - Development agreement - If developer has taken any steps in relation to construction of flats, on the basis of development agreement, then it has to be considered as transfer and assessee is liable to capital gains tax in the year of transfer [S. 2(47)(v), Transfer of Property Act,1882.S.53A]

When an owner enters in to an agreement for development of the property and certain rights area assigned to the developer who in turn has made the substantial payment and taken steps to construction of flats, then the transaction held to be transfer under section 2(47)(v). Legal ownership continued with the owner does not have bearing on taxability of capital gains. Though total profits received in later year for the purpose of capital gains tax the year of transfer is relevant. On the facts of the case the provisions of section 53A of Transfer of Property Act is held to be applicable. (A.Y. 2002-03 & 2008-09)

ACIT v. A. Rama Reddy (2012) 52 SOT 521 (Hyd.)(Trib.)

S. 45 : Capital gains - Short term capital asset - capital gain had to be computed on sale of flats and not on transfer of right of claim in flats [S. 2(42A), 48]

Assessee owned a land since 1962. It entered into a development agreement on 21-2-2001 with a builder for a consideration of Rs. 61 lakh and 55 per cent share in built up area. Assessee was given possession of flats on 24-2-2005. Assessee sold two flats on 10-4-2006 and 12-5-2006 and computed long term capital gain by taking holding period from date of agreement 21-2-2001. 'Right of claim in flats' as per agreement of 2001 was an 'asset', assessee had not sold 'right of claim in flats' but had sold 'flats' of which he was owner. 'Right of claim in flats' no longer subsisted once assessee acquired flats and took possession of same on 24-2-2005. Therefore, capital gain had to be computed on sale of flats and not on transfer of right of claim in flats; and considering dates of possession of flats and sale therefore, gain on sale of flats was short term capital gain. Since assessee along with flats had also sold right of land as owner, which was an independent asset held since 1962, capital gain in respect of transfer of right of assessee in land had to be computed separately as long term capital gains. It would be reasonable to adopt a profit margin of 25 per cent on cost of construction of flats to arrive at sale consideration pertaining to flats and balance sale consideration of flats would be appropriated towards sale price for transfer of right in land. (A.Y. 2007-08)

ACIT v. Jaimal K. Shah (2012) 137 ITD 376 (Mum.)(Trib.)

S. 45 : Capital gains - Computation - Accrual of income - Tripartite development agreement - Amount never received by assessee under the arrangement capital gain cannot be assessed [S. 48]

Agreed consideration in the form of constructed area of 18000 sq. ft. as stated in the development agreement between the assessee landowner and the developer not having been actually received by the assessee as a result of subsequent developments i.e. sale of entire property to a third party, that

part of the consideration did not actually accrue to the assessee and, therefore, same cannot be taken into account for the purpose of computation of capital gain arising from the transfer of property. (A.Y. 2007-08)

Chemosyn Ltd. v. ACIT (2012) 139 ITD 68 / 19 ITR 6 / 149 TTJ 294 / 77 DTR 89 (Mum.)(Trib.)

S. 45 : Capital gains - Consideration - Entire consideration on transfer of property is to be taken for consideration during year in which transfer is effective

In view of provisions of section 45(1) entire consideration on transfer of property is to be taken for consideration during year in which transfer is effective, irrespective of fact that payment of a part of consideration may have been deferred by parties. (A.Y. 2006-07)

ITO v. Indira R. Shete (Ms) (2012) 138 ITD 264 (Mum.)(Trib.)

S. 45 : Capital gains - Port folio management service (PMS) - Business income - Gains from port folio management provider has to be assessed as capital gains and not as business income [S. 28(i)]

The assessee declared the capital gains in respect of investments made through the PMS providers. The Assessing Officer assessed the long term as well as short term gains as business income. On appeal Commissioner(Appeals) upheld the contention of assessee. On further appeal to Tribunal by revenue, the Tribunal held that by engaging PMS provider, assessee was looking for appreciation and maximization of wealth and not merely encashing of profits as trader, gain from such activity was liable to be considered as derived from activity of investment and not trading hence liable to be assessed as capital gains. (A.Y. 2006-07)

Apoorva Patni v. Addl.CIT (2012) 24 taxmann.com 223 / 54 SOT 9 (URO)(Pune.)(Trib.)

S. 45 : Capital gains - Computation - Computation - Sale of shares with restrictive covenant is capital receipt [S. 48]

Assessee company having sold its entire shareholding in L&T Ltd. constituting 7.7 per cent of the shares of the latter under an agreement coupled with a restrictive covenant whereby assessee agreed not to acquire any equity shares of L&T Ltd or any other instrument that provides voting rights for a minimum period of five years, 25 per cent of the price received by the assessee for the sale of shares is to be attributed to the non compete agreement having regard to the tenor of cl. 20(8) of SEBI (substantial acquisition of shares and Takeovers) Regulations, 1997; prior to A.Y. 2003-04, non compete fee was a capital receipt not liable to tax and, therefore 25 per cent of the sale consideration of the shares is not liable to tax in A.Y. 2002-03. (A.Y. 2002-03)

Reliance Industries Ltd. v. Addl. CIT (2012) 79 DTR 315 / (2013) 55 SOT 8 (URO) (Mum.)(Trib.)

S. 45 : Capital gains - Business income - Purchase and Sale of shares - Transactions part of investment portfolio and not trading portfolio - Did not have large number of transactions which had frequency, volume, continuity and regularity - Hence, transactions be treated as capital gain [S. 28(i)]

Assessee was a sub-broker of shares. He had also carried out purchase and sale of shares on own account. Considering volume of transactions, Assessing Officer opined that activity undertaken by assessee had all ingredients of business and, therefore, income arising from sale of shares was to be taxed as business income. It was held that the assessee was maintaining two separate portfolios *i.e.*, investment portfolios and trading portfolios. Further, shares in question which were subject matter of short term capital gain and long term capital gain were part of investment portfolios and were not part of trading portfolio. Also revenue could not demonstrate that there were large number of transactions which had frequency, volume, continuity and regularity. Hence, it was held that Assessing Officer

was to be directed to calculate income arising from sale of shares under head 'capital gains'. (A.Y. 2005-06)

Jignesh Indulal Patel v. ITO (2012) 139 ITD 294 (Mum.)(Trib.)

S. 45 : Capital gains - Long term or short term - Sale of shares allotted under ESOP - Sale after lock in period of three years taxable as long term capital gains [S. 2(29B), 2(42A)]

Assessee was granted valuable rights in the shares of ESOP stock of P Inc, the holding company of his employer PIHL, which were held with B Group (trustees). Clauses of allotment clearly show that a specified number of shares were allotted to assessee in different years at different prices though distinctive numbers were not allotted- Assessee was not required to pay the purchase price at the time of allotment and the same was to be deducted at the time of sale or redemption of shares. Since there was an apparent fixed consideration of ESOP shares, the right to allotment of specified number of shares accrued to the assessee at the relevant time. Benefit of deferment of payment of purchase price cannot lead to an inference that no right accrued to the assessee. Indistinctive shares were held by a trust on behalf of assessee. Non allotment of distinctive number of shares by the trust is not repugnant to the proposition that assessee's valuable right of claiming shares was held in trust. Thus, there was a define, valuable and transferable right which can be termed as a capital asset of the assessee. If the Assessing Officer's stand that the date of allotment of the shares and sale thereof is the same is accepted, then there will be no capital gain. Therefore, the gains arising on the sale of such rights after the lock in period of three years are taxable as long term capital gains. (A.Y. 2004-05)

Abhiram Seth v. JCIT (2012) 79 DTR 63 / 150 TTJ 228 / (2013) 58 SOT 1 (URO)(Delhi)(Trib.)

S. 45 : Capital gains - Long term or short term - Relinquishment of rights under ESOP which was held by him for more than three years are taxable as long term capital gains [S. 2(29B), 2(42A)]

Assessee acquired right in the form of cashless ESOP. He surrendered these rights and obtained certain amount, being the difference of the price of shares between the date of grant and the date of surrender. Assessee has not been allotted any shares nor has he acquired them. He surrendered the right to exercise the option for purchase of shares. Rights which were relinquished by the assessee to earn income were held by him for more than 3 years. Therefore, gains arising therefrom are taxable as long term capital gains. (A.Y. 2006-07)

ACIT v. Ambrish Kumar Jhamb (2013) 57 SOT 40 (UO) / (2012) 79 DTR 75 / 150 TTJ 240 (Delhi)(Trib.)

S. 45 : Capital gains - Market value - Actual consideration - Evasion of tax - Sale of shareholding in wholly owned subsidiary company - Transaction held to be genuine, addition was not justified

During the financial period March 28, 2006, the assessee sold its equity shareholding in its wholly owned subsidiary at Rs. 48.56 per share. The Assessing Officer recomputed the value of share at Rs. 184.25 per share as there was a distribution of dividends at Rs. 140 per equity share just before the sale transaction. The Assessing Officer held that the distribution of dividend was nothing but a colourable device to deny legitimate share of revenue in capital gains of the assessee, and should, therefore, be ignored. The Commissioner(Appeals) decided in favour of assessee. On appeal by revenue the Tribunal held that there were sufficient reserves and surplus, which were eligible for distribution as dividend, and had sufficient cash balances as well. Considering the facts the appeal of revenue was dismissed. (A.Y. 2006-07)

ADIT v. Maersk Line UK Ltd. (2012) 20 ITR 643 / 149 TTJ 537 / 77 DTR 282 / 54 SOT 34 (Kol.)(Trib.)

S. 45 : Capital gains - Capital asset - Income from other sources - Reassessment - Development agreement - Consideration is taxable as capital gains - Reassessment was held to be invalid [S. 2(14), 56, 147]

Assessee-co-owner transferred land under a development agreement. Availability of higher FSI on plot enabled developer to load TDR and construct additional floors. Those floors were sold to outsiders and outsiders did not own any interest over land. The Assessing Officer concluded that it was an arrangement done to facilitate developer to load TDR on plot of land and, hence, transfer by assessee was not a transfer falling within provisions of section 45 and was a case where assessee was getting a compensation for loading and developing TDR by new structure and therefore, proceeds received by assessee were in nature of income from other sources. It was noted that right to construct building on plot of land by consuming FSI and right as a receiving plot owner to load TDR over and above normal FSI accrued to assessee by virtue of development control regulations for area in which property was located. The Tribunal held that these rights were rights on property, which were capital assets falling under definition of capital assets under section 2(14) therefore the consideration received by assessee for transfer of rights over such capital asset would fall within provisions of section 45. In the first part of the reasons recorded the belief entertained by the Assessing Officer is that the income in question is capital gain whereas in the second part of the reason recorded the belief entertained is that the income in question is 'Income from other sources'. The question that would arise for consideration is whether the Assessing Officer can record two reasons which are mutually contradictory to each other, for initiating reassessment proceeding. The reasons recorded also do not claim that it is an alternate case sought to be made out by the Assessing Officer for initiating reassessment proceedings. It is opined that permitting initiation of reassessment proceedings in such circumstances would not be proper. As already explained in the earlier part of this order, the belief entertained by the Assessing Officer regarding escapement of income chargeable to tax must not be arbitrary or irrational. The expression 'reason to believe' does not mean purely subjective satisfaction of the Assessing Officer. The belief must be held in good faith. It cannot be merely pretence. It cannot be said that from the second part of the reason recorded by the Assessing Officer one can form a bona fide belief, a belief held in good faith, regarding escapement of income. Looked at from any angle, the initiation of reassessment proceedings on the basis of the reasons recorded by the Assessing Officer cannot be sustained. Therefore, the grounds raised in the cross-objection regarding validity of initiation of reassessment proceedings were allowed and it was to be held that the initiation of reassessment proceeding is not legal. The order of reassessment is therefore annulled. (A.Y. 2005-06)

ITO v. Chetana H. Trivedi (Mrs.) (2012) 53 SOT 544 / 73 DTR 153 / 150 TTJ 276 (Mum.)(Trib.)

S. 45 : Capital gains - Capital asset - Derivative (future and options) - Business income [S. 2(14), 28(i)]

Derivative by itself cannot be termed as investment or stock-in-trade. Therefore, entire transactions of purchase/sale of securities/shares through derivatives and later on dealing with those shares/securities will determine whether an investment is made or stock-in-trade is procured. In the present case, the natures of the transactions of derivatives in its entirety on case to case basis are not produced before the Bench and also before the revenue. Therefore, this alternate ground raised by the assessee is dismissed. (A.Y. 2006-07)

Mask Investment Ltd. v. ACIT (OSD) (2012) 53 SOT 532 (Ahd.)(Trib.)

S. 45 : Capital gains - Deemed transfer - Liable to be taxed in the year developer willingness to perform as per section 53A of the Transfer of property Act, year of taxability held to be justified - Cost of construction to be considered for determining the value of consideration, matter remanded to the Assessing Officer [S. 2(47)(v), 53A Transfer of Property Act, 1882]

Assessee gave a plot to developer for construction of residential flats vide Joint Development Agreement (JDA) dated 21-12-2005. Later on, Supplementary Agreement (SA) was entered into in

April, 2006 and assessee's share was shown as seven flats in lieu of transfer of plot to developer. Lower authorities held that since assessee's right to receive consideration in form of seven flats was determined by SA of 2006 assessee was liable for capital gains tax in A.Y. 2007-08, to which assessee objected .However, examination of JDA and SA in light of section 53A of TPA revealed that consideration receivable by assessee was specifically determined by SA. Further, it was found that developer's willingness to perform his obligation under JDA was acted upon through SA only in current year when investment was made in construction activities. It was rightly inferred that developer's willingness to perform under section 53A of TPA was satisfied only in A.Y. 2007-08. Therefore, deemed transfer under section 2(47)(v) occurred in A.Y. 2007-08 and then only capital gain was required to be taxed.

As regards the cost of construction as admitted by the builder in his ret urn of income at Rs. 925/- per sq. ft. for determining the value of consideration of 850 sq. ft. relating to assessee's share in residential flats, it was held that the issue be remitted to Assessing Officer with the direction that while determining the value of consideration it shall not go above Rs. 925/- per sq. ft. As regards the expenditure of Rs. 5 lakhs and Rs. 1,61,300/- paid by the assessee to labourers was disallowed by lower authorities for arriving at the cost of acquisition, due to non-production of details, it was held that since assessee was still not able to lead any evidence to show incurring of such expenditure towards cost of acquisition, this ground was to be dismissed. (A.Y. 2007-08)

P. Prathima Reddy (Smt.) v. ITO (2012) 54 SOT409 (Hyd.)(Trib.)

S. 45 : Capital gains - Dutch Citizen - DTAA - India-Netherland - Sale of tenancy rights in property - Sale of shares of a company holding ownership rights in immovable property is taxable as per Article 13 of India-Netherlands DTAA [Art. 13(1)(4)]

Mrs. Punnika, Dutch resident holds ¼ interest in the tenancy rights and 596 shares in Parikh Agencies Pvt. Ltd., a dormant company holding ownership rights in immovable property in Mumbai. The applicant desired to know her tax liability under the Indian Tax Laws and under the laws of Netherlands in respect of the release of tenancy rights and on sale of the said shares. The questions involved for ruling are

1. Is the amount received for the release and relinquishment of tenancy rights, a real estate transaction liable to be taxed under the head capital gain and further, is it to be taxed in India or in the Netherlands?

2. Is it correct that the capital gain tax on sale of shares is to be paid in the Netherlands only and that, the TDS already made on the sale of shares is to be refunded to her by India?

It was held that

Ans. 1 The amount received for the release and relinquishment of tenancy rights is liable to be taxed under Article 13.1 of the DTAA in India.

Ans. 2 The capital gains on sale of shares is taxable in India under Article 13.4 of the DTAA. The TDS already paid on the sale of shares is to be allowed credit against any tax demanded by the Revenue, upon its proper verification.

Punnika Parikh (Mrs.) (2012) 349 ITR 533 / 249 CTR 253 / 206 Taxman 372 / 69 DTR 153 (AAR)

S. 45 : Capital gains - Merger and amalgamation - 100% subsidiary - Merger by takeover of all assets and liabilities of 100% subsidiary without any consideration, gain is not determinable under section 45 and section 48 is not chargeable to tax [S. 2(IB), 47(via), 48]

Swiss applicant had 100% subsidiary in India and intended to merge with Swiss parent under the Swiss Merger Act. All assets & liabilities of the applicant would be assumed by the Swiss parent and no consideration would pass to the applicant consequent on the merger. The Authority observed that the gain if any in this case is not determinable within the scope of section 45 and section 48 of the Act as postulated in the Ruling in Dana Corporation (AAR No. 788 of 2008). Accordingly, it ruled that

vesting of shares of Indian subsidiary in parent company after amalgamation is not chargeable to capital gains tax under section 45. However it also held that the merger was not exempt under section 47(via). Section 47(via) exempts transfer of Indian assets pursuant to amalgamation of foreign companies, subject to certain conditions which are not met.

Credit Suisse (International) Holding AG (2012) 349 ITR 161 / 252 CTR 250 / 210 Taxman 412 (AAR)

S. 45 : Capital gains - Buyback of shares - Mauritius tax resident - Transfer pricing -DTAA - India-Mauritius - Capital gains in hands of Mauritian shareholder on buy back is exempt, section 47(iv) is not applicable as entire capital is not held by Mauritius Co., transfer pricing provisions would apply [S. 47(iv), 92C]

The applicant, a tax resident of Mauritius is a wholly-owned subsidiary of a UK Company ('UK Co.'). Indian Company ('Ind Co.') is held by the applicant (99.97%) and UK Co. (0.03%). Ind. Co. proposes to buyback a part of its shares from the applicant under Section 77A of the Companies Act, 1956. Revenue contended that the applicant is a shell company with no business purpose and that the transactions were undertaken with the motive of tax avoidance.

The Authority observed that sufficient evidence was not produced by IT Dept. to substantiate that investments were made through the applicant to take advantage of the India-Mauritius DTAA and to avoid tax in India. It relied on the Supreme Court decision in the case of Azadi Bachao Andolan (2004) 10 SCC 1 (SC) and held that the applicant was eligible to claim the benefit under the said DTAA and capital gains should be taxed only in Mauritius. It further ruled, placing reliance of ruling in the case of RST (AAR No.1067 of 2011) that benefit of section 47(iv) would not be available as the entire share capital of Ind. Co. was not held by the applicant but jointly by the applicant and UK Co. Further placing reliance on the ruling in Castleton Investment Ltd. (AAR No. 999 of 2010), it ruled that transfer pricing provisions would apply for income from international transactions even though the transaction may not be taxable in view of the DTAA.

Armstrong World Industries Mauritius Multiconsult Limited (2012) 349 ITR 303 / 252 CTR 260 / 210 Taxman 303 (AAR)

S. 45 : Capital loss - Setoff - Short term capital loss - Short term capital loss cannot be setoff against cancellation of agreement

Assessee suffered the short term capital loss on cancellation of the agreement of sell (banakhat), and set off the same against short term capital gains on sale of diamond disclosed under Voluntary Disclosure Scheme (VDIS). The Court held that, as no assets were owned by the assessee and nothing was transferred loss cannot be set off. On facts, the sale was held to be non genuine. (A.Y. 1999-2000, 2000-01)

Dinesh Babulal Thakkar v. ACIT (2012) 341 ITR 632 / 67 DTR 321 / 249 CTR 568 (Guj.)(HC)

S. 45 : Capital loss - Genuineness of transaction - Loss on sale of property purchased by partners wife is allowed as capital loss

On the facts of the case the Tribunal has allowed the loss. The revenue contended that the finding of Tribunal is perverse. The Court directed the revenue to file the documentary evidence to prove that finding is perverse, however as the revenue has not provided any evidence, the High Court up held the order of Tribunal. (A.Y. 2004-05)

CIT v. Bharti Overseas Trading Co. (2012) 349 ITR 52 / 249 CTR 554 / 70 DTR 336 / 207 Taxman 135 (Mag.)(Delhi)(HC)

S. 45 : Capital loss - Loss on sale of - Non convertible debentures is a short term capital loss [S. 2(42B)]

Loss on sale of non convertible portion of partly convertible debentures. Assessee applied in the rights issue of 15 per cent secured redeemable partly convertible debentures of Rs. 400 each of BILT. Part A was the convertible portion having face value of Rs. 100 while Part B was the non convertible portion having face value of Rs. 300. In terms of an agreement with a bank, non convertible Part B of the PCD having face value of Rs. 300 each was sold to the bank at a price of Rs. 235 each resulting in loss of Rs. 65 per non-convertible Part B. Loss suffered by the assessee in the sale of the non convertible Part B portion of PCD to the bank is to be treated as a short term capital loss. (A.Y. 1993-94)

JCIT Ltd. v. CIT (2012) 78 DTR 337 / 211 Taxman 1 / 254 CTR 429 (Cal.)(HC)

S. 45 : Capital loss - Loss on sale of share - Not related to business activity, hence capital loss not to be allowed

Where loss on sale of shares was not in accordance with the business activity of the assessee, then the capital loss cannot be allowed. (A.Y. 2003-04, 2004-05 & 2006-07)

ACIT v. Lanco Infratech Ltd. (2012) 18 ITR 579 (Hyd.)(Trib.)

S. 45 : Capital loss - Conversion of US 64 units into US 6.75 per cent tax free bonds - No long term capital loss could be claimed as arising on conversion of US 64 Units into 6.75 percent tax-free bonds [S. 2(14), 10(33), 10(35), 45(6)]

As the transfer in the case of the assessee of units of US 64 by conversion to 6.75 per cent tax free bonds is claimed to have taken place on 31st May, 2003, the provisions of section 10(33) would be the provision applicable to assess the claim of the assessee for its claim for rights to determine the loss on conversion of the units of US 64 into 6.75 per cent tax free bonds and not section 10(35). Provisions of section 10(33) were inserted only with a view to ensure that those who gained on capital by transfer of US 64 scheme do not pay tax on such gain. Provisions are not meant to enable an assessee to claim loss by indexation for set off against other capital gain chargeable to tax. Reasons for insertion of section 10(33) clearly show that the source viz., transfer of capital asset being units of US 64 itself that has been excluded by the legislature and not the capital gain alone. No long term capital loss could be claimed as arising on conversion of US 64 units into 6.75 per cent tax free bonds. (A.Y. 2004-05)

Schrader Duncan Ltd. v. Addl. CIT (2012) 79 DTR 25 / 150 TTJ 559 / 50 SOT 68 (Mum.)(Trib.)

S. 45 : Capital loss - Business loss - Investment in shares - Forfeiture of partly allotted shares being nature of investment assessable as capital loss and not as business loss [S. 28(i)]

Assessee-investment company disclosed investment for allotment of shares of a company being partly paid-up under head of 'investment in equity shares'. The Tribunal held that since partly allotted shares were in nature of investment of assessee, income or loss arising out of purchase and sale of same had to be taxed under head of capital gains, either short-term or long-term and not as business loss.

Where shares of a company were shown as stock-in-trade in balance sheet of assessee-investment company, loss on purchase and sale of those shares had to be treated as trading loss. (A.Y. 2006-07)

Mask Investment Ltd. v. ACIT (OSD) (2012) 53 SOT 532 (Ahd.)(Trib.)

S. 45(2) : Capital gains - Agricultural land in urban area - No agricultural activities carried on - Land sold in small plots - Capital asset converted into stock-in-trade Gains assessable under section 45(2) [S. 2(13), 28(i)]

Land in an urban area was partly inherited by the assessee from his father. The remaining part was purchased by him. The assessee converted the land into small plots and sold them from 1984 onwards. Forty three sale deeds were executed between 1984 and 1991. The Assessing Officer took the actual sale consideration for purchases of computation of income for the A.Y. 1989-90 to 1991-

92. Deduction of the notional value of land covered under passage and drainage was not allowed. This was upheld by the Tribunal. On appeal to the High Court: Held, dismissing the appeals, that since no agricultural operations were carried on, the Income-tax authorities rightly concluded that the capital asset was converted into stock-in-trade, and that sales of plots in the case of such land would be treated to be business activity to make profits. The Tribunal was correct in applying section 45(2) of the Act for the purposes of assessment for the relevant A.Y. and adopting a notional value for the purposes of fixing the price for land for stamp duty or working out business income from the sale of land. They correctly adopted a method, which was fair and reasonable in arriving at a value of land as on April 1, 1974, to be notional cost of acquisition and applying the depreciated value by 10 per cent of every year for the purposes of arriving at the value in the year 1984. (A.Y. 1989-90 to 1991-92)
Rajendra Kumar Dwivedi v. CIT (2012) 349 ITR 432 / 210 Taxman 588 / (2013) 83 DTR 65 (All.)(HC)

S. 45(2) : Capital gains - Conversion of capital asset in to stock-in-trade - Liable to capital gain tax in the year of sale
The assessee converted plot of land in to stock in trade on 15th May, 2002 for the purpose of his real estate business and the conversion was recorded in a declaration-cum-affidavit. The assessee obtained commencement certificate and approval for the building plan from Municipal Corporation on 3rd August, 2002. Development agreement was entered in to on 16th September, 2002, whereby he agreed to grant development rights to the developer for a consideration of Rs. 1.40 Crores and constructed area of 20,700 sq. ft.
The Tribunal held that on the facts there was a conversion of land by the assessee in to stock in trade on 15th May, 2002 , within the meaning of section 45(2) hence, the profits or gains arising from the transfer by way of such conversion were chargeable to tax as income of the assessee under the head "capital gains" in the A.Y. 2005-06 in which the stock-in-trade was finally sold on transfer by the assessee to the developer only when the developer had fulfilled its obligations under the development agreement. i.e. on payment of monetary consideration and on handing over the constructed area to the assessee. (A.Y. 2005-06)
Ramesh Abaji Walavalkar v. Addl. CIT (2012) 80 DTR 319 / (2013) 54 SOT 15 (URO) / 150 TTJ 725 (Mum.)(Trib.)

S. 45(4) : Capital gains - Firm - Dissolution of firm - Distribution of capital asset - Amount received on dissolution / compromise by partner is not liable to capital gain tax [S. 2(47), 47(ii)]
The business of the firm was carried on till Feb. 28, 1979. Thereafter, disputes arose between the partners of the firm. The assessee sent a notice dated March 7, 1979, dissolving the firm. According to section 43 of the Partnership Act, 1932, where the partnership is at will, the firm stands dissolved by any partner giving notice in writing of his intention to dissolve the firm. Therefore, the partnership stood dissolved on March 7, 1979, which fell in the assessment year 1979-80. There were disputes regarding settlement of accounts. Ultimately, under a compromise recorded in the Supreme Court the assessee received Rs. 15 lakhs in 1988. The Assessing Officer held that this amount constituted capital gains and this was upheld by the Tribunal. On appeal to the High Court; held, allowing the appeal, that when the assessee was paid Rs. 15 lakhs by YKS in full and final settlement towards his 50 per cent share on the dissolution of the firm, there was no "transfer" as understood in law and, consequently, there could not be a tax on capital gains. Upto the A.Y. 1987-88, section 47(ii) of the Act, excluded transactions of dissolution of firms. From the A.Y. 1988-89, in the case of dissolution of a firm, only the firm is taxable on capital gains on dissolution of the firm under section 45(4) of the Act and not the partner. (A.Y. 1989-90)
Chalasani Venkateswara Rao v. ITO (2012) 349 ITR 423 / 211 Taxman 110 (Mag.) / (2013) 257 CTR 39 (AP)(HC)

S. 47 : Capital gains - Transaction not regarded as transfer - Amalgamation - Excess value cannot be assessed as business income [S. 2(27), 28(iv)]

During relevant assessment year, a company, SIFL, got amalgamated with assessee-company. Pursuant to amalgamation, assets and liabilities and rights and obligations of SIFL vested with assessee-company and those items had been recorded at their fair values. Excess of fair value of net assets taken over by assessee-company over paid-up value of allotted equity shares worked out to Rs. 2,899.68 lakhs and the said surplus amount was transferred by assessee to its General Reserve Account. Held that the assessee had acquired business of another company through medium of amalgamation, and in view of provisions of section 47(vi), there was no transfer as such of any capital asset. Therefore, question of taxing capital gains did not arise. (A.Y. 2002-03)

Spencer & Co. Ltd. v. ACIT (2012) 137 ITD 141 / 75 DTR 311 / 148 TTJ 421 (TM)(Chennai)(Trib.)

S. 47 : Capital gains - Transaction not regarded as transfer - Dissolution of firm - The amount received by a partner on dissolution of firm cannot be brought to tax as capital gains by virtue of section 47(ii) [S. 47(ii)]

Following the ratio of Bombay High Court in Prasant S. Joshi v. ITO (2010) 324 ITR 154 (Bom.)(HC) which held that "During the subsistence of a partnership, a partner does not possess an interest in specific in any particular asset of the partnership. During the subsistence of a partnership, a partner has a right to obtain a share in profits. On a dissolution of a partnership or on upon retirement, a partner is entitled to a valuation of his share in the net assets of the amount paid to a partner upon retirement, after meeting the debts and liabilities. An amount paid by to a partner upon retirement, after taking accounts and upon deduction of liabilities does not involve an element of transfer within the meaning of section 2(47)." The Court accordingly held that the amount received by a partner on dissolution of firm cannot be brought to tax as capital gains by virtue of section 47(ii). (A.Y. 1978-79)

CIT v. Abid A. Kalvert (2012) 76 DTR 109 (Bom.)(HC)

S. 47 : Capital gains - Transaction not regarded as transfer - Non-resident - Transaction not regarded as transfer - Buy-back of shares - Indian subsidiary company - DTAA - India-Germany - Indian subsidiary held not to be 100% owned as some shares held through nominees, section 46A being specific provision it was held that capital gains chargeable to tax in India [S. 45, 46A, 77A, 115JB, Art. 13]

Applicant, a company in Germany holds 43,83,994 shares in the capital of a public limited company in India. Balance 6 shares are held by group companies as nominee of German company to maintain minimum number of shareholder to 7 as required by the Companies Act, 1956. The Indian company has proposed to buy back shares from the applicant. Applicant has approached Authority for Advance ruling on following questions

1. Whether, in the facts and circumstances of the case, would the transfer of shares in the course of the proposed buy-back of shares, be exempt from tax in India in the hands of the applicant, in view of the provisions of section 47(iv)?
2. Without prejudice to Question 1, whether the applicant would be liable to tax under the provisions of section 115JB of the Act, in the absence of any business presence or permanent establishment, (PE) in India?
3. Where the gains arising to the applicant in the course of buy-back of shares by UVW India, is not taxable in India under the Act, whether UVW Germany is entitled to receive the amount on buy-back of shares without any deduction of tax at source?

AAR held that the exemption under section 47(iv) is available only where the parent company itself holds, or its nominees separately hold 100% shares of the shares of the subsidiary. Also the AAR observed that a nominee shareholder has the same rights in the company as any other shareholder and

hence the shareholding by the nominees is not to be equated with the shareholding by the Applicant. The AAR held that section 46A has to prevail over section 45. The AAR referred to the speech of the Finance Minister and concluded that the intent behind the section was to clarify that income earned on buy back of shares would be deemed to be capital gains and not dividend income. On that basis AAR ruled the capital gains to be taxable in India. Without further discussion it was held that section 115JB has no application and the income being chargeable to tax, the applicant cannot receive any amount without deduction of tax at source.

RST (2012) 348 ITR 368 / 249 CTR 113 / 69 DTR 1 / 206 Taxman 477 (AAR)

S. 47 : Capital gains - Transfer to subsidiary - Subsidiary must be wholly owned, matter set aside to Tribunal to decide a fresh [S. 45, Companies Act, 1956, S. 49, 187C]

During the course of block assessment proceedings the Assessing Officer found that the assessee was not a wholly owned subsidiary of Sunair Hotes Ltd. and it was a wrong claim, hence the entire consideration received by the assessee was liable to tax and benefit of section 47(v) was not available. On appeal Commissioner(Appeals) allowed the claim of assessee, which was confirmed by Tribunal. On appeal by revenue the Court held that for benefit under section 47(v) of the Income-tax Act, 1961, the subsidiary must be wholly owned subsidiary. Being subsidiary is not sufficient, even if one of the share holders was not a nominee of the holding company, the benefit under section 47(v) has to be denied. The Court also held that the normal presumption in law is that the registered share holder holds the share in his own right and in his individual personal capacity. He does not hold shares as a nominee. The onus is, therefore, on the party who claims to the contrary. The Court held that the finding of Tribunal was perverse, because the payments were not by Cheque, no paper was produced & the party has not been examined. The court set aside the order of Tribunal and remanded the matter to the Tribunal with a direction to examine the matter there under. (A.Y. 1995-96)

CIT v. Sunaero Ltd. (2012) 345 ITR 163 / 73 DTR 321 / 209 Taxman 67 / 251 CTR 209 / 172 Comp Cas 562 (Delhi)(HC)

S. 47 : Capital gains - Transactions not regarded as transfer - Conversion of proprietary concern into company - For continuing the bank account of proprietary concern by the company and issuing the shares on revaluation of shares exemption cannot be denied

Assessee has transferred all his assets and liabilities of his proprietary concern to a closely held limited company and claimed exemption under section 47(xiv) of the Act. Assessing Officer held that bank accounts of sole proprietary concern still continued and not been transferred to a company nor said accounts were closed as conditions of section not satisfied he disallowed the exemption. The Tribunal held that as the agreement which assigned business in favour of private limited company showed that assessee had transferred all bank accounts in favour of the company and balance sheet referred to all bank accounts and same had been treated as company's bank account hence exemption cannot be denied. The Assessing Officer also held that the assessee had revalued the intangible assets and transferred the reserves to his capital accounts and the shares have been issued to the assessee on revalued amounts hence the assessee is not entitled for exemption. The Tribunal also held that receipt of higher number of shares because of revaluation cannot be treated as consideration or benefit received other than by way of allotment of shares for attracting proviso (c) to section 47(xiv), hence, denial of exemption was not justified. (A.Y. 2005-06).

ACIT v. Nayan L. Mepani (2012) 49 SOT 641 (Mum.)(Trib.)

S. 48 : Capital gains - Computation - Indexed cost of acquisition - Previous owner - In case of transfer by gift, will, trust, etc. indexed cost to be determined with reference to holding by previous owner [S. 45, 49]

The settlor acquired property before 1.4.1981 and he settled in on trust on 5.1.1996. The assessee-trust sold the property and computed the indexed cost of acquisition on the basis that it "held" the

property from the time the settlor had held it. The Assessing Officer accepted that the settlor's cost of acquisition had to be treated as the assessee's cost of acquisition but held that the settlor's period of holding could not be treated as the assessee's period of holding. This was upheld by the Tribunal. On appeal by the assessee to the High Court, Held reversing the Tribunal:
The department's contention that in a case where section 49 applies the holding of the predecessor has to be accounted for the purpose of computing the cost of acquisition, cost of improvement and indexed cost of improvement but not for the indexed cost of acquisition will result in absurdities. It leads to a disconnect and contradiction between "indexed cost of acquisition" and "indexed cost of improvement". This cannot be the intention behind the enactment of section 49 and the Explanation to section 48. There is no reason why the legislature would want to deny or deprive an assessee the benefit of the previous holding for computing "indexed cost of acquisition" while allowing the said benefit for computing "indexed cost of improvement". The benefit of indexed cost of inflation is given to ensure that the taxpayer pays capital gain tax on the "real" or actual "gain" and not on the increase in the capital value of the property due to inflation. The expression "held by the assessee" used in Explanation (iii) to section 48 has to be understood in the context and harmoniously with other Sections and as the cost of acquisition stipulated in section 49 means the cost for which the previous owner had acquired the property, the term "held by the assessee" should be interpreted to include the period during which the property was held by the previous owner [CIT v. Manjula J. Shah (2012) 204 Taxman 42 (Bom.) followed.] (A.Y. 2001-02).

Arun Shungloo Trust v. CIT (2012) 205 Taxman 456 / 68 DTR 279 / 249 CTR 294 (Delhi)(HC)

S. 48 : Capital gains - Computation - Cost of acquisition - Amount paid to tenant for vacating the premises is allowable as deduction while computing the capital gains

Assessee has sold the cinema hall and it paid certain sum to tenant who was running canteen in said cinema hall to vacate the said premises. The amount paid was set off against sale consideration of capital gains. The Assessing Officer disallowed the claim. In an appeal, the Commissioner(Appeals) and Tribunal allowed the claim. On appeal to Tribunal by revenue, the Court held that the amount paid was wholly and exclusively connected and linked with transfer of sale. Accordingly the view of Tribunal was confirmed. The Court also upheld the view of Tribunal as regards the scrap valuation of building which has applied the thumb rule for computing the gain under section 48 of the Act. (A.Y. 2007-08)

CIT v. Eagle Theatres (2012) 205 Taxman 449 (Delhi)(HC)

S. 48 : Capital gains - Computation - Non-Cumulative redeemable preference shares - Non-Cumulative redeemable preference shares could not be equated with debentures or Bond assessee is entitled to benefit of indexation [S. 2(47)]

The assessee had subscribed to purchase 4 lakh preference shares each of Rs. 100/- for an aggregate value of Rs. 4 crores, in the year 1992. During the A.Y. 2001-02 the assessee redeemed three lakhs shares at par and claimed a long term capital loss of Rs. 2.73 crores after availing the benefit of indexation. The Assessing Officer disallowed the claim of set off of long term capital gain on sale of other shares on the ground that (i) both the assessee and the company in which the assessee held that preference shares, were managed by the same group of persons, and (ii) there was no transfer and that the assessee was not entitled indexation on the redemption of non-cumulative redeemable preference shares. On appeal, Commissioner(Appeals) and Tribunal allowed the claim of assessee following the ratio of judgment in Anarkali Sarabhai v. CIT (1997) 224 ITR 422 (SC). On appeal by revenue the Court held, that set off of loss against the gain on shares is rightly allowed by the Tribunal .Genuineness and creditability of transaction was not disputed in past years hence cannot be questioned in the year of set off. Non-cumulative redeemable preference shares could not be equated with debentures or bond hence the assessee is entitled to benefit of indexation. (A.Y. 2002-03)

CIT v. Enam Securities P. Ltd. (2012) 345 ITR 64 / 75 DTR 258 / 208 Taxman 54 / 253 CTR 256 (Bom.)(HC)

S. 48 : Capital gains - Computation - Cost of acquisition - Indexation - Valuation accepted for the purpose of wealth tax has to be considered as reliable base for arriving at the cost of acquisition of the jewellary as on 1st April, 1974 by the process of reverse indexation for the purpose of computing the capital gains [S. 45, 49, 55(2)(b)(i)]

The assessee is the mother of erstwhile ruler of Baroda. The assessee sold the certain jewellary / valuable articles made of gold and pearls which she inherited from her son. The assessee following the method of reverse indexation worked out the fair market value of the said jewellary as on 1st April 1974 and computed the capital gains. The Assessing Officer valued the indexation based on the actual sale price in December, 1991 as the basis, whereas as per the assessee contended that the basis should be valuation done by registered valuer as on 31st March, 1989 for the purpose of wealth tax. The Court held that revenue having accepted the valuation of the self same jewellary given by the assessee as on 31st March, 1989, as correct valuation for the purpose of Wealth-tax Act, the same valuation and not the actual sale price in December, 1991 has to be a reliable base for arriving at the cost of acquisition of the jewellary as on 1st April, 1974, by the process of reverse indexation for the purpose of computing the capital gain. Accordingly the appeal of assessee was allowed. (A.Y. 1992-93)

Shantadevi Gaekwad (Deceased) v. Dy. CIT (2012) 250 CTR 421 / 72 DTR 241 (Guj.)(HC)

S. 48 : Capital gains - Computation - Self acquired trademark and design - A provision introduced with effect from a particular date would not have retrospective effect unless it is expressly stated to be so-Since there was no cost of acquisition capital gains is not chargeable [S. 55(2)]

The assessee transferred self acquired trade mark and designs for the consideration of Rs. 15 crore and Rs. 20 lakhs in the previous year relevant to A.Y. 1999-2000 and claimed exemption from capital gains tax relying on the ratio of judgment in CIT v. B. C. Srinivasa Setty (1981) 128 ITR 249 (SC). Claim of assessee was rejected by the Assessing Officer. On appeal, Commissioner(Appeals) and Tribunal accepted the claim of assessee. On appeal by revenue, the Court upheld the order of tribunal by holding that prior to the amendment made to section 55(2) by the Finance Act, 2001, effective from 1-4-2002 by adding the words 'trade mark or brand name associated with the business self generated assets such as trade mark did not have any cost of acquisition. Therefore, for the period under consideration the computation under section 48 fails resulting in such transfer of trademarks not being chargeable to capital gains tax. Circular issued by the CBDT 14-2001 explaining of the Finance Act, 2001 specifically state that the amendment bringing self generated intangible assets such as trademarks to capital gains only w.e.f. A.Y. 2002-03 onwards. The Court also observed that so far as the sale of self-generated designs (i.e. not acquired) the same is also not chargeable to capital gains tax not only for the reasons applicable to trademarks but also for the fact that even till date, no amendment has been made to section 55(2) of the said Act, defining cost of acquisition of design as in the case of trademark, goodwill, etc. Appeal of revenue was dismissed. A provision introduced with effect from a particular date would not have retrospective effect unless it is expressly stated. (A.Y. 1999-2000)

CIT v. Fernhill Laboratories and Industrial Establishment (2012) 348 ITR 1 / 74 DTR 398 / 254 CTR 357 / (2012) Vol. 114 (5) Bom. 2887 (Bom.)(HC)

S. 48 : Capital gains - Computation - Payments to remove slum dwellers held to be allowable against short term capital gains [S. 45]

Assessee derived short term as well long term capital gain from sale of land. It had paid certain amount to a party for removal of slum dwellers from land and claimed it as expenses against short term capital gains only. Assessee's claim was supported by letter from payees, Payee's bills showed that expenses related exclusively to sites which resulted in short term capital gain. The Court held that such expenses could not be apportioned to long term and short term capital gain. (A.Y. 2006-07)

CIT v. Mohd. V. Shaffiulla (2012) 210 Taxman 613 (Karn.)(HC)

S. 48 : Capital gains - Computation - Exchange of property - Development agreement - In the case of property A as specified in project development agreement represented market value on date of entering into agreement, same was to be taken as basis for computation of capital gain [S. 45]

The assessee filed his return of income for the A.Y. 2001-2002 declaring a total income of Rs. 8,98,127/-. The Assessing Officer noticed that assessee had shown 1/3rd share of long term capital gain on sale of J. P. Nagar property site. The said site was jointly held by the assessee along with his two brothers. The long term capital gain had been calculated after taking into consideration the fair market value as on 1-4-1981. However, the assessee got the ownership over the property on 11-11-1987. The Assessing Officer found that adopting fair market value as on 1-4-1981 for calculating the capital gain was contrary to law and assessed the said property having arrived at the long term capital gain of the assessee at higher amount. The property value had been fixed at Rs. 66 lakhs taking into consideration the fair market value as on 1-4-1981 and the long term capital gain had been shown as NIL. The Assessing Officer, worked out the capital gain based on the actual cost of construction reported by the Developer vide letter dated 1-2-2004 as Rs. 2.86 crores and 50 per cent had to be reckoned as the value of site received by the assessee and his brothers. The share of the assessee was 1/3. Taking into consideration the said value, the Assessing Officer assessed the capital gain in respect of the property situated at 'A' road at higher amount. The Commissioner(Appeals) as well as Tribunal partly allowed the appeal. The appellate authority clearly held that the market value of the property had to be taken into consideration as on the date of grant of land in respect of the J. P. Nagar Property and also market value of the property as on the date of development agreement entered into between the parties in respect of 'A' Road. On revenue's appeal, the court held that since property J was allotted to assessee's father prior to 1-4-1981, fair market value as on 1-4-1981 had to be taken into consideration for arriving at capital gain. The court also held that since exchange value of property A as specified in project development agreement represented market value on date of entering into agreement, same was to be taken as basis for computation of capital gain. (A.Y. 2001-02)

CIT v. Ved Prakash Rakhra (2012) 210 Taxman 605 / (2013) 256 CTR 285 / 82 DTR 234 (Karn.)(HC)

S. 48 : Capital gains - Computation - Relinquishment of tenancy rights - Payment is not deductible as it was reducing tax liability

Assessee was owner of rented property situated in Baroda on which assessee had constructed a building of seven floors with a provision for further construction of three more floors. Such construction was still going on and assessee entered into lease rent agreement with one company. Company enjoyed possession of 2nd and 4th to 7th floor of building as a tenant. Company in turn sublet property to bank. After seven years of this arrangement, assessee sold property-in-question to same bank for a sum of Rs. 1,03,22,325/-. Assessee also paid a sum of Rs. 15,00,000 to company for relinquishment of tenancy rights. In computing capital gain, assessee contended that such sum of Rs. 15,00,000/- should be deducted from sale consideration in terms of section 48. Since payment of Rs. 15,00,000/- made to Company by assessee was only for reducing its tax liability and not for purpose of executing transaction of sale, such expenditure could not be stated to be incurred wholly and exclusively in connection with such transfer and would not represent a deductible expenditure for computation of capital gains. Appeal of assessee was dismissed.

L. M. Patel & B. M. Patel (HUF) v. CIT (2012) 211 Taxman 252 / (2013) 89 DTR 121 (Guj.)(HC)

S. 48 : Capital gains - Computation of - Cost of acquisition - Coffee plantation - Matter remanded [S. 55(2)(b)]

Assessee owned a coffee plantation company. It returned capital gain from sale of overgrown rosewood and silver oak trees planted as shade trees. It relied on a letter dated 31-3-1981 of Deputy Conservator of Forests for determining fair market value of trees as on 1-4-1981. Without verifying genuineness of such letter authorities below rejected assessee's computation of capital gain. Matter was to be remanded to Assessing authority to work out value of assets after obtaining copy of specific notification from Conservator of Forest with regard to market value of trees as on 1-4-1981. (A.Y. 1997-98 to 1999-2000 and 2001-02)

Tata Coffee Ltd. v. CIT (2012) 211 Taxman 7 (Karn.)(HC)

S. 48 : Capital gains - Computation - Distribution of tax free dividend - "sham" transaction or "colourable device" - On facts, the transaction cannot be regarded as a "sham" or a "colourable device" because (a) the WOS had sufficient reserves and cash surplus for the distribution of dividend & (b) the WOS paid dividend distribution tax which was duly accepted in its assessment [S. 45]

The assessee's act of getting its' wholly owned subsidiary ('WOS') to distribute tax-free dividend, and thereby reduce the FMV of the shares of the WOS, just prior to the sale of those shares, did result in a tax advantage to the assessee because it paid lower tax on capital gains. However, the transaction of dividend distribution by the WOS cannot be regarded as a "colourable device" or as an "impermissible tax avoidance scheme". A transaction can be regarded as a "sham" where "the document is not bona fide nor intended to be acted upon, but is only used as a cloak to conceal a different transaction" or where "it is intended to give to third parties the appearance of creating between the parties legal rights and obligations which are different from the actual legal rights and obligations which the parties intend to create". On facts, the transaction cannot be regarded as a "sham" or a "colourable device" because (a) the WOS had sufficient reserves and cash surplus for the distribution of dividend & (b) the WOS paid dividend distribution tax which was duly accepted in its assessment. Declaration of dividend was held to be genuine transaction. (A.Y. 2006-07)

ADIT v. Maersk Line UK Ltd. (2012) 20 ITR 643 / 149 TTJ 537 / 77 DTR 282 / 54 SOT 34 (Kol.)(Trib.)

S. 48 : Capital gains - Computation - Cost of acquisition - Portfolio management -Portfolio management services fee is not deductible [S. 45]

The expenditure incurred in connection with fee of portfolio management has nothing to do with the cost of acquisition of shares or transaction of shares, therefore it is not allowable. (A.Y. 2006-07)

Pradeep Kumar Harlalka v. ACIT (2012) 65 DTR 157 / 143 TTJ 446 (Mum.)(Trib.)

S. 48 : Capital gains - Computation - Indexation - Bond - Conversion of units of UTI in to tax free bonds no indexation is available

The assessee filed the return of income disclosing long term capital loss. While computing the capital loss the assessee claimed benefit of indexed cost of acquisition of UTI units. Assessing Officer invoked the third proviso of section 48 as per which no indexation is available on bonds and debentures. According to the Assessing Officer scheme of conversion was required to be listed on whole sale debt segment of NSE, which clearly implied that it was a debt instrument, where fixed rate of interest was available which was in the nature of FD/NSC, Bonds and debentures and other fixed income instruments. Tribunal held that since units issued by UTI fell under definition of 'bond' order passed by the Assessing Officer was upheld. (A.Y. 2005-06)

Dy. CIT v. Areez P. Khambhatta (2012) 49 SOT 319 (Ahd.)(Trib.)

S. 48 : Capital gains - Cost of improvement - PMS fee - Investment portfolio - PMS fee held to be deductible expenditure [S. 45]

The assessee entered into an investment management (Portfolio Management Scheme) agreement with ENAM AMC pursuant to which it paid Rs. 2.11 crores as "performance fees/ maintenance fee". This was treated as a cost of purchase of the shares. The Assessing Officer disallowed the claim & the CIT(A) confirmed it on the basis that as the PMS gains were assessable as "capital gains", the expenditure was neither cost of investment or improvement nor an expenditure incidental to sale. Before the Tribunal, the assessee relied on its own case (KRA Holding & Trading Pvt. Ltd. v. Dy. CIT) where it had been held (*dissenting* from Davendra Kothari 136 TTJ 188 (Mum.)(Trib.) that as there was *a nexus between the expenditure and the acquisition of shares*, the same was allowable under section 48. The department relied on Homi K. Bhabha v. ITO which had (*dissenting* from KRA Holdings) held that PMS fees is not deductible against capital gains. Held by the Tribunal:

The Mumbai Bench declined to follow the decision of the Pune Bench of the Tribunal. It is the settled proposition of law that when two view are possible on the same issue the view which is favourable to the assessee has to be followed [CIT vs. Vegetable Products (1973) 88 ITR 192 (SC)]. Further, as the Tribunal in the assessee's own case has already taken a view in favour of the assessee that has to be followed unless it is reversed by a higher court. (A.Y. 2007-08)

KRA Holding & Trading Pvt. Ltd. v. Dy. CIT (2012) 54 SOT 493 (Pune)(Trib.)

S. 48 : Capital gains - Computation - Fair market value - Sale consideration - Only sale consideration can be taxed and not the fair market value [S. 56(2)(vii), 153A]

It is the sale consideration which is to be considered for purposes of computing capital gains and not the fair market value .Even by introduction of section 56(2)(vii) w.e.f. 1st Oct., 2009, it has not been provided that fair market value of the assets as contained in balance sheet of the company should be considered for ascertaining the value of the shares. Assessee held shares in BAPL which were sold to YCL @ Rs. 100/- per shares. According to the Assessing Officer, the assessee sold shares in question to one TS Ltd at Rs. 318/- per share via YCL as a device to avoid tax. In the absence of any evidence that assessee received anything over and above stated consideration, no addition could be made by artificially relating the transaction to purchase of Plot by BAPL.Further, "share" sale is altogether a different transaction than "asset" sale holding period for purposes of long term capital gains in case of shares is one year while in case of assets it is three years similar sale of shares has been assessed as long term capital gains in the hands of other assessee while it is being treated as short term capital gain in the hands of assessee. There is nothing on record with the company which purchased the shares from the assessee company and has passed on money from TS Ltd. to the assessee. Therefore, there was no case of increasing the capital gain when there is no iota of evidence to suggest that the assessee has received consideration over and above the consideration received hence no addition could be made. (A.Y. 2007-08)

Singhal Credit Management Ltd. v. ACIT (2012) 136 ITD 7 / 76 DTR 169 / 149 TTJ 856 (Jp.)(Trib.)

Singhal Securities (P) Ltd. v. ACIT (2012) 76 DTR 169 / 149 TTJ 856 (Jp.)(Trib.)

SNR Rubbers (P) Ltd. v. ACIT (2012) 76 DTR 169 / 149 TTJ 856 (Jp.)(Trib.)

S. 48 : Capital gains - Computation - Initial public offer - Pre issue expenses borne by promoter and company proportionately - Deduction allowed for expenses necessarily incurred in connection with sale of such shares

The assessee were promoter directors in company R which had gone for initial public offering (IPO) of its shares during the PY. Assessee sold their respective shares in 'R' as part of IPO. The pre-issue expenses were borne by 'R' and assessee proportionately. It was held that when prospectus itself mentioned that issue expenses were to be borne proportionately by company and selling shareholders, it could not be considered that such expenses were not incurred for purpose of selling shares. Thus,

expenses having being incurred for IPO through which assessee were also able to sell their shares, expenses necessarily in connection with sale of such shares and, therefore deduction claimed by assessee was to be allowed. (A.Y. 2007-08)
Usharani Raghunathan (Mrs) v. CIT (2012) 53 SOT 84 (Chennai)(Trib.)

S. 48 : Capital gains - Computation - Constructed area - Agreed consideration not being actually received the same cannot be taken into account for the purpose of computation of capital gains
Agreed consideration in the form of constructed area of land as stated in the development agreement between the assessee-landowner and the developer not having been actually received by the assessee, the same cannot be taken into account for the purpose of computation of capital gain arising from the transfer of the property. (A.Y. 2007-08)
Chemosyn Ltd. v. ACIT (2012) 139 ITD 68 / 19 ITR 6 / 149 TTJ 294 / 77 DTR 89 (Mum.)(Trib.)

S. 48 : Capital gains - Agricultural land - No cost of acquisition - Compensation received for right of lifting water from well was not liable to capital gain [S. 2(14), 45, 55(2)]
The assessee was the owner of the agricultural land situated in Pune on which a well was existing. State Government acquired assessee's land along with a well thereon and paid compensation. State Government granted a special privilege to assessee for lifting water from well by paying nominal rent of Re. one per year. Subsequently Municipal Corporation took over aforesaid land along with well and paid to assessee Rs. 15 lakhs for surrendering his right to lift water from well. Since right of lifting water from well was not acquired by incurring any cost, no capital gain could be worked out on aforesaid amount. (A.Y. 2003-04)
Dilip G. Sopal Barshi v. ITO (2012) 138 ITD 272 / 80 DTR 419 / (2013) 151 TTJ 254 (Pune)(Trib.)

S. 48 : Capital gains - Income from house property - Deductions - Interest - Interest paid on borrowing for acquiring house is deductible under section 24(b) and as cost of acquisition under section 48 [S. 24(b)]
The assessee borrowed funds for purchasing a house. The interest paid on the said loan was claimed as a deduction under section 24(b). When the house was sold, the interest paid on the said loan was treated as "cost of acquisition" and claimed as a deduction under section 48 in computing the capital gains. The Assessing Officer held that as the interest had been allowed as a deduction under section 24(b), it could not allowed again in computing capital gains. The CIT(A) allowed the claim. On appeal by the department to the Tribunal, held dismissing the appeal:
Deduction under section 24(b) and computation of capital gains under section 48 are altogether covered by different heads of income i.e., income from 'house property' and 'capital gains'. Neither of them excludes the other. A deduction under section 24(b) is claimed when the assessee computes income from 'house property', whereas, the cost of the same asset is taken into consideration when it is sold and capital gains are computed under section 48. There is no doubt that the interest in question is an expenditure in acquiring the asset. Since both provisions are altogether different, the assessee is entitled to include the interest at the time of computing capital gains under section 48. (A.Y. 2007-08)
ACIT v. C. Ramabrahmam (2013) 57 SOT 130 (Chennai)(Trib.)

S. 48 : Capital gains - Computation of - Full value of consideration - Sale price less than market price of shares - Sale value cannot be substituted with market price of shares
During relevant assessment year, assessee-trust filed its return showing certain income arising from sale of shares. Sale price shown by assessee was less than market price of shares. Assessing Officer while computing amount of capital gain, adopted market value of shares on date of transfer as full value of consideration under section 48. Accordingly, certain addition was made to assessee's taxable

income. When bona fide of transaction and actual sale consideration received by assessee had not been suspected, then for purpose of computation of capital gains, full value of consideration could not be substituted by market price or value of capital asset as on date of transfer. Therefore, impugned addition made by Assessing Officer was to be deleted. (A.Y. 2005-06)
SIL Employees Welfare Trust v. JCIT (2012) 54 SOT 551 (Mum.)(Trib.)

S. 48 : Capital gains - Computation - Cost of acquisition - Cost of land allotted to assessee in lieu of acquisition of agricultural land which was later converted into stock-in-trade and sold by assessee, cost of acquisition of the land for the purpose of computing capital gain shall be the market value of the said land on the date of allotment [S. 48]
16 acres Agricultural land was allotted to the assessee for the meritorious service rendered by assessee in 1965 war with Pakistan. The said land was subsequently acquired by the Government and the assessee was compensated in monetary terms for the said acquisition. On further requests and applications made by assessee, he was given on lease by CIDCO two plots of land one at Sanpada, Vashi and the Other at Nerul, Navi Mumbai as additional compensation for acquisition of Agricultural land. Plot of land at Sanpada, Vashi admeasuring 4000 sq. mts. was claimed to be converted by the assessee in to stock-in-trade on 15th May, 2002, for the purpose of real estate business. Once a particular amount was considered as full value of consideration at the time of its purchase, the same shall auto matically become the cost of acquisition when such capital asset is subsequently transferred. Cost of acquisition of the land for the purpose of computing capital gain on sale of stock-in-trade shall be the market value of the land on the date of allotment. (A.Y. 2005-06)
Ramesh Abaji Walavalkar v. Addl. CIT (2012) 80 DTR 319 / (2013) 54 SOT 15 (URO) / 150 TTJ 725 (Mum.)(Trib.)

S. 49 : Capital gains - Previous owner - Cost of acquisition - The property acquired by assessee under will of her father in the year 1988 and mother in the year 2000, which property was originally acquired by assessee's grand father in 1942, the period of holding shall be from 1st April 1981, in respect of entire property and benefit of indexation will be available from that date [S. 242(A), 48]
The assessee's father acquired immoveable property in the year 1942, from his father. The assessee's father expired in the year 1988 leaving behind a will bequeathing the property to his wife and the assessee in equal shares. The asssessees mother expired on 21st Feb.., 2000 leaving behind a will bequeathing 50 percent share in the property to the assessee. The assessee sold the property in the A.Y. 2005-06 and claimed the indexation from 1-4-1981. The Assessing Officer has allowed the indexation from the date of acquisition by assessee and not from 1-4-1981. The Commissioner(Appeals) allowed the appeal of assessee. The revenue challenged the order of Commissioner(Appeals) only in respect of 50 percent of the property acquired by the mother. On appeal the Tribunal held that in respect 50 percent of the inherited property from his mother period of holding will start from 21st August, 1988 as she became the owner of her 50 per cent share in the property only from that date under the will made by her husband. Department filed an appeal against the order of Tribunal and the assessee filed a cross appeal. According to revenue the period should be considered from the year 1988. The court held that, the property acquired by assessee under will of her father in the year 1988 and mother in the year 2000, which property was originally acquired by assessee's grand father in 1942, the period of holding shall be from 1st April 1981, in respect of entire property and benefit of indexation will be available from that date. (A.Y. 2005-06)
CIT v. Janhavi S. Desai (Ms) (2012) 75 DTR 1 / 209 Taxman 289 / 252 CTR 518 (Bom.)(HC)
Janhavi S. Desai (Ms) v. CIT (2012) 75 DTR 1 / 209 Taxman 289 / 252 CTR 518 (Bom.)(HC)

S. 49 : Capital gains - Previous owner - Cost of acquisition - Inheritance - Property acquired by inheritance before 1-4-1981, cost of acquisition would be as on 1-4-1981

Assessee has inherited a share in the property on death of his wife, who died on 28-11-1994. The said property was acquired by his wife by inheritance form her mother on 28-4-1984 and she was owner of property before 1-4-1981. Since the property was inherited the assessee took the cost of acquisition as fair market value of the asst as on 1-4-1981 and claimed indexation from 1-4-1981. The Assessing Officer held that the assessee had become owner of the property only on death of his wife i.e. 28-11-1994, hence the cost of acquisition was worked by applying the indexation from the year 1994 as against 1981. On appeal the Commissioner(Appeals) held that the property was inherited and the cost of acquisition should be as on 1-4-1981. On appeal by revenue, the Tribunal also confirmed the view of Commissioner(Appeals) and dismissed the appeal of revenue. (A.Y. 2008-09)
ITO v. Sapna Dimri (2012) 50 SOT 96 (Delhi)(Trib.)

S. 49 : Capital gains - Previous owner - Cost of acquisition - Inheritance - Property acquired by inheritance - Cost of acquisition would be as on 1-4-1981 [S. 42A, 48]
The assessee became the owner of the property on 6-4-1990, by transfer, on account of execution of his father's will. The said property was built by his father in 1965 and was expanded in 1971. The assessee took cost of acquisition at Rs. 2.54 Lakhs being the fair value of property as on 1-4-1981, and accordingly worked out cost of acquisition. The Assessing Officer held that the assessee became owner of property on 6-4-1990, therefore indexation will be available only from 6-4-1990. In an appeal before Commissioner(Appeals), the Commissioner(Appeals) allowed the appeal of assessee. On further appeal to Tribunal, the Tribunal also confirmed the view of Commissioner(Appeals) and held that the indexation has to be allowed from 1-4-1981. (A.Y. 2007-08)
ACIT v. Suresh Verma (2012) 135 ITD 102 / 72 DTR 82 / 147 TTJ 81 (Delhi)(Trib.)

S. 49 : Capital Gains - Previous owner - Cost of acquisition - Property acquired on partition of HUF, year of acquisition of property by HUF to be taken as year of Indexation
The assessee sold the house property, which she acquired on partition of HUF. Since the property was not acquired by assessee at her own but was acquired under the mode specified in Section 49(1), the index cost of acquisition is to be computed with reference to the year in which HUF had acquired the property and not the year in which the property came to the assessee on partition. (A.Y. 2008-09)
Shakuntala Somani (Smt) v. ITO (2012) 50 SOT 629 (Indore)(Trib.)

S. 49 : Capital gains - Previous owner - Cost of acquisition - Property inherited indexed cost to be determined as on 1-4-1981 [S. 2(42A), 48]
The assessee has declared long term capital gain, claiming the indexation cost as on 1st April, 1981. The Assessing Officer held that the father of the assessee had expired on 6th April 1990, hence, indexation will be available only with the reference to financial year 1990-91. In appeal the Commissioner(Appeals) allowed the claim of indexation from 1-4-1981. On appeal by revenue the Tribunal held that as the property was acquired by assesee's father in 1965 and inherited by assessee on death of his father in 1990, indexed cost of acquisition of property shall have to be determined as on 1st April 1981, for purpose of computation of capital gains. (A.Y. 2007-08)
ACIT v. Suresh Verma (2012) 135 ITD 102 / 72 DTR 82 / 147 TTJ 81 (Delhi)(Trib.)

S. 50 : Capital gains - Depreciable assets - Block of assets - Transfer of EOU units after tax holiday period, capital gains is to be computed by adjusting the depreciable assets of same block of assets [S. 2(11)]
Assessee carried on business as an export undertaking as well as on domestic in India. On expiry of the period of tax holiday under section 10B the assessee transferred the export undertaking and while working out the capital gains under section 50(2) made adjustment in the matter of working out the capital gains in respect of another unit. The Tribunal held that on expiry of period of tax holiday

normal provision of income tax is applicable hence, the assessee was justified in computing the capital gains after adjusting the machineries which fall in the same block of assets. (A.Y. 1993-94)
S. Muthurajan v. Dy. CIT (2012) 67 DTR 165 / 247CTR 450 / (2011) 339 ITR 301 / 202 Taxman 356 (Mad.)(HC)

S. 50 : Capital gains - Depreciable assets - Block of assets - Land is not depreciable asset - Land and building - Land having been held for a period of more than 36 months, surplus of sale price over indexed cost of acquisition of land was to be taxed as long term capital gains [S. 2(11), 2(42A) 32, 45, 54EC]
The assessee had purchased a property in March, 2001. It sold said property in the A.Y. 2006-07. In the return of income, the assessee bifurcated the property in to land and building. According to assessee, the capital gain arising from sale of land was taxable as long term capital gain, since the entire capital gain from sale of land was invested in specified bonds under section 54EC, same was not liable to tax. The Assessing Officer held that since land and buildings were not sold separately the land was not long term capital asset and it was purchased together with building for a consolidated sum and not separately shown in the balance sheet hence provisions of section 50(2) is applicable. On appeal, Commissioner(Appeals) and Tribunal held that provisions of section 50(2) is not applicable hence directed the Assessing Officer to allow deduction under section 54EC. On appeal by the revenue the Court held that since the land is not depreciable asset and cannot form part of block of assets in the absence of a rate of depreciation having been prescribed therefore, provisions of section 50 could not be invoked. As the land being held more than 36 moths, surplus of sale price over indexed cost of acquisition of land was to be taxed as long term capital gain. (A.Y. 2006-07)
CIT v. I. K. International (P) Ltd. (2012) 206 Taxman 622 / 72 DTR 70 (Delhi)(HC)
Editorial:- SLP of revenue is dismissed. (2013) 214 Taxman 26 (Mag.)SC)

S. 50 : Capital gains - Depreciable assets - Block of assets - Plant and machinery - Plant and machinery which was not in use and no depreciation was claimed and assets were held for more than 36 moths assets were to be treated as long term capital gains [S. 2(11), 2(29B), 45]
The assessee had sold the plant and machinery in the A.Y. 2006-07 and claimed the same as assessable as long term capital gain. The plant and machinery was acquired partly in the financial year 1997-98 and partly in the year 1998-99. The assessee contended that as the plant and machinery was not in use, the assessee had not claimed depreciation. The Assessing Officer held that the section 50 is applicable hence assessable as short term capital gain. The Commissioner(Appeal) also confirmed the order of Assessing Officer. On appeal to the Tribunal, the Tribunal held that section 50 did not apply and plant and machinery which was not in use had to be regarded as long term capital gain. On appeal by revenue the Court held that once Tribunal had recorded a finding of fact that plant and machinery, which is covered by section 50, would be a depreciable asset and not one on which no depreciation was ever claimed, then such assets, which were not depreciable, could not ever be assessed under section 50. Since assessee held assets as defined under section 2(28A) and capital gain arising on transfer is required to be assessed as long term capital gain. (A.Y. 2006-07)
CIT v. Santosh Structural & Alloys Ltd. (2012) 206 Taxman 616 / 72 DTR 65 / 251 CTR 53 (P&H)(HC)

S. 50 : Capital gains - Depreciable assets - Block of assets - Short term capital gain on sale of plant and machinery of one unit cannot be assessed if the assessee has one more unit where the rate of tax is the same [S. 2(11), 45]
The assessee sold the entire plant and machinery of their paper division and stopped and ceased to carry on business in their paper division with effect from 2nd June, 1987. The Assessing Officer held that section 50 of the Act is not applicable as the entire division, i.e. plant and machinery belonging to the paper division had been sold. He differentiated the block of assets belonging to the paper division

and the block of assets belonging to other divisions of the assessee. The view of Assessing Officer is also confirmed by the Commissioner(Appeals). On appeal to the Tribunal the Tribunal held that section 2(11) defines the term "block of assets" to mean group of assets in respect of which same percentage of depreciation is prescribed. The definition does not make distinction between block of assets of one division or other. The block of assets held by assessee cannot be differentiated on this ground. Further income of an assessee under the Act was calculated under different heads of capital gains has to be computed as per the provisions contained in Chapter IV-E relating to capital gains and not in accordance with the provisions of chapter IV-D relating to profit and gains of business or profession. Reference was made to section 32, which provides for deduction of depreciation in respect of block of assets in such percentage as is prescribed provided the asset is owned by the assessee and was used for the purpose of business. The Tribunal allowed the appeal of assessee. On appeal by the revenue the court held that, all assets, which may be of different types, but in respect of which same percentage of depreciation is prescribed, are to be treated and forming part of block of assets. On the facts the block of assets carrying on same rate of depreciation does not cease to exist and provisions of section 50 was not applicable. Appeal of revenue was dismissed. (A.Y. 1989-90, 1990-91)

CIT v. Ansal Properties & Infrastructure Ltd. (2012) 207 Taxman 61 / 73 DTR 131 (Delhi)(HC)

S. 50 : Capital Gains - Depreciable assets - Block of assets - On sale of office premises which was included in block of assets no depreciation was claimed hence assessable as long term capital gains

The assessee earned long-term capital gain on transfer of an office premises. It was apparent from the records that the assessee had included the said property in block of assets but no depreciation was ever claimed or allowed on it. In the present case both the conditions mentioned in section 50 were fulfilled and hence the gain declared by the assessee was accepted as such, since no infirmity was pointed out by Assessing Officer in the calculation thereon by assessee, hence provisions of section 50 cannot be applicable. (A.Y. 2006-07)

Divine Construction Company v. ACIT (2012) 49 SOT 6 (URO)(Mum.)(Trib.)

S. 50 : Capital gains - Depreciable assets - Block of assets - Shed godown - Land - Depreciation claimed, assessable as short term capital gains [S. 2(11)]

Assessee filed its return showing certain amount of long term capital gain arising from sale of shed godown. Since assessee had been claiming depreciation on said asset, Assessing Officer opined that sale of said asset resulted into short-term capital gain. Assessee's claim that there was only land which was sold remained unsubstantiated and same was contrary to facts on record. Admittedly assessee had been showing cost of land and building in a composite manner and had been claiming depreciation on same for nine years. On facts, assessee could not plead that asset sold was not depreciable asset and, therefore, impugned order of Assessing Officer was to be upheld. (A.Y. 2002-03)

Raj Woolen Industries v. ACIT (2012) 54 SOT 117 (URO) / (2011) 7 ITR 339 (Delhi)(Trib.)

S. 50B : Capital gains - Slump sale - Transfer of unit - Undertaking transferred was a unit as a whole, itemized earmarking would not be possible the transaction would be a slump sale and hence not liable to capital gains [S. 2(42C), 45]

Assessee company is engaged in the manufacture and sale of liquor. It entered in to an agreement to sell the undertaking business together with its assets and liabilities as a running business/going concern on as is-where-is basis in respect of the business of manufacturing, blending, bottling, distribution, storage and sale of Indian Made Foreign Liquor for a consideration of Rs. 1.38 crores. The assessee claimed that the said consideration is not chargeable to tax. Assessing Officer worked out the written down value of fixed assets at Rs. 3.48 crores and the difference of Rs. 6.90 crores was

held to be taxable under the head capital gains. In an appeal the Commissioner(Appeals) confirmed the view of Assessing Officer. Tribunal has allowed the appeal of the assessee, the Tribunal held that it was case of slump sale and hence profits arising on transfer of undertaking would not be chargeable to capital gains tax. On appeal by revenue the Court held that since the assessee has sold the unit as a whole and business of said undertaking consisted not only of tangible items but other intangibles such as rights in intellectual property, licenses and manpower, in such a situation itemized earmarking would not be possible therefore the transaction involved a slump sale hence the order of Tribunal was affirmed and revenues appeal was dismissed. (A.Y. 1994-95)

CIT v. Polychem Ltd. (2012) 343 ITR 115 / 205 Taxman 465 / 68 DTR 139 / (2012) Vol. 114 (2) Bom.L.R. 0824 (Bom.)(HC)

S. 50B : Capital gains - Slump sale - Slump sale need not be a sale, all slump transfers are covered, hence lump sum consideration is taxable [S. 2(42C), 2(47)]

The assessee entered into a scheme of arrangement under section 391-394 of the Companies Act, 1956 pursuant to which it transferred its project finance business and asset based financing business to another company for a lumpsum consideration of Rs. 375 lakhs. The assessee filed a settlement application in which it claimed that the said consideration on transfer of the project finance business was not chargeable to tax as it was not by way of "sale" and there was no cost of acquisition for the same. However, the Settlement Commission held that the said transfer, though effected through an order of the Court was a "slump sale" and was chargeable to tax under section 50B. The assessee filed a Writ Petition to challenge the Settlement Commission's order. Held by the High Court dismissing the Petition:

The assessee's argument that a "transfer" under a scheme of arrangement under section 391-394 of the Companies Act is not a "slump sale" for purposes of section 50B is not acceptable. Section 50B was inserted to supercede decisions which held that a slump sale (i.e. transfer of business as a going concern) was not taxable for want of cost of acquisition. The term 'slump sale' is defined in section 2(42C) to mean the "transfer" of an undertaking as a result of a "sale". The use of the word 'transfer' in section 2(42C) is significant and any type of "transfer" which is in nature of slump sale i.e. when lump sum consideration is paid without values being assigned to individual assets and liabilities is covered by section 2(42C) and section 50B. This is the reasonable, plausible and natural grammatical meaning which has to be given to the definition of 'slump sale'. It is not correct to construe the word 'slump sale' to mean that it applies to 'sale' in a narrow sense and as an antithesis to the word 'transfer' as used in section 2(47). The intention of the legislature was to plug in the gap and tax slump sales and not to leave them out of the tax net. The term 'slump sale' has been used in the enactment to describe a particular and specific type of transfers called slump sales. The use of the word 'sale' in the term 'slump sale' does not narrow down the concept of 'transfer' as defined and understood in section 2(47). All transfers in the nature of 'sales' i.e. 'slump sales' are covered by section 2(42C).

SREI Infrastructure Finance Ltd. v. ITSC (2012) 70 DTR 153 / 207 Taxman 74 / 251 CTR 129 (Delhi)(HC)

S. 50B : Capital gains - Slump sale - Negative net worth - For computing the capital gains for section 50B "Slump Sale", liabilities reflected in "negative net worth" cannot be treated as "consideration" but the resultant "negative net worth" has to be added to the "consideration" [S. 2(42C)]

Pursuant to a scheme of arrangement under section 391 & 394 of the Companies Act, the assessee transferred its "Power Transmission Business" to KEC International Ltd. for a total consideration of Rs. 143 crores. The assessee claimed this transaction to be a "slump sale" under section 50B. The "net worth of the undertaking" was computed at a negative figure of Rs. 157.19 crores, being the excess of liabilities over assets. The assessee treated the net worth as Nil and offered the entire sale

consideration of Rs. 143 crore as LTCG. The Assessing Officer held that as the purchaser had taken over liabilities of Rs. 157.19 crores, the same had to be added to the consideration of Rs. 143 crores to arrive at the "full value of consideration" of Rs. 300 crores. The CIT(A), relying on Zuari Industries Ltd. v. ACIT (2007) 105 ITD 569 (Mum.) & Paper Base Co. Ltd. v. ACIT (2008) 19 SOT 163 (Delhi), held that the "net worth" in section 50B could not be a negative figure and if it was so because of the liabilities exceeding the assets, the net worth had to taken at Nil. The Special Bench had to consider two issues (i) whether the excess of liabilities over assets could be treated as "consideration" in the hands of the assessee & (ii) whether the resultant "negative net worth" could be treated as Nil or had to be added to the "consideration"? Held by the Special Bench:

(i) On the issue as to the "full value of consideration", the department's argument that since the transferor's liabilities have been taken over by the transferee, it would have to be treated as consideration received by the transferor is not acceptable. In the case of a slump sale, one lump sum value of the undertaking derived by adding all assets and reducing all the liabilities is arrived at. This is the "full value of the consideration". If one adds the liabilities to this value, one is arriving at the consideration for the "assets" but not the consideration for the "undertaking". Also, once the sale consideration has been approved by the High Court, it is unrealistic for the Revenue to contend that the consideration of Rs. 143 crore does not represent the full value of consideration of the undertaking. Accordingly, the "consideration" is Rs. 143 crores and not Rs. 300 crores as calculated by the Assessing Officer [CIT v. George Henderson and Co. Ltd. (1967) 66 ITR 622 (SC), CIT v. Gillanders Arbuthnot & Co. (1973) 87 ITR 407 (SC) & CIT v. Attili N. Rao (2001) 252 ITR 880 (SC) distinguished];

(ii) On the issue as to the "net worth" of the undertaking, the assessee's argument that if the net worth is negative (excess of liabilities over assets), it should be taken at Nil is not acceptable. Though, in ordinary parlance, the terms "cost" & "net worth" may not have a negative value, in the context of section 50B, if the liabilities exceed the assets, there would be a negative net worth. The said negative net worth has to be "deducted from" (i.e. "added to") the full value of consideration. Consequently, the chargeable capital gain is Rs. 300 crores (Rs. 143 crores + Rs. 157 crores) [Zuari Industries Ltd. v. ACIT (2007) 105 ITD 569 (Mum.) & Paper Base Co. Ltd. v. ACIT (2008) 19 SOT 163 (Delhi) reversed]. (A.Y. 2006-07)

Dy. CIT v. Summit Securities Ltd. (2012) 135 ITD 99 / 68 DTR 201 / 15 ITR 1 / 145 TTJ 273 (SB)(Mum.)(Trib.)

S. 50B : Capital Gains - Slump sale - Lump-sum compensation received on transfer of business for discontinuance of business - Held to be long term capital gain [S. 2(42C)]

The assessee was a proprietor of a going concern engaged in providing consultancy services. The concern was taken over by a company. The assessee received a compensation of Rs. 1,20,00,000/- for discontinuance of the business. It was held that the lump-sum compensation so received was in nature of long term capital gain chargeable to tax as it was case of transfer of business was for lump-sum consideration. The intention of assessee was eloquently clear from the disclosure of accounting policies. (A.Y. 2008-09)

ACIT v. Sangeeta Wij (Smt) (2012) 17 ITR 162 / (2013) 54 SOT 1 (Delhi)(Trib.)

S. 50B : Capital gains - Slump sale - Sale of entire business as going concern as slump sale is liable to capital gains under section 50B [S. 2(42C)]

The personal weighing scale business had been sold as a going concern for a lump sum amount of Rs. 30 lakhs and no part of the consideration was attributable to any particular asset or liability. Thus it was a case of a slump sale as defined in section 2(42C) of the Income-tax Act, 1961 and the profit arising from such slump sale was chargeable to tax as capital gain under the provisions of section 50B which was applicable from the assessment year 2000-01. Therefore, the capital gain had to be

computed in accordance with the provisions of section 50B which was applicable in the case of the assessee. Assessing Officer directed to compute the same. (A.Y. 2002-03, 2003-04)
Mettler Toledo India P. Ltd. v. ITO (2012) 20 ITR 461 (Mum.)(Trib.)

S. 50C : Capital gains - Full value of consideration - Stamp valuation - Stock-in-trade -Land and building - Stamp duty valuation - Provision of section 50C, does not apply to land & building held as 'stock-in-trade'
The assessee sold a plot of land for Rs. 79 lakhs. The Assessing Officer held that the said plot was a capital asset and that the gains had to be computed in accordance with section 50C. The CIT(A) & Tribunal upheld the assessee's claim that as the said plot was held as stock-in-trade, section 50C did not apply. On appeal by the department to the High Court, held dismissing the appeal:
For applicability of section 50C, it is essential that an asset should be a "capital asset". The question whether an asset is a "capital asset" or "stock-in-trade" is one of fact and has to be determined as per the guidelines laid down. On facts, the assessee was a builder and the investment in purchase and sale of plots was ancillary and incidental to the business activity. The assessee had treated the land as stock-in-trade in the balance sheet. Consequently, section 50C had no application. (A.Y. 2006-07)
CIT v. Kan Construction and Colonizers (P) Ltd. (2012) 70 DTR 169 / 208 Taxman 478 (All.)(HC)

S. 50C : Capital gains - Full value of consideration - Stamp valuation - Valuation of property - Report of departmental valuation officer is binding on Assessing Officer
The assessee entered into an agreement for sale of his property in December 2001. The sale deed was registered on April 27, 2002. The Assessing Officer invoked the provisions of section 50C for substitution of the recorded sale consideration of Rs. 51,75,000/- with Rs. 1,38,00,000/- being the valuation done by the stamp valuation authorities.
The Dept. valuation officer valued the property in question of Rs. 58,50,000/- but the Assessing Officer rejected the Dept. valuation officers report. On appeal to the High Court it was held that the valuation by the Dept. valuation officer had to be adopted. It is provided that where the assessee claims that the value adopted or assessed for stamp duty purposes exceeds the fair market value of the property as on the date of transfer, the Assessing Officer may refer the valuation of the relevant asset to a valuation officer in accordance with section 55A. Generally, when the Assessing Officer has obtained the report of the District valuation officer it is binding on him. (A.Y. 2003-04)
CIT v. Indra Swaroop Bhatnagar (Dr.) (2012) 349 ITR 210 (All.)(HC)

S. 50C : Capital gains - Full value of consideration - Stamp duty valuation - Addition was not justified only on the basis of stamp valuation as unexplained investment in property [S. 69B]
Assessee purchased six properties. Declared value of property was found to be less than value on which stamp duty was paid for acquisition. Assessing Officer added back to assessee's income difference between consideration mentioned in sale deeds and consideration declared for purpose of stamp duty. On appeal Commissioner(Appeals) deleted the addition, which was confirmed by the Tribunal. On appeal by revenue the Court held that provisions of Stamp Act levy stamp duty at predetermine or notified rates. Where higher cost of acquisition is declared for stamp duty, assessing authority should analyze contemporary comparable sales before adopting such higher cost as cost of acquisition and without doing so no addition could be made. Appeal of revenue was dismissed. (A.Y. 2007-08)
CIT v. Khoobsurat Resorts (P.) Ltd. (2012) 211 Taxman 510 / (2013) 256 CTR 371 / (2013) 82 DTR 290 (Delhi)(HC)

S. 50C : Capital gains - Full value of consideration - Stamp valuation - Booking flat - Rights in land and building - Provision of section 50C is a deeming provision which does not apply to

"rights in land & building", amount paid for booking of flat returned subsequently, section 50C is not applicable [S. 45]

The assessee booked a flat in a building which was under construction for which he had paid Rs. 16.12 lakhs. The builder had not handed over possession of the flat to the assessee nor had he executed any registered sale deed in favour of the assessee. The assessee entered into an agreement pursuant to which he transferred his rights, title and interest in the said flat in consideration of the amount paid by him to the builder. The Assessing Officer took the view that as the flat was valued at Rs. 57.57 lakhs for stamp duty purposes, capital gains had to be computed on that basis under section 50C. This was reversed by the CIT(A). On appeal by the department, held dismissing the appeal:

Section 50C applies "where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed by any authority of a State Government for the purpose of payment of stamp duty …" Section 50C is a deeming provision and extends to only to land or building or both. A deeming provision can be applied only in respect of the situation specifically given and cannot go beyond the explicit mandate of the section. If the capital asset under transfer cannot be described as "land or building or both", section 50C will cease to apply. As the assessee had transferred booking rights and received back the booking advance, the booking advance cannot be equated with the capital asset and therefore section 50C cannot be invoked [Dy. CIT v. Tejinder Singh (2012) 16 ITR 45 (Kol.)(Trib.) followed] (A.Y. 2006-07)

ITO v. Yasin Moosa Godil (2012) 18 ITR 253 / 147 TTJ 94 (Ahd.)(Trib)

S. 50C : Capital gains - Full value of consideration - Stamp valuation - Residential house - Investment in residential house - Provision of section 50C is not applicable [S. 48, 54EC, 54F]

During relevant assessment year, assessee sold a property and entire sale consideration was invested in Bonds in view of provisions of section 54EC. Assessing Officer by taking value determined by DVO under section 50C, revalued capital gain and after reducing amount invested in Bonds, added remaining amount in assessee's income. Since the assessee has invested entire amount of sale consideration in Bonds, provisions of section 50C are not applicable and he is entitled to deduction under section 54F. Provisions of section 50C is applicable to section 48 and section 54F and not where entire consideration invested in Bonds under section 54EC. (A.Y. 2006-07)

Prakash Karnavat v. ITO (2012) 49 SOT 160 (Jp.)(Trib.)

S. 50C : Capital gains - Full value of consideration - Stamp valuation - Development agreement - Development agreement provision of section 50C is applicable

Assessee as a co-owner of building entered into development agreement with developers. Consideration received was Rs. 2,18,35,000/- however, the stamp authorities have valued at Rs. 3,82,50,000/-. The Tribunal held that, in accordance with the terms of agreement, the developer were to demolish the structure and redevelop the land in to building on 50-50 percent sharing basis. As there was transfer of land and building, section 50C is applicable, however the matter remanded for proper computation of capital gains after providing benefit of indexation. (A.Y. 2005-06)

Chiranjeev Lal Khanna v. ITO (2012) 66 DTR 260 / 144 TTJ 607 / (2011) 132 ITD 474 (Mum.)(Trib.)

S. 50C : Capital gains - Full value of consideration - Stamp valuation - Tenancy rights - Provision of section 50C does not apply to transfer of tenancy / leasehold rights

The assessee held lease hold rights for 99 years in a house property. By a tripartite agreement, the owner sold his rights in the property while the assessee assigned his leasehold rights. The assessee received Rs. 3.19 crores. The Assessing Officer held that as the stamp duty valuation of the said property was higher than the agreed consideration, section 50C applied and the assessee was assessable on the basis of the stamp duty valuation. This was reversed by the CIT(A) on the ground

that section 50C did not apply to leasehold rights. On appeal by the department to the Tribunal, the Tribunal held dismissing the appeal:
There is a distinction between a receipt for transfer of ownership rights in property and a receipt for transfer of tenancy rights in respect of a property because though both are assessable as capital gains, in the case of tenancy rights, the "cost of acquisition" is deemed to be Nil under section 55(2)(a) unless if it is purchased for a cost. The fact that the assessee assigned his rights, together with the owner, pursuant to the tripartite agreement did not mean that the assessee's had ownership rights in the property. Section 50C applies "where the consideration received or accruing as a result of the transfer by an assessee of a capital asset, being land or building or both, is less than the value adopted or assessed or assessable by any authority of a State Government … for the purpose of payment of stamp duty in respect of such transfer". The sine qua non for application of section 50C is that the transfer must be of a "capital asset, being land or building or both". A "leasehold right in land or building" cannot be equated with the "land or building". Accordingly, section 50C has no application to the assignment of leasehold/ tenancy rights. (A.Y. 2008-09)
Dy. CIT v. Tejinder Singh (2012) 50 SOT 391 / 16 ITR 45 / 72 DTR 160 / 147 TTJ 87 (Kol.)(Trib.)

S. 50C : Capital gains - Full value of consideration - Stamp valuation - Registration - When registration does not take place provisions cannot be applied
Where the registration does not take place by paying stamp duty, provisions of section 50C cannot be invoked. (A.Y. 2004-05)
Ran Mal Bhansali v. ACIT (2012) 143 TTJ 65 (UO)(Jodh.)(Trib.)

S. 50C : Capital gains - Full value of consideration - Stamp valuation - Purchaser - Income from undisclosed source - Deeming fiction created under Section 50C with reference to full value of consideration cannot be extended to provision of Section 69 in case of purchaser [S. 69]
Section 50C incorporates special provision for determining full value of consideration in case where such full value of consideration declared to be received or accruing as a result of transfer of immovable property is less than value assessed or adopted by Stamp Valuation authority. It was held that the provisions of Section 50C apply only to the seller of the property and not the purchaser and thus, no addition can be made as unaccounted investment with reference to stamp duty value. (A.Y. 2006-07)
ITO v. Inderjit Kaur (Mrs.) (2012) 50 SOT 377 / 79 DTR 297 / (2013) 152 TTJ 252 (Chd.)(Trib.)

S. 50C : Capital gains - Full value of consideration - Stamp valuation - Reference to DVO - Assessing Officer to adopt the value ascertained by DVO for purposes of computing long term capital gains [S. 45]
DVO on reference made by CIT(A), having ascertained the fair market value of the property transferred for amount which is less than value adopted by stamp duty authorities. In view of the provisions of sub-section (2) of section 50C, the Assessing Officer has to adopt the value ascertained by DVO for purposes of computing long term capital gains. (A.Y. 2005-06)
ITO v. Gita Roy (2012) 135 ITD 345 / 146 TTJ 762 / 17 ITR 431 / 71 DTR 358 (Kol.)(Trib.)

S. 50C : Capital gains - Full value of consideration - Stamp valuation - No notice is required to invoke provisions of the said section
In the instant case, it was held that there was no requirement under the Act for Assessing Officer to put the assessee on notice before invoking the provisions of section 50C. Further it was also held that where assessee had objected to action of Assessing Officer in adopting guideline value of property in place of stated consideration in sale deed, Assessing Officer ought to make a reference to Valuation Officer for valuation of property as per section 50C(2)(a). (A.Y. 2008-09)

T. V. Nagasena (Smt) v. ITO (2012) 53 SOT 166 (Bang.)(Trib.)

S. 50C : Capital gains - Full value of consideration - Stamp valuation - Matter remanded
Value adopted or assessed or assessable by stamp duty authority shall be deemed to be the full value of consideration and capital gains shall be computed on the basis of such consideration under section 48. Section 50C(2) provides two remedies at the option of the assessee, in that, he can either file appeal against stamp value or seek reference to valuation cell. However, where assessee had not availed such opportunity, the Assessing Officer is bound to follow the clear mandate of law as contained under section 50C(2). Where the Assessing Officer referred the property to the valuation Cell, on the direction of the CIT(A), then, the CIT(A) is not competent to delete the addition, without waiting for such report from the Valuation cell. Matter remanded for reconsideration. (A.Y. 2006-07)
ITO v. Inderjit Kaur (Mrs.) (2012) 50 SOT 377 / 79 DTR 297 / (2013) 152 TTJ 252 (Chd.)(Trib.)

S. 50C : Capital gains - Full value of consideration - Stamp valuation - Assessing Officer is required to value as per stamp valuation if the said value is less than the value determined by the Valuation Officer [S. 48, 55A]
When the reference was made to the valuation officer and he determined a value higher than the value adopted by the stamp valuation authority, the Assessing Officer was required to adopt the value determined by stamp duty authority as per provisions of section 50C(3). (A.Y. 2008-09)
ACIT v. Prakash Ratanlal Sheth (2012) 53 SOT 378 (Ahd.)(Trib.)

S. 50C : Capital gains - Full value of consideration - Stamp valuation - Fair market value - Not fair market value assessed by DVO [S. 55A]
Assessee had sold property for a total consideration of Rs. 15.25 lakhs. Assessing Officer referred assessability of fair market value of property sold by assessee to Departmental valuer (DVO) under section 55A. DVO computed value at Rs. 25.02 lakhs which was adopted by the Assessing Officer for computing long-term capital gains. Under provisions of section 50C, fair market value estimated by registering authority is deemed to be full value of consideration; and there is no provision under Act under which provides that fair market value assessed by DVO is to be taken as full value of consideration, therefore, impugned order of Assessing Officer was not sustainable. (A.Y. 2006-07)
ITO v. Mohinder Nath Sehgal & Sons (2012) 53 SOT 539 / (2010) 133 TTJ 109 (UO) / 46 DTR 238 / 6 ITR 138 (Chd.)(Trib.)

S. 50C : Capital gains - Full value of consideration - Satmp valuation - Provision can not be invoked to purchaser of property [S. 69B]
Section 50C is applicable in case of a seller of property and, therefore, cannot be invoked in case of purchase of property for purpose of section 69B. (A.Y. 2006-07)
Dy. CIT v. Vallabhbhai Purshottambhai Surani (2012) 54 SOT 556 (Ahd.)(Trib.)

S. 54 : Capital gains - Profit on sale of property used for residence - Investment in joint names Investment in joint names of assessee and her husband is entitled to exemption [S. 54EC]
Assessee, out of sale proceeds of residential property, purchased another residential property and specified bonds. Exemption under section 54 and 54EC could not be denied to her to the extent of 50 per cent on the ground that new property and bonds were purchased in the names of assessee and her husband when admittedly no consideration followed from the husband. (A.Y. 2007-08)
DIT (IT) v. Jennifer Bhide (Mrs.) (2012) 349 ITR 80 / 252 CTR 444 / 75 DTR 402 (Karn.)(HC)

S. 54 : Capital gains - Profit on sale of property used for residence - Mere construction of room without amenities like boundary wall, kitchen, toilet electricity, water and sewerage connection etc cannot be held to be house, hence benefit of section 54 cannot be granted

The assessee claimed the long term capital gain arising from the sale of his residential house to be exempted under section 54 on the ground that investment was made for purchase of residential plot in Janta Enclave, Ludhiana and subsequently he had constructed a room on the said plot, which was let out at the rate of Rs. 250/- per month. The Assessing Officer concluded that the residential house constructed by the assessee was only one room set and as it was having no amenities, the exemption under section 54 could not be granted. In the instant case, in order to examine the entitlement of the assessee for exemption under section 54, it is to be seen whether the assessee had constructed residential house within three years of the transfer of his property. For doing so, the meaning of the term 'house' is to be explored. The term 'house' has not been given any statutory definition and, thus, has to be assigned meaning as understood in common parlance. As per dictionary, it means abode, a dwelling place or building for human habitation. A building, in order to be habitable by a human being, is ordinarily required to have minimum facilities of washroom, kitchen, electricity, sewerage, etc. In view of the above, it was held that the house in question was not a residential house and therefore, the assessee was not entitled to the benefit under section 54. Appeal of assessee was dismissed. (A.Y. 1997-98)

Ashok Syal v. CIT, Jalandhar (2012) 209 Taxman 376 / 78 DTR 162 (P&H)(HC)

S. 54 : Capital gains - Profit on sale of property used for residence - Property given to a builder for construction and development of residential and commercial Complexes -Residential building was demolished by assessee himself before entering into development agreement, he was not entitled to claim benefit under section 54 [S. 54F]

Property situated at 'A' road, the assessee claimed that he was a co-owner of the said property along with his two brothers. The said property was sought to be jointly developed with 'E'. As per the development agreement, the land was handed over to the Developer in the year 1995 and superstructure was built in the year 2000 consisting of multistoried building. As per the agreement 50 per cent of the flats 50 per cent of the car parking space and 50 per cent of saleable terrace were given to the assessee and two of his brothers. In that, the assessee was entitled for 1/3 share. The property value had been fixed at Rs. 66 lakhs taking into consideration the fair market value as on 1-4-1981 and the long term capital gain had been shown as NIL. The Assessing Officer, worked out the capital gain based on the actual cost of construction reported by the Developer vide letter dated 1-2-2004 as Rs. 2.86 crores and 50 per cent had to be reckoned as the value of site received by the assessee and his brothers. The share of the assessee was 1/3. Taking into consideration the said value, the Assessing Officer assessed the capital gain in respect of the property situated at 'A' road at higher amount. The Commissioner(Appeals) as well as Tribunal after partly allowed the appeal and issued directions to the assessing authority to give exemption under section 54. On revenue's appeal relating to deduction under section 54 is concerned, as per the development agreement entered into between the parties, the assessee and his brothers have demolished the existing residential building and handed over the vacant space to an extend of 16,800 sq.ft. to the developer for construction of the apartment. Since the residential building has already been demolished by the assessee and his brothers themselves, they are not entitled to claim benefit under section 54. At the most they are entitled to benefit under section 54F. The order passed by the appellate authority directing the Assessing Officer to allow the deduction under section 54 is contrary to law and the same cannot be sustained. Hence, this issue is held against the assessee. (A.Y. 2001-02)

CIT v. Ved Prakash Rakhra (2012) 210 Taxman 605 / (2013) 82 DTR 234 / 256 CTR 285 (Karn.)(HC)

S. 54 : Capital gains - Profit on sale of property used for residence - Investment in property within time allowed under section 139(4), entitled to exemption [S. 139(4)]

The assessee has invested the sale consideration in his new residential house which he acquired on 15-10-2008. The Assessing Officer has held that as the assessee has not invested the amount in capital

gain account scheme, before due date of filing of return of income which was 31-7-2008, as per section 54(2), the exemption was denied. On appeal the Commissioner(Appeals) allowed the claim of assessee on the ground that the investment was made within the period of section 139(4). On appeal by revenue, the Tribunal also confirmed the order of Commissioner(Appeals) holding that since the assessee had invested in the new property within time allowed under section 139(4), the assessee would be entitled to exemption under section 54. (A.Y. 2008-09)
ITO v. Sapna Dimri (2012) 50 SOT 96 (Delhi)(Trib.)

S. 54 : Capital gains - Profit on sale of property used for residence - Investment in property in joint name-Benefit of exemption to be allowed for entire amount of investment [S. 22 to 26, 27(i), 64(i)(iv)]
The assessee sold the inherited property and purchased a new residential property in joint name with his wife and claimed deduction under section 54. The Assessing Officer allowed the exemption only to the extent of 50% investment on the ground that 50% property belongs to wife. On appeal the Commissioner(Appeals), granted the exemption of entire amount. On appeal by revenue, the Tribunal held that the name of assessee's wife was entered in the sale agreement just for purpose of security, and for purpose of sections 22 to 26, 27 and 64. Assessee would be owner of whole property and income there from would be assessable in his hands, therefore benefit of section 54 of entire amount invested in new property was to be allowed. Appeal of revenue was dismissed. (A.Y. 2007-08)
ACIT v. Suresh Verma (2012) 135 ITD 102 / 72 DTR 82 / 147 TTJ 81 (Delhi)(Trib.)

S. 54 : Capital gains - Profit on sale of property used for residence - Exchange of old flat for new one under a development agreement, amounts to construction for claiming deduction under section 54 [S. 45]
Acquisition of new flat under a development agreement in exchange of old flat amounts to construction of new flat for purpose of claiming deduction under section 54. (A.Y. 2006-07)
Jatinder Kumar Madan v. ITO (2012) 51 SOT 583 (Mum.)(Trib.)

S. 54 : Capital gains - Profit on sale of property used for residence - Booking of the flat with the builder is to be treated as construction of flat and extended period under section 139(4) has to be considered for the purpose of utilisation of capital gain amount [S. 139(4)]
The assessee sold the property and invested in residential property. The Assessing Officer denied the exemption on the ground that the assessee has failed to deposit the balance amount in the account in any of the specified bank as required under section 54 and utilize the same in accordance with the scheme framed by the Government and could not produce evidence regarding taking possession of the new flat. On appeal Commissioner(Appeals) confirmed the disallowance. On appeal to Tribunal the Tribunal held that the assessee had booked the new flat with the builder and the assessee was to make payment by installments and the builder was to hand over the possession of the flat after construction. Based on the circular No. 672 dated 16-12-1993 (1994) 205 ITR (St) 47, read with circular No. 472 dated 15-10-1986, (1986) 162 ITR (St) 17 the case of the assessee was to be considered as construction of new residential house and purchase of flat. The Tribunal held that in case the assessee had invested the capital gains in construction of a new residential house within a period of three years, this should be treated as sufficient compliance of section 54 and it was not necessary that the possession of the flat should also be taken within the period of three years. The Tribunal also held that the due date of filing of return of income under section 139(1) has to be construed with respect to the due date of section 139(4) as the section 139(4) provides for the extended period of filing return as an exception to section 139(1) and considering this there is no default as the entire amount of capital gain had been invested within due date under section 139(4). (A.Y. 2006-07)

Kishore H. Galaiya v. ITO (2012) 137 ITD 229 / 79 DTR 201 / 150 TTJ 444 / BCAJ July P. 58 (Mum.)(Trib.)

S. 54 : Capital gains - Profit on sale of property used for residence - Sale of two residential houses invested in acquiring single residential house is eligible for exemption

If other conditions as regards time limit etc. Are fulfilled, exemption under section 54 is allowable where capital gains arising from sale of two residential houses are invested in a single residential house. On facts, there was no evidence to show that one of the two houses sold was used for business purposes and not as a residential unit. (A.Y. 1998-99)

Dy. CIT v. Ranjit Vithaldas (2012) 79 DTR 377 / 150 TTJ 581 (Mum.)(Trib.)

S. 54B : Capital gains - Land used for agricultural purposes - Land purchased in the name of his son and daughter-in-law assessee is not entitled to exemption

The assessee purchased new agricultural land in the name of his son and daughter-in-law and claimed exemption under section 54B. The disallowance of claim was confirmed by Tribunal. On appeal, the Court held that word "assessee" used in Income-tax Act needs to be given a legal interpretation and not a liberal interpretation and consequently an assessee would not be entitled to get exemption under section 54B for land purchased by him in name of his son and daughter in law.

Kalya v. CIT (2012) 208 Taxman 436 / 251 CTR 174 / 73 DTR 302 (Raj.)(HC)

S. 54B : Capital gains - Land used for agricultural purposes - Purchase of agricultural land - Exemption cannot be denied only on the presumption that the assessee may not use the land for agricultural purposes [S. 45]

The assessee purchased the agricultural land and claimed exemption under section 54B. The Assessing Officer disallowed the claim on the ground that the assessee being in the business of the land may not use the said land for agricultural purposes. On appeal the Commissioner(Appeals) allowed the claim. On appeal to Tribunal, the Tribunal held that in the absence of any assertion by the Assessing Officer that the new land purchased by assessee for agricultural purpose is being actually put to use for any other purpose, claim for exemption under section 54B cannot be disallowed only on the ground that he has started a real estate business. (A.Y. 2006-07)

ITO v. Mahesh Nemichandra Ganeshwade & Ors. (2012) 73 DTR 1 / 144 TTJ 488 (Pune)(Trib.)

S. 54EA : Capital gains - Investment in specified securities - Additional Compensation from date of receipt held allowable

Claim of exemption under section 54EA for investment made around 5 years after the date of transfer instead of within 6 (six) months. Transfer took place in 1992 but compensation received in June, 1997. Amount was invested in UTI Monthly Income Scheme on July 5, 1997, and July 15, 1997. Claim of allowability of exemption under Section 54EA in A.Y. 1998-99, with respect to additional compensation from the date of receipt was held to be allowable. (A.Y. 1998-99)

CIT v. J. Palemar Krishna (2012) 342 ITR 366 / (2011) 244 CTR 618 (Karn.)(HC)

S. 54EA : Capital gains - Investment in specified securities - Net Consideration includes cash and kind - Tax on transfer of long term capital asset not to be charged in case of investment on specified securities

Assessee transferred her land to a developer under a development agreement in order to construct a 16 storied apartment. Assessee got 6 flats as consideration of which 3 flats were sold by her for Rs. 41.13 lakhs and sale proceeds were invested in specified securities and exemption under section 54EA was claimed. The Assessing Officer held that the assessee had sold land and received six flats in lieu of such land and out of six flats three were sold, accordingly the Assessing Officer held that the long term gain has arisen on sale of land and therefore, it could not be said that the amount

invested in specified securities were qualified for deduction under section 54EA as the condition of section 54EA was not fulfilled hence not entitle for deduction under section 54EA. In appeal Commissioner(Appeal) allowed the claim of assessee which was confirmed by the Tribunal. On appeal by the revenue to High Court the Court held that the net consideration, as defined under section 54EA not only refers to consideration received in cash but also refers to full value of consideration which might have been accruing hence the assessee was entitled to exemption under section 54EA.Accordingly the appeal of revenue was dismissed. (A.Y. 1999-2000)

CIT v. Padmavathy (Smt) (2012) 210 Taxman 105 / (2013) 82 DTR 369 (Karn.)(HC)

S. 54EC : Capital gains - Investment in bonds - Fact that section 54EC bonds were available during the 6 months & that there were alternative bonds available is irrelevant if the bonds were not available on the last date

The assessee sold factory building on 22.3.2006 and earned LTCG of Rs. 49.36 lakhs. The LTCG was invested in section 54EC bonds of Rural Electrification Corporation ("REC Bonds") on 31.1.2007, beyond the period of 6 months (21.9.2006) specified in section 54EC. The assessee claimed that the delay was due to the fact that for the period from 4.8.2006 to 22.1.2007, the bonds were not available and the investment was made when available. The Tribunal allowed the assessee's claim (included in file). Before the High Court, the department argued that (a) even if the bonds were not available for a part of the period, they were available for some time in the period after the transfer (1.7.2006 to 3.8.2006) and the assessee ought to have invested then & (b) the section 54EC bonds issued by National Highway Authority (NHAI) were available and the assessee could have invested in them. Held by the High Court dismissing the appeal:

(i) The department's contention that the assessee ought to have invested in the period that the section 54EC bonds were available (1.7.2006 to 3.8.2006) after the transfer is not well founded. The assessee was entitled to wait till the last date (21.9.2006) to invest in the bonds. As of that date, the bonds were not available. The fact that they were available in an earlier period after the transfer makes no difference because the assessee right to buy the bonds upto the last date cannot be prejudiced. *Lex not cogit impossibila* (law does not compel a man to do that which he cannot possibly perform) and *impossibilum nulla oblignto est* (law does not expect a party to do the impossible) are well known maxims in law and would squarely apply to the present case;

(ii) The department's contention that the assessee ought to have purchased the alternative section 54EC NHAI bonds is also not well founded because if section 54EC confers a choice investing either in the REC bonds or the NHAI bonds, the revenue cannot insist that the assessee ought to have invested in the NHAI bonds.

CIT v. Cello Plast (2012) 76 DTR 439 / 209 Taxman 617 / 253 CTR 246 (Bom.)(HC)

S. 54EC : Capital gains - Investment in bonds - Time limit - Investment time limit begins from date of receipt of consideration and not from date of transfer, hence, entitled for exemption

The assessee entered into an agreement and handed over possession to the buyer which constituted a "transfer". The consideration received from the buyer was invested by the assessee in section 54EC Bonds beyond 6 months from the date of transfer though within 6 months from the date of receipt of the consideration. The Tribunal had to consider whether in view of the language of section 54EC that the consideration had to be invested in the specified bonds within 6 months of the date of transfer, the relief could be allowed. Held by the Tribunal:

In a case where the consideration for the transfer was received several months after the date of transfer, the period of 6 months for making deposit under section 54EC should be reckoned from the date of actual receipt of the consideration. If the period is reckoned from the date of agreement and receipt of part payment at the first instance, it would lead to an impossible situation by asking assessee to invest money in specified asset before actual receipt of the same. Also, section 54EC requires the "consideration" to be invested. If the consideration is not received, there is no question of

investing it [S. Gopal Reddy v. CIT (1990) 181 ITR 378 (AP), CIT v. Janardhan Dass (2008) 299 ITR 210 (All.) Darapaneni Chenna Krishnayya (HUF) v. CIT (2007) 291 ITR 98 (AP) (compulsory acquisition cases) followed]. (A.Y. 2005-06)

Chanchal Kumar Sircar v. ITO (2012) 50 SOT 289 / 16 ITR 91 (Kol.)(Trib.)

S. 54EC : Capital gains - Investment in bonds - Financial year - Limit of Rs. 50 lakhs applies to the transaction & not financial year - Order of Assessing Officer was confirmed

In A.Y. 2008-09, the assessee sold property for Rs. 2.47 crores and disclosed capital gain of Rs. 1.14 crores. To overcome the restriction in the Proviso to section 54EC that the investment made in the specified asset "during any financial year" should not exceed Rs. 50 lakhs, the assessee, within the prescribed period of 6 months, invested Rs. 50 lakhs on 31.03.2008 (F.Y. 2007-08) & 10.06.2008 (F.Y. 2008-09) and claimed a deduction of Rs. 1 crore. The Assessing Officer rejected the claim though the CIT(A) allowed it. On appeal by the department, Held reversing the CIT(A) order :

The object of the proviso to section 54EC is to provide a ceiling of Rs. 50 lakhs on investment by an assessee in the long term specified assets. If the assessee's interpretation is accepted then, because the transfer of assets has taken place from 1st October, to 31st March, the assessee is able to invest Rs. 50 lakhs in the financial year in which the transfer took place and Rs. 50 lakhs in the subsequent financial year. However, assessees who have made a transfer of assets from 1st April to 30th September will not be entitled to do so. Accordingly, the investment has to be linked to the financial year in which transfer has taken place and the claim for deduction cannot exceed Rs. 50 lakhs. (A.Y. 2008-09)

ACIT v. Raj Kumar Jain & Sons (HUF) (2012) 20 ITR 212 / 50 SOT 213 (Jp.)(Trib.)

S. 54EC : Capital gains - Investment in bonds - Limit - Financial year - Limit of Rs. 50L does not apply to the transaction but financial year. Delay in investing within 6 months owing to non-availability of bonds to be excused

The assessee sold property on 22.10.2007 and computed long-term capital gains. The section 54EC investment was required to be made within 6 months i.e. on or before 21.04.2008. The assessee invested Rs. 50 lakhs in REC bonds on 31.12.2007 (F.Y. 2007-08, within the 6 M time limit) and Rs. 50 lakhs in NHAI bonds on 26.5.2008 (F.Y. 2008-08, beyond the 6 M time limit) and claimed a deduction of Rs. 1 crore. The assessee claimed that no eligible scheme was available for subscription from 1.4.2008 to 28.5.2008 and that he applied in the NHAI bonds as soon as it opened and that he was prevented by sufficient cause from investing within the time period of 6 months. The Assessing Officer & CIT(A) rejected the claim for exemption of Rs. 50 lakhs in respect of the NHAI bonds on the ground that (i) it exceeded the monetary limit of Rs. 50 lakhs prescribed in section 54EC and (ii) it was made beyond the time limit of 6 months. On appeal to the Tribunal, held allowing the appeal:

(i) The Proviso to section 54EC provides that the investment made in a long term specified asset by an assessee "during any financial year" should not exceed Rs. 50 lakhs. It is clear that if the assessee transfers his capital asset after 30th September of the financial year he gets an opportunity to make an investment of Rs. 50 lakhs each in two different financial years and is able to claim exemption upto Rs. 1 crore under section 54EC. The language of the proviso is clear and unambiguous and so the assessee is entitled to get exemption upto Rs. 1 crore in this case;

(ii) Though the time limit of 6 months for making the investment under section 54EC expired on 21.4.2008, no bonds were available for subscription between 1.4.2008 to 28.5.2008. The investment was made as soon as the subscription opened on 26.5.2008. The assessee was accordingly prevented by sufficient cause which was beyond his control in making investment in these Bonds within the time prescribed. Exemption should be granted in cases where there is a delay in making investment due to non-availability of the bonds [Ram Agarwal (2002) 81 ITD 163 (Mum.) followed] (A.Y. 2008-09)

Aspi Ginwala v. ACIT (2012) 52 SOT 16 (Ahd.)(Trib.)

S. 54EC : Capital gains - Investment in bonds - Within six months - If investment within 6 months of transfer is impossible, then relief available if investment made within 6 months of receipt of consideration

The assessee entered into a development agreement on 12.7.2005 in which the consideration was fixed at Rs 2.50 crores. A correction deed was entered into on 2.7.2007 in which the sale consideration was increased to Rs. 4.90 crores. The assessee invested Rs. 50 lakhs in section 54EC bonds on 3.8.2007 and 27.10.2007. The Assessing Officer held that the date of transfer was 12.7.2005 and as the section 54EC investments had been made beyond a period of 6 months from the date of transfer, the exemption was not available. The assessee claimed that as it was impossible for him to invest within 6 months from the date of transfer, the period of 6 months had to be reckoned from the date of receipt of consideration. Held by the Tribunal:

Though section 54EC requires the investment to be made within 6 months of the date of transfer, a technical interpretation cannot be adopted but it has to be interpreted having regard to the purpose and spirit of the section. In Circular No. 791 dated 2.6.2000 the CBDT held in the context of capital gains arising under section 45(2), that though the transfer arises in the year of conversion of a capital asset into stock-in-trade, the period of 6 months for investment under section 54E has to be reckoned from the date of sale of the stock-in-trade. The CBDT appreciated the impossibility of the assessee being able to invest the amount in specified assets within six months from the date of transfer. This interpretation of the CBDT supports the assessee's claim that where the consideration is received much after the date of transfer and it is not possible to invest the same within 6 months of the date of transfer, the period of 6 months must be reckoned from the date of receipt of consideration. (A.Y. 2006-07)

Mahesh Nemichandra Ganeshwade v. ITO (2012) 73 DTR 1 / 147 TTJ 488 / 17 ITR 116 (Pune)(Trib.)

S. 54EC : Capital gains - Investment in bonds - Purchase of REC Bond prior to sale of property - Exemption disallowed as the investment was made before the date of transfer

As per Section 54EC of the Act the investment in specified bond is to be made 'within specified six months after date of such transfer'. Thus, exemption claimed on the ground that assessee had purchased REC bonds prior to sale of property was disallowed as the investment was made before the date of transfer. (A.Y. 2008-09)

Dakshaben R. Patel (Smt) v. ACIT (2012) 52 SOT 212 (Ahd.)(Trib.)

S. 54EC : Capital gains - Investment in bonds - Investment out of total capital gains in REC bonds, deduction cannot be denied on the ground that the assessee has availed the exemption under section 54F also against a part of the capital gain (S. 54F)

As per Section 54EC, expression 'the whole or any part of capital gains in long term specified assets' makes it clear that the exemption under section 54EC is available even when the part of capital gain is invested in specified long term asset. There is no dispute that the assessee has invested out of total capital gain in REC bonds within the prescribed period of time as provided under section 54EC. Therefore, once the conditions as prescribed under section 54EC are complied with, then the deduction cannot be denied on the ground that the assessee has availed the exemption under section 54F also against a part of the capital gain. (A.Y. 2007-08)

ACIT v. Deepak S. Bheda (2012) 52 SOT 327 (Mum.)(Trib.)

S. 54EC : Capital gains - Investment in bonds - Beneficial owners - Clubbing of income - Separate exemption is available in respect of income clubbed under section 64 [S. 64]

The assessee earned long term capital gain on sale of shares. The two children of assessee, being beneficial owners also earned LTCG on sale of beneficial shares. The assessee along with his minor

children invested amount of long term capital gain in REC bonds and claimed deduction under section 54EC. The Assessing Officer clubbed the income of the minor children in the hands of the assessee but disallowed the claim of deduction on account of minor children. It was held that in case of clubbing of minor/ spouse, all deductions are to be allowed while computing income of minor/spouse and only net taxable income to be clubbed under section 64. Therefore, where income of assessee's minor children was clubbed with his income, assessee was eligible for deduction under section 54EC on investment in REC capital gain bonds on account of minor's income from long-term capital gains separately. (A.Y. 2007-08)

Dy. CIT v. Rajeev Goyal (2012) 52 SOT 335 (Kol.)(Trib.)

S. 54EC : Capital gains - Investment in bonds - Limit of 50 lakhs - Limit of Rs. 50L does not apply to the transaction but financial year. Cheque has to be issued within 6 months. Encashment of Cheque & Allottment of Bonds beyond 6 months is irrelevant

In A.Y. 2008-09, the assessee sold land on 14.12.2007 and computed capital gains of Rs. 1.57 crores. He invested Rs. 50 lakhs on 3.3.2008 (F.Y. 2007-08) in REC Bonds and Rs. 50 lakhs on 4.6.2008 (F.Y. 2008-09) in NHAI Bonds and claimed a deduction of Rs. 1 crore under section 54EC. The NHAI Bonds were allotted on 30.6.2008. The Assessing Officer & CIT(A) restricted the assessee's claim to Rs. 50 lakhs on the ground that (i) the Proviso to section 54EC imposed a ceiling of Rs. 50 lakhs for the investment and (ii) the allotment of the NHAI Bonds was made beyond 6 months of the date of transfer. On appeal by the assessee, HELD allowing the appeal:

(i) In Aspi Ginwala (ITAT Ahmedabad) it was held that the Proviso to section 54EC merely restricted the investment that can be made in one F.Y. to Rs. 50 Lkahs but it did not restrict the exemption to Rs. 50 lakhs. However, a contrary view was taken in Raj Kumar Jain & Sons (ITAT Jaipur) that the exemption under section 54EC had to be restricted to Rs. 50 lakhs. However, Circular No. 3/2008 dated 12.3.2008 issued by the CBDT makes it clear that the Proviso only intended to restrict the investment in a particular financial year and did not intend to restrict the maximum amount of exemption permissible under section 54EC. The fact that the Proviso uses the words "in a financial year" fortifies this interpretation. Accordingly, it has to be held that the assessee is entitled to total deduction of Rs. 1 crores in respect of the investment of Rs. 50 lakhs made in each financial year;

(ii) The cheque was issued to NHAI before the expiry of 6 months from the date of transfer. The fact that the allotment of the Bonds was made after 6 months is irrelevant. A payment by cheque which is encashed subsequently relates back to the date of receipt of the cheque. The date of payment is the date of delivery of the cheque and not the date of its encashment [Kumarpal Amrutlal Doshi (Mum.)(Trib.) followed]. (A.Y. 2008-09)(ITA no 236/Bang/2012 dt 14-12-2012)

Vivek Jairazbhoy v. Dy. CIT (Bang.)(Trib.) www.itatonline.org

S. 54EC : Capital gains - Investment in bonds - Investment within six months - Eligible exemption

Under a development agreement, assessee-co-owner of land received, apart from built-up area, monetary consideration .Assessee invested said amount in NABARD Capital Gains Bonds within six months. Assessing Officer noted that investment was made in A.Y. 2006-07 while assessee was claiming exemption under section 54EC for A.Y. 2005-06. Assessing Officer, thus, rejected assessee's claim .Provisions of section 54EC do not make any reference to assessment year in which investment is to be made but only lays down a condition of 6 months period of time after date of transfer of capital asset .Since investment in long term specified asset was made by assessee within period of 6 months after date of transfer of capital asset, assessee's claim for deduction was to be allowed. (A.Y. 2005-06)

ITO v. Chetana H. Trivedi (Mrs.) (2012) 53 SOT 544 / 73 DTR 153 / 150 TTJ 276 (Mum.)(Trib.)

S. 54F : Capital gains - Investment in residential house - Purchased - Constructed - Section does not require construction to be complete within specified period, just because the construction is not complete the assessee cannot be denied the exemption

The assessee sold shares for Rs. 4.18 crores and within 12 months, invested Rs. 2.16 crores thereof to construct a house property and claimed exemption under section 54F. However, as even after the expiry of 3 years of the date of transfer, the construction of the house was not complete and sale deed was not executed, the Assessing Officer & CIT(A) denied relief under section 54F though the Tribunal granted it. On appeal by the department to the High Court, the High Court held dismissing the appeal:

Section 54F is a beneficial provision for promoting the construction of residential house & requires to be construed liberally for achieving that purpose. The intention of the Legislature was to encourage investments in the acquisition of a residential house and completion of construction or occupation is not the requirement of law. The words used in the section are 'purchased' or 'constructed'. The condition precedent for claiming benefit under section 54F is that the capital gain should be parted by the assessee and invested either in purchasing a residential house or in constructing a residential house. Merely because the sale deed had not been executed or that construction is not complete and it is not in a fit condition to be occupied does not disentitle the assessee to claim section 54F relief [CIT v. Sardarmal Kothari and another (2008) 302 ITR 286 (Mad.) followed]. (A.Y. 2006-07)

CIT v. Sambandam Udaykumar (2012) 345 ITR 389 / 206 Taxman 150 / 72 DTR 232 / 251 CTR 317 (Karn.)(HC)

S. 54F : Capital gains - Investment in residential house - Purchase of house in joint names of assessee and his wife, assessee is entitled to exemption under section 54F

Assessee purchased the house in the joint name of assessee and his wife and claimed exemption under section 54F. The assessing Officer has allowed exemption only to the extent of 50 percent, which was confirmed by Commissioner(Appeal). On appeal to the Tribunal, the Tribunal allowed the full exemption to the assessee. On further appeal to High Court by revenue the Court held that as the wife has not contributed to purchase and whole purchase consideration was paid by assessee, it would be treated as the property purchased by the assessee in his name and merely because he had included the name of his wife and the property purchased in the joint name of his wife would not make any difference and the assessee is entitled to exemption under section 54F. Accordingly the appeal of revenue was dismissed. (A.Y. 2007-08)

CIT v. Ravinder Kumar Arora (2012) 342 ITR 38 / 75 DTR 406 / 252 CTR 392 / (2011) 203 Taxman 289 (Delhi)(HC)

S. 54F : Capital gains - Investment in residential house - Exemption cannot be denied for holding joint property with her husband - Since assessee did not own any property in status of an individual as on date of transfer, claim was allowed

Assessee held a property jointly with her husband. She transferred another property owned by her individually for consideration under a development agreement. It was held that joint ownership of a property could be held to stand in her way of claiming exemption under section 54F, since assessee did not own any property in status of an individual as on date of transfer, her claim was to be allowed. (A.Y. 2000-01)

P. K. Vasanthi Rangarajan (Dr.)(Smt.) v. CIT, Chennai (2012) 209 Taxman 628 / 252 CTR 336 / 75 DTR 56 (Mad.)(HC)

S. 54F : Capital gains - Investment in residential house - Mere construction of sunshade is not construction of new house hence not eligible for exemption

For the purpose of section 54F, the residential house so constructed is referred to as new asset. Obviously, a new house is not something which is either an extension or addition made to an existing structure. In the present case, approval plan of the Corporation pertains only to roof changing (sunshade projection) and for construction/extension of/to the first floor. Assessee was not therefore entitled to exemption under section 54F.

Pushpa v. ITO (2012) 79 DTR 218 / (2013) 255 CTR 222 (Ker.)(HC)

S. 54F : Capital gains - Investment in residential house - Transfer - Transfer is complete when possession was handed over - As the investment made by assessee within period of one year prior date of transfer, the assessee is entitled to deduction under section 54F. [S. 2(47)]

The assessee has sold the property at Chennai and the sale agreement was originally entered into on 27-8-1996 and clearance from appropriate authority was obtained on 8-10-1996. Subsequently the agreement was restated and conveyance was done on 25-11-1999. The assessee once again approached the appropriate authority on 11-02-2000 for clearance and obtained and The possession was given on 28-11-2009. All these facts were disclosed in the original assessment which was completed under section 143(3) read with 147 the claim was allowed only for purchase at the stage of assessment. On appeal the Commissioner(Appeals) considering the various judicial pronouncement applicable to section 54 and 54F allowed the claim for both the purchases and construction of property at Bangalore. Subsequently, notice under section 263 was issued which was withdrawn. A fresh notice under section 148 was issued on the ground that the assessee had furnished the wrong date of transfer since the provision was complied with only on 21-2-2000, deduction under section 54/54F was wrongly claimed hence to be withdrawn. On appeal the Commissioner(Appeals) allowed the appeal of assessee on reassessment as well as on merits following the ratio of Bombay High Court Judgment in Chaturbuj Dwarakadas Kapadia v. CIT (2003) 260 ITR 491 (Bom.). Revenue filed an appeal before the Tribunal, as there was difference of opinion the matter was referred to third member. The Tribunal held that since the possession was handed over to buyer on 28-11-1999 against receipt of consideration of transaction, it could be said that transfer of property had taken place on 28-11-1999 satisfying the requirement of section 2(47). The Tribunal also held that latest NOC issued by appropriate authority on 21-2-2000 could not be considered in isolation of first NOC issued on 8-10-1996 as it was revision of first NOC, therefore, NOC issued on 21-2-2000 relates back to first NOC issued on 8-10-1996 and as such reinforced facts of transfer of property on 28-11-1999, when the possession was handed over to buyer. Accordingly the investment made by assessee on 9-12-1998 in residential property was well within period of one year prior to transfer i.e. 28-11-1999 for availing deduction under section 54F. Accordingly the issue was decided in favour of assessee. (A.Y. 2007-08)

ACIT v. P. R. Chockalingam (2012) 135 ITD 75 / 70 DTR 138 / 146 TTJ 44 / 17 ITR 617 (TM)(Chennai)(Trib.)

S. 54F : Capital gains - Investment in residential house - Construction of house - Court order - Assessee could not construct the house with in period of three years due to Court's restraint order, assessee is entitled to exemption

The assessee sold one of her capital assets in the previous year relevant to the A.Y. 2007-08, and purchased land for construction of house and claimed exemption in respect of capital gains under section 54F. The assessee could not construct the house due to injunction order from Civil Court. The Assessing Officer rejected the claim under section 54F. The Tribunal held that, without purchasing the land the assessee was not entitled to construct the house, as the assessee has spent entire amount for purchase of land, the assessee is entitled to exemption under section 54F. (A.Y. 2007-08)

V. A. Tharabai (Smt) v. Dy. CIT (2012) 14 ITR 15 / 50 SOT 537 / 75 DTR 113 / 149 TTJ 41 (UO)(Chennai)(Trib.)

S. 54F : Capital gains - Investment in residential house - Cost of acquisition - Contractor - Amount paid to contactor is to be considered as cost of acquisition

Amounts paid for completion of flat purchased in semi finished condition, pursuant to a tripartite agreement entered by the assessee with the contractors and the builder form part of cost of new house even though such agreement was entered prior to agreement for purchase of house. On the facts all expenditure incurred prior to taking over possession has to be considered as part of cost. (A.Y. 2006-07)

Nirupama K. Shah v. ITO - 419 (2012) 43B BCAJ P. 31 (Jan. 2012) (Mum.)(Trib.)

S. 54F : Capital gains - Investment in residential house - Purchase of land - Invested in purchase of land construction not completed, entitled to exemption

The assessee had invested full sale consideration received on sale of original asset in purchase of plot of land and started construction of a new house, though not completed. In view thereof the assessee was entitled to the exemption under section 54F of the Act, in as much as the thrust of the said section is on investment of net consideration received on sale of original asset and started construction of a new residential house, though the new house is not completed the assessee had complied with provisions of section 54F and hence is entitled to benefit of exemption claimed by assessee. (A.Y. 2007-08)

Rajneet Sandhu (Smt.) v. Dy. CIT (2012) 49 SOT 7 (Chd.)(Trib.)

S. 54F : Capital gains - Investment in residential house - Assessee unable to construct residential house within prescribed period, exemption to be granted under special circumstances where intention of the statute is satisfied

During the relevant assessment year, the assessee sold the capital asset and earned long term capital gain. Subsequently, assessee invested entire sale consideration in purchasing a land for construction of a residential house. However, assessee was prevented from constructing the house on the said land for the prescribed period of 3 years due to Order of status quo by Civil Court as a result of injunction petition filed by the owner of the land. The Tribunal observed that the conduct of assessee unequivocally demonstrates that assessee had proceeded to construct a residential house, based on which he had claimed exemption, thus under certain special facts and circumstances the assessee would be entitled to exemption under Section 54F of the Act as the intention of the statute was fully satisfied by the assessee. (A.Y. 2007-08)

V. A. Tharabai (Smt) v. Dy. CIT (2012) 14 ITR 15 / 50 SOT 537 / 75 DTR 113 / 149 TTJ 41 (UO)(Chennai)(Trib.)

S. 54F : Capital gains - Investment in residential house - Though the construction was not completed - As the full consideration was paid to builder, the assessee is entitled for exemption - Exemption was allowed only in respect of one house

The assessee paid the entire consideration when the building was under constructuion and claimed the exemption under section 54F. The Assessing Officer rejected the claim on the ground that the flat was not ready within two years of transfer. The Tribunal held that as the assessee having paid full consideration before the statutory period of two years from the date of sale of shares and has acquired the right in the flats constructed by the builder the benefit of exemption under section 54F cannot be denied. The Tribunal allowed the exemption in respect of one flat because the purchase was by two separate agreements though both the flats were on the same floor and the certificate by architect being a self serving document and nothing has been produced from the builder to show that the flats were used as one unit. (A.Y. 2005-06)

ACIT v. Sudhakar Ram (2012) 72 DTR 187 / 49 SOT 90 / 150 TTJ 703 (Mum.)(Trib.)
Sudhakar Ram v. ACIT (2012) 72 DTR 187 / 49 SOT 90 / 150 TTJ 703 (Mum.)(Trib.)

S. 54F : Capital gains - Investment in residential house - Investment in four flats - Held that exemption allowed as requirement of assessee family met-out only by enlarging residential unit by merging 4 flats and that too prior to handing over of the possession of said residential unit

The assessee earned capital gain from sale of ancestral property. The assessee claimed exemption under section 54F in respect of amount invested towards purchase of four flats which were converted into one residential unit. The Assessing Officer allowed exemption only in respect of one flat by holding that flats were separate and independent residential unit having separate kitchen and entrance and thus, according to him flat could not be said as adjacent flats even though builders had referred them as composite unit. It was held by the Tribunal that, if requirement of assessee family was met-out only by enlarging residential unit by merging 4 flats and that too prior to handing over of the possession of said residential unit, then said converted residential unit would be treated as a residential house as stipulated under section 54F and thus, claim of the assessee was allowed. (A.Y. 2007-08)

ACIT v. Deepak S. Bheda (2012) 52 SOT 327 (Mum.)(Trib.)

S. 54F : Capital gains - Investment in residential house - Purchase of house jointly with spouse is eligible for exemption

The assessee had made long-term capital gain on sale of shares. The sale proceeds were invested in purchase of row house in the joint names and exemption under section 54F was claimed. The Assessing Officer denied the exemption on the ground that the property was purchased in joint name of wife. In appeal Commissioner(Appeal) confirmed the denial of exemption. On appeal to Tribunal, the Tribunal held that total consideration for the house had been met by the assessee and the name of wife was added only for the sake of convenience. The Tribunal drew the support from the section 45 of the Transfer of Property Act which provides that the share in the property will depend on the amount contributed towards the purchase consideration. (A.Y. 2004-05)(ITA No. 4285/Mum/2009 dated 6-6-2012 Bench 'F')

Vasudeo Pandurang Ginde v. ITO (2012) BCAJ July P. 57 (Mum.)(Trib.)

S. 54F : Capital gains - Investment in residential house - Consideration from sale of shares is invested in purchase of residential house property - Exemption allowed

Where assessee invested consideration received from sale of shares in purchase of residential house property, exemption under section 54F could not be denied to it on ground that flat was registered in name of assessee's minor daughter. (A.Y. 2008-09)

N. Ram Kumar v. ACIT (2012) 138 ITD 317 / 150 TTJ 656 / 79 DTR 386 (Hyd.)(Trib.)

S. 54F : Capital gains - Investment in residential house - Capital gains earned had been utilized for other purposes - Borrowed funds were deposited in capital gains investment account, benefit of section 54F exemption cannot be denied

Merely because capital gains earned had been utilized for other purposes and borrowed funds were deposited in capital gains investment account, benefit of section 54F exemption cannot be denied. (A.Y. 2008-09)

J. V. Krishna Rao v. Dy. CIT (2012) 54 SOT 44 (Hyd.)(Trib.)

S. 54F : Capital gains - Investment in residential house - Flat purchased in the name of minor assessee exemption is allowable

House purchased in the name of daughter. Assessee having purchased flat in the name of his minor daughter is entitled to deduction under section 54F. A bare reading of section 54F(1) makes it clear that there is no requirement that the house has to be purchased in the name of the assessee only. (A.Y. 2008-09)

N. Ram Kumar v. ACIT (2012) 138 ITD 317 / 150 TTJ 656 / 79 DTR 386 (Hyd.)(Trib.)

S. 54F : Capital gains - Investment in residential house - Purchase of house outside India is eligible for exemption

There is nothing in s. 54F to suggest that the new residential house acquired should be situated in India and therefore, assessee is eligible to claim exemption under section 54F notwithstanding the fact that the house property purchased in outside India. (A.Y. 2009-10)

Vinay Mishra v. ACIT (2012) 79 DTR 1 / 20 ITR 129 / 150 TTJ 245 / (2013) 141 ITD 301 (Bang.)(Trib.)

S. 54F : Capital gains - Investment in residential house - House need not be completed within three years

Assessee sold a commercial plot of land on 14-10-2005 and invested total sale consideration in construction of a residential house within three years after transfer of plot said house was completed by end of October, 2008. Assessee claimed exemption under section 54F in respect of capital gain arising from sale of plot. Once assessee had invested total sale consideration into construction of a residential house within three years after transfer of plot, she was entitled to exemption under section 54F even though house was completed after expiry of three years from transfer of plot. (A.Y. 2006-07)

Usha Vaid (Smt.) v. ITO (2012) 53 SOT 385 (Amritsar)(Trib.)

S. 54F : Capital gains - Investment in residential house - Exemption - Purchase of land - Investment in Capital Gain Account Scheme - Assessee is entitled to exemption - Offering the amount to tax on of the end of third year will be justified

During previous year assessee earned capital gain from transfer of his shares and claimed exemption under section 54F in respect of same. Out of said capital gain, he acquired one acre agricultural land for construction of a residential house and deposited balance amount in Capital Gain Account Scheme. He could not start construction due to restrictions imposed by Coastal Zone Regulations. During year, he had alsowithdrawn money deposited in Capital Gain Account Scheme. He offered capital gain for tax at the end of third year, i.e., in A.Y. 2009-10, and paid taxes. Since first step was purchase of land and next step could not be put forward thereafter for reasons beyond control, amount spent by assessee in purchasing land had to be considered as amount invested for purchase/construction of residential house. Assessee having offered capital gain for tax in A.Y. 2009-10 could not be saddled with same liability in impugned A.Y. 2006-07. Therefore, assessee was entitled to exemption under section 54F in respect of impugned capital gain. (A.Y. 2006-07)

JCIT v. B. Shivkumar (2012) 54 SOT 562 (Chennai)(Trib.)

S. 54G : Capital gains - Shifting of industrial undertaking from urban area - Investment for the purpose of carrying on business is sufficient compliance, it is not mandatory that the investment in land and building in non-urban area is for the purpose of the business of the industrial undertaking transferred

The assessee company which was carrying on its business of manufacturing activity at its leased premises. The assessee sold its plant and machinery and surrendered the tenancy rights. Part of consideration was invested in Capital Gain Account Scheme and part of amount was invested for purchase of land and building in non-urban area and claimed exemption under section 54G and balance amount was offered to tax. The Assessing Officer held that, the assessee had sold entire plant and machinery in the F.Y. 1999-2000 and since there was no existence of undertaking when the leased premises which was surrendered on 1-10-2003 claim under section 54G was not available. In appeal the Commissioner(Appeals) has allowed the claim of assessee. On appeal by revenue, the Tribunal held that section 54G(1)(b) merely requires that the acquisition of building or land or construction of building should be for the purpose of its business in such non-urban area. The

Tribunal compared the section 54D and section 54G(1)(a) and held that if the amounts are utilized for acquisition of assets for the purpose of its business, this should qualify for the purpose of exemption under section 54G as there is no requirement that the land and building should be used for the purpose of the business of industrial undertaking. The Tribunal also negatived the contention of revenue that industrial undertaking was ceased to exits in 1999-2000, because the section refers the shifting was 'in the course of or in consequence of" of such undertaking. Appeal of revenue was dismissed. (A.Y. 2004-05)

Dy. CIT v. Enpro Finance Ltd. (2012) 53 SOT 151 / 149 TTJ 546 / 77 DTR 297 (Mum.)(Trib.)

S. 55 : Capital gains - Cost of improvement - Cost of acquisition - Fair market value - Fair market value as on 1-4-1981 - Matter remanded to the Assessing Officer to determine the valuation afresh

Assessee has shown the valuation at Rs. 1,00,000/- per ground, though the valuation report of valuer of assessee valued at Rs. 1, 20,000/- per ground for determination of cost of acquisition. The Assessing Officer adopted the value at Rs. 15,000/- per ground based on the guidelines from the Sub-Registrar collected by the inspector of Income tax. The Tribunal held that the Assessing Officer has could have availed the assistance of the Departmental valuer, he merely relied on the report of inspector, which is an arbitrary method. Similarly the valuation report of the approved valuer submitted by the assessee refers only experience and wisdom, but not given comparable cases of sales or other relevant information which could support the value adopted by the approved valuer. The matter was set aside for fresh consideration. (A.Y. 2007-08)

ITO v. Usha Ramesh (Smt.) (2012) 144 TTJ 673 / 68 DTR 94 / (2011) 133 ITD 67 (TM)(Chennai) (Trib.)

S. 55 : Capital gains - Cost of improvement - Cost of acquisition - Trade mark - Brand name - Patents - Designs - Amount received by assessee for transfer of trade mark ,patents and designs is capital receipt and not liable to tax [S. 4]

The assessee has executed three deed of assignments for assigning intellectual property rights (IPRS) being trademarks, designs, copyrights for an aggregate consideration of Rs. 30 crores. The assessee is of the opinion that they are not liable to capital gains tax on the ground that IPR being self generated assets. The Assessing Officer held that the same is taxable as long term capital gains as cost of acquisition being nil. The Commissioner(Appeals) upheld the view of Assessing Officer. In appeal before the Tribunal, there was difference of opinion and the matter was referred to third member. The third member held that the assessee has transferred only the rights in IPR and not the right to manufacture, produce or process biscuits and therefore it was entitled to claim amount of Rs. 30 crores as non taxable capital receipt. Appellate Tribunal following the Circular No. 14/2001 dated 9-11-2011, held that amendment made to section 55(2)(a) by bringing in terms 'trade mark' and 'brand name' is only prospective and is applicable only from A.Y. 2002-03.

Kwality Biscuits (P) Ltd. v. ACIT (2012) 135 ITD 35 (TM)(Bang.)(Trib.)

S. 55 : Capital gains - Cost of improvement - Cost of acquisition - No capital gain when no cost incurred for acquiring land [S. 2(14)(iii), 45]

Since assessee had not incurred any cost for acquiring land in question because it was allotted to assesse's father by Govt. of India, being refugee from Pakistan at relevant point of time, capital gain was not assessable in respect of sale of such land. (A.Y. 2007-08)

Manohar Pyarelal Sadane v. ITO (2012) 138 ITD 250 / 80 DTR 186 (Pune)(Trib.)

S. 55(2)(ab) : Capital gains - Cost of improvement - Cost of acquisition - Acquisition of shares on corporation and demutualization in lieu of BSE membership - Protective Assessment made on event of sale of shares deleted

The assessee company was engaged in the business of stock broking and stock trading. The assessee acquired shares of BSE consequent to corporation and demutualization of BSE as a company. The Revenue made protective assessment on the premise that in the event of sale of shares so acquired, the assessee would take benefit of section 55(2)(ab) of the Act and would claim cost of acquisition at the price at which the assessee originally paid by for acquiring stock exchange membership card ignoring the depreciation availed of for period from acquisition of stock exchange membership card till exchange of shares for BSE card. On appeal before the Tribunal, it was held that protective assessment so made was erroneous as while computing capital gains on transfer the assessee had calculated its cost of acquisition on the basis of written down value and Re. 1 which it had paid per share at the time of issue of shares by the BSE. (A.Y. 2006-07)

ACIT v. Omniscient Securities Pvt. Ltd. (2012) 15 ITR 82 (Mum.)(Trib.)

S. 55A : Capital gains - Reference to valuation Officer - Report received after completion of assessment - Reference does not became invalid Action taken by the tax authorities on the basis of such a valuation will be open for challenge. [S. 45,Constitution of India , Art 226]

The assessee opted to take fair market value of land as on 1-4-1981 on the basis of registered valuation report. The Assessing Officer referred the matter to DVO. Since report was not received with in time stipulated for completing assessment proceedings, the Assessing Officer accepted the valuation shown by the assessee. The assessee received the notice from DVO for valuing the property. The assessee challenged the said notice by way of wit petition on the ground that the said notice by the Valuation Officer was invalid once the assessment under section 143(3) was completed. The Court while dismissing the writ petition held that reference to DVO does not become in valid on completion of assessment proceedings before receipt of valuation report. Such valuation report received after completion of assessment proceedings, would become part of record and if any action is taken by departmental authorities on basis of such valuation report, same will be open to challenge by assessee. (A.Y. 2007-08)

ACC Ltd. v. DVO (2012) 79 DTR 365 / 208 Taxman 397/(2013) 357 ITR 160 (Delhi)(HC)

S : 55A : Capital gains - Reference to valuation officer - Full value of consideration under section 48 cannot be construed as fair market value for purpose of section 55A. [S. 48, 50C]

For calculation of capital gain full value of the transaction received or accruing as a result of the transfer of the capital assets following amount is to be deducted (i) expenditure incurred wholly and exclusively in connection with such transfer (ii) the cost of acquisition of the assets and the cost of any improvement thereon. Further, indexation on cost of acquisition and cost of improvement is to be allowed. The full value consideration means the full value of consideration received by the transferee in exchange of the capital assets transferred by him. The Supreme Court also observed that in the case of full value of consideration is the full sale price is actually paid. It was further of the view that the expression full value means the whole price without any deduction, whatsoever and it cannot refer to the adequacy or inadequacy of the price bargained for. Nor did it have any necessary reference to the market value of the capital assets which is the subject-matter of the transfer. Held that the Assessing Officer was not justified in substituting the fair market value in place of full value of consideration. The order of the Commissioner(Appeals) is confirmed. (A.Y. 2008-09)

ACIT v. Prakash Ratanlal Sheth (2012) 53 SOT 378 (Ahd.)(Trib.)

S. 56 : Income from other sources - Compensation - Capital receipt - The matter was set aside to the Assessing Officer to decide the issue after de novo consideration [S. 4]

The question raised before the Court was "whether the sum of Rs. 75,00,000/- received by the assessee as compensation from Jenson and Nichloson Limited under consent decree dated 1st September, 1998 in Suit No. .321B of 1996 passed by the Calcutta High Court was at all taxable under section 56 of the Income-tax Act 1961". The court opined that the Assessing Officer has not

looked into various documents, which are relevant to decide the issue. Accordingly the matter was remitted to the Assessing Officer to decide the entire case after de novo, consideration according to law.

CIT v. Vasudhara Holdings Ltd. (2012) 210 Taxman 568 / 254 CTR 341 / 79 DTR 351 (SC)

S. 56 : Income from other sources - Business income - Lease rent of Hotel - Lease rent from hotel is assessable as business income or income from other sources, matter set a side to the Assessing Officer

Assessee has shown the lease rent from Hotel as business income, the Assessing Officer without discussing anything treated the said income as income from other sources. The Tribunal set aside the matter to decide the issue a fresh in accordance with law. (A.Y. 2007-08)

Vijay Productions (P) Ltd. v. Addl. CIT (2012) 134 ITD 19 / 66 DTR 314 / 144 TTJ 1 / 14 ITR 614 (TM)(Chennai)(Trib.)

S. 56 : Income from other sources - Interest - Fixed deposit - Interest from fixed deposit of surplus amount is assessable as income from other sources

Assessee which is engaged in the business of developing, operating and maintaining an industrial park, interest income earned by it from surplus funds kept as fixed deposits in various banks is to be taxed under the head income from other sources. (A.Y. 1999-2000 to 2004-05)

ITO v. Information Technology Park Ltd. (2012) 49 SOT 491/(2013) 24 ITR 218 (Bang.)(Trib.)

S. 56 : Income from other sources - Parking rent - Signage rent - Terrace rent - Licence fee - Assessable as income from other sources and not under the head income from house property [S. 22, 194(1)]

The assesse company is engaged in the business of real estate development. It had declared a sum under the head income from house property. The Assessing Officer took the view that the amount received on account of signage rent, parking rent, terrace rent and license fees was to be taxed under the head 'profits and gains of business'. On appeal, Commissioner(Appeals) held that the same is assessable as income from other sources. On further appeal, the Tribunal confirmed the view of the Commissioner(Appeal) and held that signage rent, terrace rent and license fee is taxable as Income from other sources under section 56 and not as income from house property under section 22 (A.Y. 2006-07)

JMD Realtors (P) Ltd. v. Dy. CIT (2012) 135 ITD 337 / 71 DTR 179 / 146 TTJ 571 / (2013) 22 ITR 654 (Delhi)(Trib.)

S. 56 : Income from other sources - Rental income - Discontinued business - Assessee not started his discontinued business and nothing is available on record hence rental income charged as income from other sources

Where the assessee has not started his discontinued business and nothing is available on record wherefrom it can be inferred that assessee has ever intended to start its business the rental income was rightly considered by the Assessing Officer as an income from other sources; however, whatever expenses are necessary to be incurred to earn the income are allowable expenditure under section 57(iii). (A.Y. 2006-07)

ITO v. Pujya Sujatha Agro Farms (P) Ltd. (2012) 145 TTJ 489 / (2011) 56 DTR 65 / 132 ITD 131 (Visakha.)(Trib.)

S. 56 : Income from other sources - Interest on income tax refund - Business income - Income tax refund is assessable income from other sources [S. 28(i)]

The Tribunal held that interest on refund of Income-tax is assessable as income from other sources and not as business income. (A.Y. 2003-04)

Kotak Mahindra Capital Co. Ltd. v. ACIT (2012) 138 ITD 57 / 18 ITR 213 / 75 DTR 193 / 148 TTJ 393 (SB)(Mum.)(Trib.)

S. 56(2)(vi) : Income from other sources - Gift - Gift from father, source is explained addition was not justified

Assessee received a gift of Rs. 5 lakhs from his father NK who was assessed to income tax. Assessing Officer found that the HUF of NK issued a cheque of Rs. 5 lakhs in the name of MJ, a proprietary concern of NK individual and on the same date, MJ issued a cheque of Rs. 5 lakhs in the name of the assessee. Accordingly, Assessing Officer treated the amount of Rs. 5 lakhs received by the assessee as income from other sources on the ground that the amount of Rs. 5 lakhs gifted to the assessee belonged to the HUF and in reality the HUF made the gift to the assessee which was not covered under the definition of the "relative" as given in the Explanation to section 56(2)(vi). Tribunal held NK was having opening balance as well as closing balance of more than Rs. 20 lakhs in his capital account. The transaction was a genuine transaction. Nothing has been brought on record to substantiate that the loan received by NK from his HUF was bogus or non genuine. Donor is identifiable, his creditworthiness has not been doubted and there was occasion for making the gift. Donor being the father of the assessee, CIT(A) was not justified in confirming the addition made by the Assessing Officer (A.Y. 2007-08)

Amit Jain v. Dy. CIT (2012) 77 DTR 235 / 149 TTJ 527 (Jodh.)(Trib.)

S. 56(2)(vi) : Income from other sources - Gift - Marriage of daughter - Gift received by NRI realtives and friends on the occasion of marriage of daughter is taxable as income from other sources

Assessee received the gift from NRI friends and relatives on the occasion of marriage of daughter as shoguns. The Assessing Officer has held that the gifts were received on occasion of assessee's daughter marriage of assessee and not the marriage of assessee and the cheques were in the name of the assessee and the same were credited by the assessee to his bank account hence, the said amount is taxable as income from other sources, which was upheld by the Commissioner(Appeals). On appeal to the Tribunal the Tribunal held that "A perusal of the provisions of section 56(2)(vi) read with the proviso there under clearly reveals that they shall not apply to any sum of money received (b) 'on the occasion of the marriage of the individual'. Therefore, the word 'individual' in the context of marriage of individual. Therefore, the word 'individual' in the context of marriage can only be the bride or bridegroom and cannot include group of individuals". As the cheques were in the name of assessee which were credited to his account the addition was justified as income from other sources. (A.Y. 2007-08)

Rajinder Mohan Lal v. Dy. CIT (2012) 49 SOT 713 / 148 TTJ 369 / 75 DTR 85 (Chd.)(Trib.)

S. 56(2)(vi) : Income from other sources - Dissolution of trust - Equal distribution of asset - Amount received by a person as beneficiaries not be termed as amount received 'without consideration', hence, no addition could be made

Assessee and his wife were trustees and their two daughters were beneficiaries in a private trust created by assessee's mother. Subsequently, assessee and his wife were added as additional beneficiaries and their daughters, on being major, relinquished their rights, etc. on property of trust. On dissolution of trust, assets were equally distributed between assessee and his wife. It was held that amount received by a person as beneficiaries on dissolution of trust cannot be termed to be an amount received 'without consideration' and, hence, no addition could be made. (A.Y. 2007-08)

Ashok C. Pratap v. Addl. CIT (2012) 139 ITD 533 / 79 DTR 9 / 150 TTJ 137 (Mum.)(Trib.)

S. 57 : Income from other sources - Deduction - Export undertaking - Netting - Income tax refund - Payment of income tax could not be said to be more for earning interest hence interest paid is not allowable under section 57(iii)

The assessee claimed that the interest earned on income tax refund should be netted off against payment of interest. The Assessing Officer has not agreed with the contention of assessee and assessed the entire interest refund from Income tax department as income from other sources. On appeal the Commissioner(Appeals) held that the netting of interest is to be allowed. On appeal by revenue, the Tribunal held that since the payment of income tax could not be said to be made for earning of interest the deduction cannot be allowed under section 57(iii). Appeal of revenue was allowed. (A.Y. 2002-03)

Dy. CIT v. American Express (India) (P) Ltd. (2012) 135 ITD 211 / 70 DTR 330 / 146 TTJ 442 (Delhi)(Trib.)

S. 57 : Income from other sources - Dedcution - Interest paid on borrowed capital held to be allowable

Tribunal held that in view of the decision of the Tribunal in assessee's own case in R. R. Kabel Ltd. v. Addl. CIT [IT Appeal Nos. 4789, 4790, 5103 & 5104 (Mum.) of 2009, dated 11-1-2012], where interest income had been assessed under the head 'income from other sources', assessee was held to be entitled to deductions under section 57(iii) of interest paid on borrowed funds. [Paras 20, 22]. (A.Y. 2007-08)

R. R. Kabel Ltd. v Addl. CIT (2012) 54 SOT 374 (Mum.)(Trib.)

S. 68 : Cash credits - Gift from Non-residents - Matter remanded back to tribunal to consider the financial capacity of donors - Burden is on assessee to show that donors have financial capacity to give gifts, in favour of assessees

Assessee received gifts from two NRIs. The Assessing Officer assessed the said amounts under section 68 on the ground that the assessee has not led evidence that the alleged donors had adequate funds. The Tribunal deleted the addition only on the ground that the donors are assessed to tax at Singapore. On appeal by the Revenue, High Court dismissed the appeal of revenue. On appeal to Supreme Court, the Court remanded the matter back to the Tribunal for disposal a fresh in the light of the judgment in case of CIT v. Mohankala (2007) 291 ITR 278 / 6 SCC 21. The Court also observed that it is open to the assessee to produce relevant evidence. (A.Y. 1994-95, 1995-96)

CIT v. P. R. Ganapathy and Ors. (2012) 210 Taxman 572 / 254 CTR 336 / 79 DTR 300 (SC)

S. 68 : Cash credits - Gifts - Relationship - Failure to establish relationship of donor with assessee addition held to be justified

Assessee had not furnished any iota of evidence for love and affection or being an acquaintance. Activities of donor, suspicious circumstances emerging from the material, non-availability of donor personally but by his father and the huge amount of gift being sent to different persons including assessee without any occasion and without any relationship, connection of family of the donor with the activities of the assessee, the Court held that addition under section was justified. (A.Y. 1999-2000, 2000-01)

Dinesh Babulal Thakkar v. ACIT (2012) 341 ITR 632 / 67 DTR 321 / 249 CTR 568 (Guj.)(HC)

S. 68 : Cash credits - Share application money - Affidavit - Information furnished by Investigation wing showed that the parties who subscribed to share application money were entry providers and summons issued to parties were not responded, affidavits were filed after two years, addition held to be justified

In the course of assessment proceedings the Assessing Officer issued summons to parties who have subscribed shares, which could not be served, accordingly the addition was made under section 68.

On appeal the assessee filed affidavit of directors, the Assessing Officer was directed to examine the directors. After examination the Assessing Officer has forwarded the remand report. On merit the Commissioner(Appeals) deleted the addition, which was confirmed in appeal by the Tribunal. On appeal to the High Court by revenue, the Court held that, the affidavits filed by assessee two years later from entry providers to effect transaction as genuine has no evidentiary value, information from investigation wing and the summons issued to parties has come back hence there is no duty on Assessing Officer to prove that monies emanated from coffers of assessee, hence the addition under section 68 was justified, hence the appeal of revenue was allowed. (A.Y. 2000-01)

CIT v. Nova Promoters and Finlease (P) Ltd. (2012) 342 ITR 169 / 206 Taxman 207 / 75 DTR 65 / 252 CTR 187 (Delhi)(HC)

S. 68 : Cash credits - Burden of proof - Identity - Evidence cannot be disregarded without bringing any evidence contrary

Once the assessee produces adequate evidence which prima facie discharge the burden of proving identity, creditworthiness of the shareholders and genuineness of transaction, in facts of such a case if the Revenue authorities want to discard these evidences as 'created evidences' the Revenue should make through probe so as to nail the assessee under section 68 of the Act. (A.Y. 2004-05, 2006-07)

CIT v. Kamdhenu Steel & Alloys Ltd. (2012) 68 DTR 38 / 248 CTR 33 / 206 Taxman 254 (Delhi)(HC)

S. 68 : Cash credits - Credit in capital account of partner - Addition cannot be made in the hands of firm

The Tribunal treated the credit in capital account of partners at the time of formation of partnership as cash credits in the hands of firm. On appeal by the assessee, the Court held that credit in capital account of partner, being at the time of formation of partnership firm, the firm could not have any income at the time of formation and therefore no addition under section 68 could be made in the hands of firm. (A.Y. 1991-92)

Abhyudaya Pharmaceuticals v. CIT (2013) 350 ITR 358 / (2012) 72 DTR 59 (All.)(HC)

S. 68 : Cash credits - Share application money - Identity of share applicant - Cannot be assessed as cash credits

Where the assessee company had disclosed the identity of the share applicatn's, their source of investment and their creditworthiness, share application money cannot be added in the hands of the assessee company under section 68 of the Act as undisclosed income of the Company.

CIT v. LDK Shares & Securities (P) Ltd. (2012) 71 DTR 371 (All.)(HC)
CIT v. LDK Builders (P) Ltd. (2012) 71 DTR 371 (All.)(HC)

S. 68 : Cash credits - Affidavit - Source of income - Addition deleted as no independent inquiry was made by Assessing Officer to disprove the creditworthiness of creditors

Where no independent inquiry was made by Assessing Officer to disprove the creditworthiness of creditors, as established by affidavits and statements showing source of income, etc. Thus, CIT(A) justified in deleting the addition under section 68. (A.Y. 1990-91)

CIT v. Abdul Aziz (2012) 251 CTR 58 / 72 DTR 216 / 207 Taxman 62 (Mag.)(Chattisgarh)(HC)

S. 68 : Cash credits - Burden of proof

Order of CIT(A) deleting addition was upheld by Tribunal after finding that the assessee had submitted the copies of returns, the computations of income, and the balance sheets of creditors and also supplied all their particulars; that the money given to the assessee had been shown in the respective balance sheets of the creditors; and that the creditors who were called by the Assessing Officer did affirm the fact of giving money and explained the source. Tribunal also found that the

circumstances of deposit of cash in the bank accounts of some of the creditors before giving the cheques to the company by itself, would not lead to the conclusion that the money was deposited by the assessee company. On the question as formulated in the present case, there is no reason to enter into the factual inquiry so as to appreciate and evaluate the evidence over again. No substantial question of law arises. (A.Y. 1994-95)

CIT v. H. S. Builders (P.) Ltd. (2012) 78 DTR 169 / 254 CTR 542 / 211 Taxman 116 (Mag.)(Raj.)(HC)

S. 68 : Cash credits - Gift - NRE - Additions cannot be made merely because entire transcript of NRE account was not furnished

Return filed by donor and his wife on the face of record reveals the creditworthiness of the donor which according to admitted fact on record is US$ 1.16 lacs. Once genuineness of return is not in dispute then there appears to be no reason to disbelieve that the amount was paid by donor. Once the income of the donor has not been disbelieved by the assessing authority then payment of meagre amount of Rs. 10 lacs by donor should not be doubted. Merely because the entire transcript of NRE account was not furnished shall not make out a case to disbelieve the amount paid by donor to the assessee. Tribunal was therefore justified in deleting the addition. (A.Y. 1996-97)

CIT v. S. K. Jain (2012) 79 DTR 220 / 254 CTR 652 / (2013) 214 Taxman 10 (Mag.)(All.)(HC)

S. 68 : Cash credits - Share application money - Despite PAN & Bank details, addition of share allotment money valid if applicants do not respond to summons.

The assessee, a company, received Rs. 35 lakhs towards share allotment. As the shareholders did not respond to summons, the Assessing Officer assessed the said sum as an unexplained credit under section 68. On appeal, the CIT(A) and Tribunal relied on CIT v. Lovely Exports (2008) 216 CTR 195 (SC) & CIT v. Divine Leasing & Finance Ltd. (2008) 299 ITR 268 (Delhi) held that as the assessee had furnished the PAN, bank details and other particulars of the share applicants, it had discharged the onus of proving the identity and credit-worthiness of the investors and that the transactions were not bogus. It was also held that the Assessing Officer ought to have made enquiries to establish that the investors had given accommodation entries to the assessee and that the money received from them was the assessee's own undisclosed income. On appeal by the department to the High Court, held reversing the CIT(A) & Tribunal:

Though in previous decisions (Lovely Exports) it was held that the assessee cannot be faulted if the share applicants do not respond to summons and that the Revenue authorities have the wherewithal to compel anyone to attend legal proceedings, this is merely one aspect. An assessee's duty to establish the source of the funds does not cease by merely furnishing the names, addresses and PAN particulars, or relying on entries in the Registrar of Companies website. The company is usually a private one and the share applicants are known to it since the shares are issued on private placement basis. If the assessee has access to the share applicant's PAN or bank account statement, the relationship is closer than arm's length. Its request to such concerns to participate in income tax proceedings, would, from a pragmatic perspective, be quite strong. Also, the concept of "shifting onus" does not mean that once certain facts are provided, the assessee's duties are over. If on verification, the Assessing Officer cannot contact the share applicants, or the information becomes unverifiable, the onus shifts back to the assessee. At that stage, if it falters, the consequence may well be an addition under section 68 (A. Govindarajulu Mudaliar v. CIT (1958) 34 ITR 807 (SC) followed). (A.Y. 2004-05)

CIT v. N. R. Portfolio Pvt. Ltd. (2012) 83 CCH 142 (Delhi)(HC)

S. 68 : Cash credits - share application money - Shares were purchased in the name of some persons and money was contributed by others - Hence addition was held to be not justified

Only in cases where there are no existing persons having a link with the deposit in the sense that it is not a case of benami transaction and the very existence of such persons is in question, the amount can be treated as undisclosed income. However, in a case of benami transaction where the shares are shown in the name of one person whereas the money might have been provided by some other person, the credit entries are not to be treated as undisclosed income of the company. In the instant case, enquiry was conducted regarding share applicants of the assessee company who were stated to be spread over several cities. As regards the enquiry made at Jaipur, some of the shares were transferred to one P. There are no details as to how many shares stood in the name of P. This requires enquiry at the hands of the Assessing Officer. Amount which is referable to the shares transferred to P has to be necessarily excluded from the undisclosed income of the company. Only the unexplained balance amount not standing in the name of any existing person can be treated as undisclosed income of the assessee company. As far as the enquiry at Thanjavur is concerned, the share applications were in the name of M who happened to be the brother of C, one of the directors of the company, while the shares were allotted to C. Amount deposited by M could not be treated as undisclosed income at the hands of the company. As regards the enquiry made at Chennai, a sum of Rs. 1,70,000/- remains unexplained by the assessee. Barring this amount, the remaining amount of Rs. 1,41,000/- merits to be treated as explained. Once the assessee has not substantiated its case before the Assessing Officer as to certain persons who had ostensibly made applications for allotment of shares and contributed money, Assessing Officer rightly took recourse to s. 68 and treated the unexplained amount as the hands of the assessee. (Block Period 24th Feb., 1988 to 24th Feb., 1998)

Rajani Hotels Ltd. v. Dy. CIT (2012) 79 DTR 185 (Mad.)(HC)

S. 68 : Cash credits - Gift - No occasion - Gifts could have been given without any occasion and only for the love and affection with the assessee. Deletion was held to be justified

Assessee had filed relevant documents viz. gift deeds, bank accounts of the donors, bank statement of the donors, directorship/partnership, income of the donors and passports of the donors. CIT(A) as well as Tribunal both were satisfied with regard to identity and creditworthiness of the donors and genuineness of the gifts. Tribunal was also satisfied that there is no room to doubt about love and affection of the donors with the assessee as donors were brothers of the assessee. Therefore, gifts could have been given without any occasion and only for the love and affection with the assessee. It was held that Tribunal was therefore justified in deleting addition finding of fact of both the authorities below cannot be interfered with. (A.Y. 2006-07)

CIT v. Arun Kumar Kothari (2012) 254 CTR 648 / 79 DTR 193 (Raj.)(HC)

S. 68 : Cash credits - Purchase of properties - Confirmation, address was furnished, addition was not justified

Assessee-company purchased six properties. It claimed that sale consideration on its behalf was paid by proprietary concern belonging to one of directors of assessee-company. Assessee filed all necessary documents including confirmation from said director, PAN, complete address, copies of returns of proprietary concern and director and sources of investment made by director. Assessing Officer concluded that genuineness of source of funds made available to assessee had not been proved and added back amount of sale consideration to income of assessee as unexplained cash credit under section 68. Appellate authorities deleted impugned addition holding that assessee had discharged its onus of proving that funds were received. On appeal by revenue the Court held that, orders of appellate authorities did not call for interference. Hence appeal of revnue was dismissed. (A.Y. 2007-08)

CIT v. Khoobsurat Resorts (P.) Ltd. (2012) 211 Taxman 510 / (2013) 256 CTR 371 / 82 DTR 290 (Delhi)(HC)

S. 68 : Cash credits - Filed balance sheet, appeared before Assessing Officer, deletion of addition held to be justified

Tribunal deleted addition on account of cash credits noting that assessee had submitted accounts of returns, computations of income, and balance-sheets of creditors and also supplied all their particulars, that money given to assessee had been shown in respective balance-sheets of creditors, and that creditors who were called by Assessing Officer did affirm fact of giving money and explained source. Findings of Tribunal being based on appreciation of evidence and relevant considerations and not shown to be perverse could not be interfered with. (A.Y. 1994-95)

CIT v. H. S. Builders (P.) Ltd. (2012) 78 DTR 169 / 254 CTR 542 / 211 Taxman 116 (Mag.)(Raj.)(HC)

S. 68 : Cash credits - Burden of proof - Genuineness not established addition confirmed

Assessee-company had taken unsecured loans from eight different trusts. One 'R' was common managing trustee of all these trusts. He was also managing director of assessee-company and other directors were his close relatives. 'R' did not produce trust deeds, its objects, and beneficiaries of trusts to establish that there were beneficiaries other than him and his associates. Trusts were receiving cash donations, which were transferred on same day to assessee by way of cheques. Assessee did not prove that trusts had any other sources of fund or that they had given credits to any other person or company. Method and manner adopted by assessee clearly established that he was playing a fraud with revenue. Since genuineness of transactions were not established at all, there was no question of shifting burden under section 68 on revenue. Therefore, addition of unsecured loans to income of assessee was justified. (A.Y. 2003-04)

CIT v. Hindon Forge (P.) Ltd. (2012) 76 DTR 383 / 211 Taxman 113 (Mag.)(All.)(HC)

S.68: Cash credits- Non-resident-Amounts transferred from own foreign bank account addition can not be made.

The assessee non-resident has demonstrated that transfer of his own funds from foreign bank accounts maintained for the investment and business activities carried out in those countries , no addition can be made under section 68 .(A.Y. 2004-05)

Suresh Nanda v. ACIT (2012) 53 SOT 322/(2013) 90 DTR 225 (Delhi)(Trib.)

Editorial: Affirmed in CIT v. Suresh Nanda (2013) 90 DTR 283 (Delhi)(HC)

S. 68 : Cash credits - Sundry creditors - Outstanding balance - Outstanding in balance sheet - Additions cannot be as cash credits

Assessing Officer disallowed the sundry creditors holding that the assessee could not furnish complete names, addresses and PANs of all sundry creditors. The assessee contended that these creditors were petty karigars engaged in doing job work for assessee pertaining to very old period and since said records had been destroyed in fire assessee was not in a position to get these outstanding creditors verified further the reading results have been accepted. Tribunal held that taking in to consideration all facts, addition cannot be made as cash credits by invoking deeming fiction under section 68. (A.Y. 2001-02)

Dy. CIT v. Divine International (2012) 134 ITD 148 (Delhi)(Trib.)

S. 68 : Cash credits - Opening balance - Loan- Loan confirmation filed addition cannot be made as cash credits

Assessee has taken loan from various parties. Assessee filed the confirmation letters, all loans were by account payee cheques and the lenders were employed abroad. The Tribunal held that the assessee has discharged the burden hence addition cannot be made under section 68. As regards loan taken in earlier year addition cannot be made for the relevant year. (A.Y. 2006-07)

ITO v. Nasir Khan J. Mahadik (2012) 134 ITD 166 (Mum.)(Trib.)

S. 68 : Cash credits - Capital contribution - Partners - Addition cannot be made in the assessment of firm

Assessee firm received Rs. 7.15 lakhs as fresh capital contributions from its four partners and furnished copies of capital account of partners, their individual cash books, pass books and statement, their balance sheets computation of income and income tax returns. Assessing Officer treated the said amount as unexplained cash credits on the ground that the assessee did not furnish source of cash credit in cash book of partners. The Tribunal held the assessee has discharged the initial onus laid upon it by filing various documents. The Tribunal further held that if the Assessing Officer is doubting the genuineness the same could be considered in hands of partners and not in the assessment of firm. (A.Y. 2005-06)

ACIT v. Megh Malhar Developers (2012) 134 ITD 437 (Ahd.)(Trib.)

S. 68 : Cash credits - Firm - Partner - Loan - Capital introduced by partners addition cannot be made in the hands of firm

The Tribunal held that in respect of capital introduced by the partners, the Assessing Officer is entitled to proceed against partners and assess the sum in their hands, if their explanation was not found satisfactory, but addition cannot be made in the hands of firm. As regards loan from third parties the assessee has filed confirmation, PAN and acknowledgement of income tax return. The Assessing Officer has not made any enquiry, the Tribunal held that the assessee has discharged the burden and hence additions cannot be made under section 68. (A.Y. 2005-06)

Sarjan Corporation v. ACIT (2012) 14 ITR 140 (Ahd.)(Trib.)

S. 68 : Cash credits - Share application money - Identity - Identity of share applicants were not established hence addition was up held

The assessee is a Pvt. Ltd. company engaged in the trading business in coal. It was found that Hindustan Continental Ltd. (HCL) had applied for 40000 share application on face value of Rs. 10 each and premium of Rs. 90 per share. Similarly the Optimates Textile Industries Ltd. (OTL) also applied for 10000 shares. Both the parties are from Indore. The Assessing Officer referred the matter to Assistant Commissioner Indore to verify the genuineness of parties. The investigation carried out by the Officials of Indore; it was found that the parties were not in existence. The Assessing Officer held that as the assessee has failed to establish identity of share applicants the addition was made under section 68. On appeal the Commissioner(Appeals), up held the addition. On appeal to the Tribunal, the Tribunal held that since the identity of share applicants had not been established, the initial onus laid down under section 68 had not been discharged and thus addition made to be up held. The ratio of Supreme Court in CIT v. Lovely Exports (P) Ltd. (2008) 216 CTR 195 / 6 DTR 308 (SC) cannot be applicable. (A.Y. 2004-05 to 2006-07)

Agarwal Coal Corporation (P) Ltd. v. Addl. CIT (2012) 135 ITD 270 / (2011) 142 TTJ 409 / 63 DTR 201 (Indore)(Trib.)

S. 68 : Cash credits - Share application money - Identity - Identity proved and filed confirmation vide PAN, addition cannot be made

Four companies had invested in equity shares of assessee Company. All the above four companies had issued confirmation letters regarding purchase of shares from assessee and they also quoted their PAN. The assessee had also submitted resolution of board of director of each Company regarding investment in purchase of equity share of assessee and copy of their bank account's indicating availability of funds for purchase of shares. In view of the above facts, no addition could be made under section 68 of the Act as assessee had proved identity of four companies, genuiness and creditworthiness of companies. (A.Y. 2006-07)

ACIT v. Hitkarni Prakashan Limited (2012) 49 SOT 28 (URO) / (2011) 135 TTJ 12 (UO)(Jabalpur)(Trib.)

S. 68 : Cash credits - Balance sheet - Unclaimed liability - Old unclaimed liability in balance sheet for more than one year, no credit made in the books of accounts, held no addition to be made

The provisions of section 68 of the Act, held to be inapplicable in case where there are unclaimed liabilities lying in the Balance Sheet of the assessee for more than one year and no credit for the same have been made in the books of accounts. (A.Y. 2007-08)

Dy. CIT v. Eastern Medikit Ltd. (2012) 135 ITD 461 / 71 DTR 241 / 146 TTJ 551 / 18 ITR 457 (Delhi)(Trib.)

S. 68 : Cash credits - Gift - None of the donors being available at the addresses given in their returns or PAN cards - Addition is held to be justified

Where none of the donors being available at the addresses given in their returns or PAN cards, Assessing Officer was justified in making addition of alleged gifts under section 68 for failure of assessee to produce the donors though assessee produced their acknowledgements, PAN cards, IT returns, Bank Passbooks, etc. (A.Y. 2002-03)

Prakashchandra Singhvi (HUF) v. ITO (2012) 134 ITD 283 / 146 TTJ 121 / 69 DTR 276 (Ahd.)(Trib.)

S. 68 : Cash credits - Undisclosed income - Burden on department to show that the investment made by the subscribers actually emanated from the coffers of the assessee

Where the assessee discharged the onus by establishing the identity of the shareholder and along with the nature and source of the money. The assessee also filed the confirmation letter, also it was accepted by the Assessing Officer in the assessment order that identity of share applicant was not in doubt. Thus addition under the said provision was deleted relying on the judicial pronouncement that the department must show that the investment made by the subscribers actually emanated from the coffers of the assessee and then to be treated as undisclosed income under section 68. (A.Y. 2006-07)

ACIT v. ETC Industries Ltd. (2012) 52 SOT 159 / 150 TTJ 527 / 79 DTR 391 (Indore)(Trib.)

S. 68 : Cash credits - loan received from directors - No addition where assessee proved the identity as well as creditworthiness of the lenders who are its directors

The assessee received loans during the year from three directors. Assessing Officer though treated majority of loans as genuine, but made part addition of part amount as these amounts are deposited in cash in bank account of creditors. It was held that the assessee having proved the identity as well as creditworthiness of the lenders who are its directors, addition under section 68 could not be made in respect of part of the deposits simply because cash deposit of similar amounts were made in the accounts of the lenders. (A.Y. 2003-04)

Moongipa Investment Ltd. v. ITO (2012) 147 TTJ 378 / 70 DTR 132 (Delhi)(Trib.)

S. 68 : Cash credits - Loans - PAN - Lender assessed to tax and confirmation is filed addition is held not justified

Assessing Officer treated cash credits in name of one 'G' as unexplained cash credits. Commissioner(Appeals) deleted addition on grounds that 'G' had furnished required certificate before Assessing Officer and latter did not consider same, that 'G' was assessed to income-tax and that he had confirmed loan granted to assessee and quoted his PAN number. Since Commissioner(Appeals) had decided issue on foundation of requisite material on record, he was justified in his action. (A.Y. 2006-07)

ITO v. Bhagwan Dass (2012) 137 ITD 120 / 17 ITR 446 / 147 TTJ 41 (UO)(Chd.)(Trib.)

S. 68 : Cash credits - Loans - Account payee cheque - Assessee need not prove the source of source

Assessee-firm was engaged in business of manufacture of sugar. During previous year, it obtained loans from parties by means of cheques. Assessing Officer accepted part of loans and treated balance amount as unexplained cash credits and added same to income of assessee. Record showed that creditors had explained sources of their deposits in bank. No material was brought on record by Assessing Officer to show that assessee had any other source of income which could have been routed in form of loan given by a third party. On other hand interest payable by assessee on said loans was allowed by Assessing Officer. Held that since initial onus placed upon assessee stood discharged and there was no material to prove that sources explained by creditors were not genuine. Assessing Officer was not justified in calling upon assessee to prove source of source. Therefore, impugned addition made under section 68 was liable to be deleted. (A.Y. 2005-06)

Dwarikadhish Sugar Industries v. ITO (2012) 137 ITD 200 / 149 TTJ 401 / 77 DTR 40 (TM)(Luck.)(Trib.)

S. 68 : Cash credits - Loans - Examination of creditors - Addition made on assumption without examining the creditors is held to be not justified

Assessee received unsecured loans from three parties through account payee cheques. Assessee proved identity, genuineness of transactions and also creditworthiness of creditors by producing their respective bank accounts. Assessing Officer did not examine creditors and made addition on assumption that they would not have saved any money to advance loans. Held that, the Assessing Officer should not have come to any conclusion without examining the cash creditors. The assessee cannot be aware of the source of creditors, which would be within the personal knowledge of the creditors. Mere doubt with regard to the creditworthiness should not automatically reflect in disbelieving the case of the assessee to make addition under section 68 without showing that the assessee would have earned more income from any specific source, in the light of the expression may' used in section 68. In the instant case, the Assessing Officer examined the books of account of the assessee but did not make any comment on possibility of earning of any additional income from trading business or from any other source and, thus, addition cannot be made in a routine manner. (A.Y. 2006-07)

Vishnu Jaiswal v. CIT(A) (2012) 137 ITD 259 / 76 DTR 265 / 149 TTJ 165 (TM)(Luck.)(Trib.)

S. 68 : Cash credits - Bank pass book - Income from undisclosed source - Addition held to be justified as the bank has acknowledged that assessee has an asset in the form of credit in the pass book [S. 69]

The amount was credited in the pass book of assessee. The Judicial member held that as the amount was credited in the pass book maintained by Bank hence provision of section 68 is not applicable. As there was difference of opinion the matter was referred to third member. The third member held that it cannot be said that assessee has not maintaining books of account in respect of passbook entries pertaining in her individual bank, hence the addition was held to be justified. The third member also held that addition is also justified under section 69, as the assessee has not proved the source of gift in her bank account and the bank has acknowledged that assessee has an asset credited in bank account of assessee. (A.Y. 2003-04)

Renu Agarawal (Smt.) v. ITO (2012) 136 ITD 343 / 148 TTJ 169 / 75 DTR 48 (TM) (Agra)(Trib.)

S. 68 : Cash credits - Creditworthiness of creditor and genuineness of transaction proved, all documents produced, no addition warranted

The assessee received loan amount through cheques from two persons. It was held that no addition under section 68 can be made where the assessee has proved the creditworthiness of the creditor and

genuineness of the transaction by producing copy of PAN, copy of ration card, copies of Income-tax returns and return of wealth tax. (A.Y. 2003-04 & 2004-05)
Abhik Jain v. ITO (2012) 18 ITR 497 (Delhi)(Trib.)

S. 68 : Cash credits - Gift received from non-relative - No occasion of gift and no reciprocity of gift, hence addition sustained
The assessee, in the instant case received certain amount as gift. The Tribunal confirmed the addition made under section 68 on the ground that the assessee had received a gift from a person who was not related to the assessee. There was no occasion for the gift whatsoever and there was no reciprocity of gifts between the donor and the assessee. (A.Y. 2002-03)
Saroj Bala v. ITO (2012) 18 ITR 411 (Delhi)(Trib.)

S. 68 : Cash credits - Payment of school fees paid by mother-in-law - No details or proper evidences provided - Addition sustained
In the instant case a sum was paid by the mother-in-law of the assessee as school fees. The confirmation letter of the assessee's mother in law did not mention the amount paid by her nor give details of her bank account or the mode of payment. The assessee had not filed any other corroborative evidence to substantiate his claim that the payment of school fees had been made by his mother-in-law. The assessee could not supply before the Tribunal the copy of the bank statements from which the amount had been transmitted to India. The onus was on the assessee to explain the sources from which the payment of school fees had been made. The assessee had failed to discharge the onus and the addition was liable to be confirmed. (A.Y. 2005-06)
Jackie Shroff v. ITO (2012) 19 ITR 83 (Mum.)(Trib.)

S. 68 : Cash credits - Failure to prove identity of shareholders - Addition sustained
Where assessee-company failed to prove identity of alleged shareholders and, moreover, it was also apparent that amount was deposited in bank accounts of those investors immediately prior to issuing cheques to assessee, Assessing Officer was justified in making addition under section 68 in respect of share capital. (A.Y. 2007-08)
Vaibhav Cotton (P) Ltd. v. ITO (2012) 139 ITD 264/(2013) 153 TTJ 341 (Indore)(Trib.)

S. 68 : Cash credits - Repayment in next year - Matter remanded
Assessee filed its return wherein certain amount was shown payable under head 'sundry creditors' and 'hire charges'. Assessing Officer added said amount to assessee's income under section 68. Commissioner(Appeals) finding that assessee had made payment to said creditors in subsequent year, deleted addition. The Tribunal held that even though subsequent payment by assessee was a relevant factor, yet in absence of confirmations from concerned creditors, matter remained indeterminate and, thus, same was to be remanded back for disposal afresh. (A.Y. 2003-04)
Dy. CIT v. Verma Roadways (2012) 53 SOT 207 (URO)(Luck.)(Trib.)

S. 68 : Cash credits - Burden of proof - Burden is on assessee to prove genuineness of credits - Matter remanded
The assessee furnished the names and details regarding seven credits furnished, however no details furnished with regard to one credit. Details of seven creditors not verified. The Tribunal held that it is the duty of Commissioner(Appeals) to have got verification done. Matter remanded. (A.Y. 1990-91)
Siltex India v. ITO (2012) 20 ITR 300/(2013) 58 SOT 82 (URO)(Mum.)(Trib.)

S. 68 : Cash credits - Onus of proof - Donor giving different stand, addition cannot be made, without giving an opportunity of cross examination

Donor confirmed corpus donation made. Later on in some other proceedings donor denied this fact by stating that donation was given not by him but by other party who paid directly to assessee to resolve some land dispute. Since identity of creditor was accepted by Assessing Officer and transaction was through other party's pay order which was donated to assessee, genuineness and creditworthiness was proved. Since donor had first accepted to have given corpus donation, any different version given in some other proceedings in which he was not offered to be cross-examined, would not bind assessee, therefore, donation could not be added as unexplained cash credit under section 68. (A.Y. 2006-07 & 2007-08)

Chiranjiv Charitable Trust v. Dy. DIT (2012) 54 SOT 141 (URO)(Delhi)(Trib.)

S. 68 : Cash Credits - Onus of proof - Corpus donation - Confirmation filed, addition cannot be made as cash credit

Assessee received corpus donation by account payee cheque. Since donor was living abroad he could not be produced. However, to prove donation, assessee filed all necessary documents, i.e., original confirmation, donation receipt, copy of cheque bearing donor's name and bank account number, donor's address and fact about his being abroad. Since assessee had discharged primary onus of leading evidence for identity of donor and his creditworthiness, assessee could not be saddled with addition under section 68. (A.Y. 2006-07 & 2007-08)

Chiranjiv Charitable Trust v. Dy. DIT (2012) 54 SOT 141 (URO)(Delhi)(Trib.)

S. 68 : Cash credits - Burden of proof - Banking business - Proof of address, proof of identity and photographs of applicant as stipulated by RBI in KYC norms were furnished, addition cannot be made as cash credit

Assessee-co-operative society was carrying on banking business for its own members only. All columns of application forms were filled by members and requisite supporting documents, i.e., proof of address, proof of identity and photographs of applicant as stipulated by RBI in KYC norms were furnished. It was not obligatory for assessee to go into checking address and creditworthiness and other proof of identity given by depositors. It was to be held that assessee had discharged onus of proof in respect of identity and genuineness of transactions. Amounts in accounts maintained by assessee were deposits of customers and not under control of assessee, and, therefore, provisions of section 68 were not applicable to assessee. On facts, addition of deposits of members of assessee could not be made merely because addresses of some customers were incomplete or because same members/depositors could not be contacted at given address. (A.Y. 2007-08)

Citizen Co-op. Society Ltd. v. Addl. CIT (2012) 54 SOT 196 (URO)(Hyd.)(Trib.)

S. 68 : Cash credits - Gift - NRI donors - No relationship - No occasion - No evidence - Addition held to be justified

Assessee received gifts from certain NRI donors. There was no relationship between assessee and donor. No occasion was also specified for making gifts. Moreover no evidence had been furnished to prove identity, creditworthiness and genuineness of alleged gift Addition was rightly made as cash credits. (A.Y. 1994-95)

Miter Sain (HUF) v. ITO (2012) 54 SOT 202 (URO)(Delhi)(Trib.)

S. 69 : Unexplained investments - Survey - Statement - Survey does not empower any ITO to examine any person on oath, statement recorded under section 133A has no evidentiary value addition cannot be made merely on the basis of such statement [S. 133A]

The Tribunal deleted the addition made by the Assessing Officer on the basis of statement recorded during the survey proceedings. In an appeal before the High Court, the High Court by passing a detailed order and referring the circular of Board dated 10th March, 2003 has held that merely on the basis of statement recorded in the Course of survey, which was retracted subsequently addition cannot

be made. High Court explained the difference between section 132(4) and section 133A. High Court held that statement obtained under section 133A would not automatically bind upon the assessee and confirmed the order of Tribunal. On appeal by the Department to the Apex court the Court held that in view of the concurrent findings of fact, the civil appeal of department was dismissed. (A.Y. 2001-02)

CIT v. S. Khader Khan Son (2012) 210 Taxman 248 / 79 DTR 184 / 254 CTR 228/(2013) 352 ITR 480 (SC)

Editorial:- View of Madras High Court in CIT v. S. Khader Khan Son (2008) 300 ITR 157 (Mad.) affirmed.

Instruction No. F. No 286/2/2003 - IT (Inv.) dt. 10-3-2003 (April 2003 AIFTP Journal P. 25)

S. 69 : Unexplained investments - Disclosure - Loose paper - Statement under section 132(4) - Addition on the basis of loose papers found was confirmed

The Assessing Officer has made addition on the basis of loose papers found and the statement jointly signed by the assessee. On appeal Commissioner(Appeals) deleted the addition on the ground that the person who has given the statement did not appear before the Assessing Officer for cross examination. Tribunal held that loose paper was signed by assessee and that it is indicative of the fact that the impugned amount was given as loan by assessee. On appeal, High Court held that the Tribunal has decided the issue based on factual aspects and therefore the order of Tribunal was up held.

Bhanuvijaysingh M. Vachela deceased, through Legal Heir v. ITO (2012) 65 DTR 201 / 246 CTR 274 (Guj.)(HC)

S. 69 : Unexplained investments - Reference to DVO under section 142A [S. 142A]

Assessing Officer is first required to reject the books of account before making a reference to the valuation officer under section 142A; Assessing Officer having not mentioned at any stage that the assessee's books of account are defective or that the cost of construction as shown in the books of account is not the true cost of construction there was no occasion for the Assessing Officer to make reference to the valuation office report made by the valuation officer pursuant to such invalid reference could not have been made the basis of the addition under section 69. (A.Y. 1989-90)

Goodluck Automobiles (P) Ltd v. ACIT (2012) 78 DTR 104 / 254 CTR 1 (Guj.)(HC)

S. 69 : **Unexplained investments - Capital gains - No other material except report of valuation cell - Report of valuation cell not on record - Reference - Question returned unanswered**

The assessee purchased three properties and sold them, declared capital gains for the A.Y. 1990-91 and 1994-95. The Assessing Officer referred the matter to the valuation cell and recomputed the purchase price and sale price. The Tribunal held that no incriminating material was found during the course of search and the transactions were duly reflected in the returns filed by the assessee in the normal course. It pointed out that except for the valuation officer's report, there was no other material to establish that the assessee had made investment from undisclosed sources or had received under hand consideration. Held, that the revenue had not placed on record the valuation officer's report and in the absence of the data and material, it was impossible to verify whether or not the findings recorded by the Commissioner(Appeals) and the Tribunal were perverse. In the absence of details and material on record question could not be answered. (Block period 1988-89 to 1998-99)

CIT v. A. K. Jain (2012) 349 ITR 236 (Delhi)(HC)

S. 69 : Unexplained investments - Firm - Partner - Capital - Addition cannot be made in the assessment of firm [S. 68]

Initial capital introduced by partners before commencement of business of firm, could not be treated as undisclosed income of assessee-firm even if the Assessing Officer was not satisfied with the

explanation offered by firm explaining the source of said income. At the most the addition could be made in hands of individual partners of firm. (A.Y. 2004-05)
G. L. Foods v. ITO (2012) 134 ITD 159 (Luck.)(Trib.)

S. 69 : Unexplained investments - Unexplained investment in plot - Merely on the basis of draft agreement additions cannot be made
Alleged amount of Rs. 1.85 crores cannot be said to have been paid by the assessee merely on the basis of the draft agreement and the papers found at the time of survey; when it was established that said deal was finally closed as per revised agreement and there was no evidence to show payment of Rs. 1.85 crores by assessee or his family members. (A.Y. 2007-08)
Dy. CIT v. Rajat Agarwal (2012) 68 DTR 58 / 144 TTJ 753 (Jaipur)(Trib.)
S. 69 : Unexplained investments - Unaccounted income - Statement - In the absence of evidence, mere statement of DGM of company surrendering deficit for cash, is not a ground to sustain addition. [S. 132(4)]
Detection of shortage in cash ipso facto does not lead to inference of earning unaccounted income and, therefore, in absence of any evidence of undisclosed income, mere statement of Director cum DGM (finance) of the assessee company surrendering the deficit of cash for taxation during the survey proceedings cannot be a ground for sustaining the addition. (A.Y. 2007-08)
Dy. CIT v. Eastern Medikit Ltd. (2012) 135 ITD 461 / 71 DTR 241 / 146 TTJ 551 / 18 ITR 457 (Delhi)(Trib.)

S. 69 : Unexplained investments - On money on sale of land - No opportunity of cross examine to director, no incriminating documents provided to the assessee, as there was violation of principle of natural justice addition was not justified
Addition of on-money, allegedly received by the assessee on the sale of land merely by relying on the documents found and seized from the group concern of the purchaser company and the statement made by a director thereof, without allowing the assessee to cross examine the said director or other concerned persons and without providing the incriminatory documents to the assessee is violative of principles of natural justice and therefore, same cannot be sustained. (A.Y. 2008-09)
Sunita Dhadda (Smt.) v. Dy. CIT (2012) 148 TTJ 719 / 71 DTR 33 (Jaipur)(Trib.)
Dy. CIT v. Sunita Dhadda (Smt.) (2012) 148 TTJ 719 / 71 DTR 33 (Jaipur)(Trib.)

S. 69 : Unexplained investments - Payment of on-money for purchase of property - Handwritten loose document found at the premises of a third party does not bear the date of the alleged payments and the name of the assessee hence no addition is to be made
Handwritten loose document found at the premises of a third party which does not bear the date of the alleged payments and the name of the assessee cannot be the basis for making addition on account of payment of on-money for purchase of property in the absence of any corroborative material to suggest that the assessee has actually paid on-money. (A.Y. 2003-04)
K. V. Lakshmi Savitri Devi (Smt) v. ACIT (2012) 148 TTJ 517 / (2011) 60 DTR 148 (Hyd.)(Trib.)

S. 69 : Unexplained investments - Money received under Will - Genuineness of Will cannot be doubted when direct evidence available, addition deleted
In the instant case, the assessee received money from father in law under a will. The Assessing Officer made an addition doubting the genuineness of the Will. It was held that when direct evidence is available on Will, issue could not be decided on assumption without contrary statements on record. Thus, addition was deleted. (A.Y. 1996-97 to 2001-02)
Rama Yadav v. ACIT (2012) 53 SOT 22 (Delhi.)(Trib.)

S. 69A : Unexplained money - Sale of shares - Short term capital gains - Addition as income from undisclosed source was confirmed

Assessee has shown the profit on sale of shares, the Court observed that the sale of Shares were not listed. It was also observed that the sale had taken place in 1998 and payment was received by the assessee was in next year. No explanation was offered as to why the payment was delayed about one year and three months. The Court held that purchase and sale of shares was not genuine and addition as undisclosed income was justified. (A.Y. 1997-98)

CIT v. Rana Gurjit Singh (2012) 340 ITR 108 / 75 DTR 376 (P&H)(HC)

S. 69A : Unexplained money - Opportunity of hearing - Natural justice - Matter remanded [S. 132]

On basis of search conducted against third person and his statements recorded therein, assessment of assessee was reopened and additions were made under section 69A. Tribunal deleted additions on ground that Assessing Officer violated principles of natural justice as assessee was not provided with statements and materials on basis of which additions were made. Though Tribunal's reasoning about denial of opportunity to assessee could not be faulted with, but in light of decision of Supreme Court in ITO v. M. Pirai Choodi (2011) 334 ITR 262 / 20 taxmann.com 733, matter was to be remitted back for fresh consideration by Assessing Officer who would proceed to make available necessary documents adverse to assessee. Matter remanded.

CIT v. PC Chemicals (2012) 211 Taxman 166 (Delhi)(HC)

S. 69A : Unexplained money - Confessional statement - Shifting stand - Addition cannot be made merely on the basis of shifting stand and confessionary statement made by assessee, low tax morality of assessee not a basis of making addition

Where addition under Section 69A was sustained merely on the shifting stand and confessionary statement furnished by the Director-cum-DGM (Finance) of the assessee and not on the evidence on record, it was held by the Tribunal that, low tax morality displayed by the assessee cannot be the basis of addition. (A.Y. 2007-08)

Dy. CIT v. Eastern Medikit Ltd. (2012) 135 ITD 461 / 71 DTR 241 / 146 TTJ 551 / 18 ITR 457 (Delhi)(Trib.)

S. 69A : Unexplained money - Jewellery - HUF - Reasonable amount of jewellery may be accepted as accumulated and explained and additions cannot be made

Assessee HUF neither furnished item-wise details of the jewellery owned by it nor adduced any reliable evidence to show that it was the owner and in possession of the jewellery on 31st March 2005, as it had filed the WT Return before an incompetent Assessing Officer and produced an undated valuation report, it could not be accepted that the whole of the jewellery was acquired by it from the deceased father of the Karta and, therefore, provisions of Section 69A are attracted to the sale proceeds of the jewellery and it is not assessable as capital gains; however, it would be reasonable to accept that jewellery was received by the assessee from the deceased and accumulated on other occasions and thus, only the remaining jewellery to be treated unaccounted. (A.Y. 2006-07)

Naveen Bansal (HUF) v. ITO (2012) 146 TTJ 207 / 69 DTR 193 (Delhi)(Trib.)

S. 69A : Unexpalined money - Jewellery - Amount invested in jewellery from non taxable funds cannot be assessed as income from undisclosed source [S. 9]

The assessee is non -resident and was living in Singapore. He has earned income which are not taxable in India. The assessee spent from non-taxable funds for gifting jewellary to his family members hence addition could not be made as un explained jewellery in hands of assessee. (A.Y. 2004-05 to 2009-10)

JCIT v. V. Deenadayalavel (2012) 52 SOT 511 (Chennai)(Trib.)

S. 69A : Unexplained money - Survey - Statement - Retraction - Addition made on the basis of purchaser which was retracted latter, addition was deleted [S. 133A]

A survey was conducted at the premises of the assessee firm, which was engaged in the construction of flats. In the course of the survey conducted in assessee's case, one of the purchasers of the flat made a statement that he had paid certain amount to assessee over and above the amount mentioned in the sale deed. On basis of the said statement, Assessing Officer made addition to assessee's income. Later on, the same purchaser of flat retracted from his aforesaid statement in course of the cross examination and revenue failed to bring on record any evidence showing that any amount in excess of sale deed have been paid to assessee firm. In view of the aforesaid fact the impugned addition made by the Assessing Officer under section 69A of the Act was deleted by the Tribunal. (A.Y. 2004-05)

Rajdeep Builders v. ACIT (2012) 52 SOT 62 (Chd.)(Trib.)

S. 69B : Amounts of investments not fully disclosed in books of account - Addition as unexplained investment in property was not justified

Section 69B in terms requires that the Assessing Officer has to first "find" that the assessee has "expended" an amount which he has not fully recorded in his books of account. It is only then that the burden shifts to the assessee to furnish a satisfactory explanation. A "finding" obviously should rest on evidence. In the present case, it is common ground that no incriminating material was seized during the search which revealed any understatement of the purchase price. That is precisely the reason why the Assessing Officer had to resort to Rule 3 of Sch. III to the WT Act. This rule does not even claim to estimate the "fair market value" of an asset; it merely lays down a procedure for computing the value of an asset for the purposes of the WT Act. There is a fundamental fallacy in invoking the provisions of the WT Act to the application of section 69B, notwithstanding that both the Acts are cognate and have even been said to constitute an integrated scheme of taxation. Section 69B does not permit an inference to be drawn from the circumstances surrounding the transaction that the purchaser of the property must have paid more than what was actually recorded in his books of account. Since the entire case has proceeded on the assumption that there was understatement of the investment, without a finding that the assessee invested more than what was recorded in the books of account, the decision of the IT authorities cannot be approved. Section 69B was wrongly invoked.

CIT v. Dinesh Jain (HUF) (2012) 79 DTR 457 / 211 Taxman 23 / 254 CTR 534/(2013) 352 ITR 629(Delhi)(HC)

CIT v. Dinesh Jain (2012) 79 DTR 457 / 254 CTR 534 / 211 Taxman 23/(2013) 352 ITR 629 (Delhi)(HC)

CIT v. Lata Jain (2012) 79 DTR 457 / 254 CTR 534 / 211 Taxman 23/(2013) 352 ITR 629 (Delhi)(HC)

S. 69B : Amounts of investments not fully disclosed in books of account - Cost of construction - Report of DVO - Addition was deleted [S. 142A]

In the absence of finding rejecting the accounts of the assessee reference to the DVO could not have been made by the Assessing Officer. That apart, variation between the total cost of construction disclosed by the assessee and that estimated by the DVO is only 3.86 per cent. This is a very minor variation having regard to the large amounts involved. Besides, since the Assessing Officer did not examine the variations with specific reference to any item of expenditure that was unreasonable or showed wide variation, this difference can also be attributed to differing perceptions and the practice adopted by the concerned business activity. Therefore, there is no infirmity in the findings of the Tribunal upholding the order of the CIT(A) deleting the impugned additions. No substantial question of law arises for consideration. (A.Y. 2002-03 to 2007-08)

CIT v. Ambience Developers & Infrastructure (P) Ltd. (2012) 79 DTR 373 / 254 CTR 527/210 Taxman 187(Mag.) (Delhi)(HC)

S. 69B : Amounts of investments not fully disclosed in books of account - Income from undisclosed sources - Purchase consideration - Stamp duty valuation - Section 50C is applicable to the seller of property and therefore addition cannot be made by invoking the section 50C in case of purchaser of property for the purpose of section 69B. [S. 48, 50C]

The assessee had acquired land. The Assessing Officer was of the view that market rate during the period cannot be less than the jantri price of land. He accordingly, taking into consideration the prevailing jantri price of land, estimated the undisclosed investment at Rs. 3,62,54,200/-. The Assessing Officer has thus relied on the jantri price and on that basis presumed that the amount expended is more than the amount recorded in the books. The Assessing Officer has failed to bring on record any material to support his estimated price, section 50C is a deeming provision whereunder the stamp duty rate is treated as full value of consideration for the purpose of computing capital gain under section 48. It is applicable to the seller of property and therefore cannot be invoked in case of purchaser of property for the purpose of section 69B. The CIT(A) has given a finding that the Assessing Officer has not made any independent enquiry or collected corroborative evidence to justify the addition. (A.Y. 2006-07)

Dy. CIT v. Virjibhai Kalyanbhai Kukadia (2012) 138 ITD 255 / 80 DTR 457 / (2013) 151 TTJ 219 (Ahd.)(Trib.)

S. 69B : Amounts of investments not fully disclosed in books of account - Purchase price - Purchase price cannot be estimated without any independent enquiry or corroborative evidence to support estimate [S. 50C]

Assessee had purchased agricultural land. Assessing Officer found that purchase price shown by assessee was quite low as compared to prevailing market price. Assessing Officer on basis of some other sale instances and also subsequent revised jantri fixed by Government, estimated purchase price and added difference to assessee's income. Where Assessing Officer had not made any independent enquiry or collected corroborative evidences to support estimation made by him no addition was called for. (A.Y. 2006-07)

Dy. CIT v. Vallabhbhai Purshottambhai Surani (2012) 54 SOT 556 (Ahd.)(Trib.)

S. 69C : Unexplained expenditure - Search and seizure - Cash flow statement - Order of High Court overruling the judgment of Commissioner(Appeals) and Tribunal was set aside and directed the Commissioner(Appeals) to decide on merit [S. 132(4), 158BB, 158BC]

High Court over-ruled the decisions of the Tribunal and Commissioner(Appeals) on factual aspects, stating that cash flow statements submitted by the assessee were not supported by documents. On appeal the Court held that High Court should have remitted case to Commissioner(Appeals) giving opportunity to assessee to produce relevant documents. Accordingly the order of High Court was set aside and the matter was remitted to the file of Commissioner(Appeals) to decide the appeal on merits. (A.Y. 1991-92, 1992-93 , 1996-97)

M. K. Shanmugam v. CIT (2012) 349 ITR 384 / 210 Taxman 574 / 254 CTR 317 / 79 DTR 286 (SC)

Editorial:- CIT v. M. K. Shanmugam (2011) 203 Taxman 94 / (2012) 349 ITR 369 / 254 CTR 318 / 79 DTR 269 (Mad.)(HC), set aside.

S. 69C : Unexplained expenditure - Purchases - Purchases recorded in the books of account though did not carry the address of parties can not be treated as unexplained purchases

During assessment proceedings, Assessing Officer found that for some of purchases effected by assessee, no details or address of vendors were available in purchase vouchers. He, therefore,

considered such purchases to be non-genuine and an addition was made on that account. Since purchases were recorded in books of account of assessee and were also shown in its stock, in such circumstances merely because those purchases did not carry full addresses of vendors, could not be a reason to treat said purchases as unexplained. Therefore, impugned addition made by Assessing Officer was to be deleted. (A.Y. 2008-09)

Dy. CIT v. Kirtilal Kalidas Jewellers (P.) Ltd. (2012) 54 SOT 529 (Chennai)(Trib.)

S. 70 : Set off loss - One source against income from another source - Same head of income - Beneficial method - Assessee can adopt which is most beneficial to him

The Assessing Officer computed short term capital gain and short term capital loss, suffered by assessee separately for the periods 1-4-2004 to 30-9-2004 & 1-10-2004 to 31-3-2005. He allowed the set off of the short term capital loss against, short term capital gains earned during 1-10-2004 to 31-03-2005 and levied the tax on the net short term capital gains. In appeal before the Commissioner(Appeals) the assessee submitted that as per section 70 assessee is entitled to set off loss under short term capital gains against income from short term capital gains. Section 70 nowhere provides that short term capital loss arising from STT paid transactions can only be set off against short term capital gains or long term capital gains. The Commissioner(Appeals) accepted the contention of assessee and allowed the appeal. On appeal to the Tribunal by revenue, the Tribunal held that since no particular mode or manner of set off is provided in Act, the assessing Officer should adopt that chronological order or manner which is most beneficial to assessee, relying on the Circular No. 26 (LXVGI-3 of 1955 dated 7-7-1955) (A.Y. 2005-06)

Dy. CIT v. Noble Enclave & Towers (P) Ltd. (2012) 50 SOT 5 (Kol.)(Trib.)

S. 71 : Set off loss - One head against income from another - Inter heads - Exempted income - Assessee is entitled to set off the loss incurred in an eligible industrial unit against the other incomes earned by the assessee [S. 10B, 70]

The assessee suffered loss in Unit eligible for deduction under section 10B and there was a business income in an another unit. The assessee set off the loss against the income of another unit. The Assessing Officer held that Income of EOU is exempt under section 10B, which did not form part of the total income, hence the loss is not allowed to be set off. On appeal the Commissioner(Appeals) confirmed the order of Assessing Officer. On appeal to the Tribunal, the Tribunal held that there is no restriction to set off the loss of the eligible industrial unit against the income earned by the assessee in any other Unit. Section 10B(6), which is a non-obstante clause which provides that loss referred in sub section (1) of section 72 or section 74(3) and section 74(1), in so far as such loss relates business undertaking eligible under section 10B, shall not be carried forward or set off where it relates to any of the A.Y. commencing before 1-4-2011, however, it is pertinent to note that provisions of section 70 or 71 have not been included in the non obstante provision, therefore, it cannot be said that the provisions of section 70 or section 71 cannot be applied in computing the total income of the assessee. Accordingly the Tribunal held that, loss in eligible unit for deduction under section 10B and there was a business loss as per section 70 and if after such set off still there is a business loss. Such loss can be set off against other sources as per section 71. (A.Y. 2007-08, 2008-09)

Bharat Resins Ltd. v. ACIT (2012) 50 SOT 298 (Ahd.)(Trib.)

S. 72 : Carry forward and set off - Business losses - Unabsorbed business loss - Unabsorbed business loss can be set off against income assessed under the head 'income from other sources' and 'income from house property'.

The assessee claimed the set off of business loss against the Income from other sources and income from house property. The Court held that while deciding the set off of the loss computed under the head "profits and gains business" against the profits and gains of business of assessee in the subsequent year, the condition that computation of the profits and gains of business carried on by

subsequent year should be under the head "profits and gains of business or profession" is consciously absent in section 72 of the Act, which means that it is not necessary that income against set off claimed in subsequent year, should be assessable under the head 'profits and gains of business'. Applying the commercial principles the income assessed under the head 'income from house property' and 'income from other sources' can be treated as the business income of the assessee, the same shall be eligible for set off against brought forward loss. (A.Y. 1995-96)

Lavish Apartmenr Pvt. Ltd. v. ACIT (2012) 210 Taxman 9 / 77 DTR 483 (Delhi)(HC)

S. 72 : Carry forward and set off - Business losses - Loss incurred on account of payment of interest treated as business loss and allowed to be carried forward

The assessee borrowed the money and utilized the said amount for depositing in tender. The tender was not materialized and amount was returned with the interest. The Assessee incurred the loss due to higher rate of interest to lender. The Tribunal held that participation in the process of tender will amount to setting up of business and the loss is to be treated as business loss and allowed to be carried forward. (A.Y. 2006-07)

Dhoomketu Builders & Developers (P) Ltd. v. Addl. CIT (2012) 49 SOT 312 (Delhi)(Trib.)

S. 72A : Carry forward and set off - Amalgamation - Accumulated loss - BIFR has power to grant benefit flowing from section 72A without referring matter to revenue [Sick Industrial Companies (Special Provisions) Act, 1985, S. 32(2)]

The assessee company was referred to BIFR. BIFR has accepted the plea of the assessee company that relief flowing from section 72A of the Income-tax Act should be granted by the BIFR itself and should not be directed to be considered by the department despite the plea of the revenue that concession sought under section 72A should be directed to be considered by revenue. The appeal of revenue before AAIFR was dismissed. Against the said order the revenue filed a writ petition before High Court. The Court dismissed the writ petition by holding that by virtue of section 32(2) of Sick Industrial Companies (Special Provisions) Act, 1985, in case of amalgamation of sick industrial company with another company BIFR has power to grant benefit flowing from section 72A without referring matter to revenue. Accordingly the writ petition of revenue was dismissed.

Government of India (Dept. of Revenue) DGI v. Orient Vegetax Pro Ltd. (2012) 210 Taxman 1 / 80 DTR 401 (Delhi)(HC)

S. 72A : Losses - Carry forward and set off of accumulated loss, etc. - Amalgamation - Order of BIFR is binding on the Assessing Officer and loss was allowed to be carried forward and set off

During the year under consideration 'S' Ltd. got merged with assessee-company. As per the BIFR's order on amalgamation assessee shall be allowed to carry forward and set off losses and unabsorbed depreciation allowance of 'S' Ltd. under section 72A and amount advanced by assessee to 'S' Ltd till the effective amalgamation takes place, shall be allowed as business loss under section 29 to assessee in the year in which amalgamation takes effect. The Assessing Officer contended that in view of the CBDT instruction dated 16-2-2000, if the department was not given chance of being heard, the assessing authority was constrained not to give effect to the recommendation of the BIFR before the same were considered by CBDT and since there was nothing on record to show that the view of the department were considered before finalization of BIFR's proceedings, the Assessing Officer did not take into account the BIFR's order while finalizing the assessment. On appeal, the assessee submitted that the order of BIFR used the words 'shall be allowed' while deciding on the reliefs. It was submitted that when 'shall' was used by the statute, the context in which it was used becomes an obligation or a direction. It would be an altogether different case if the words 'may' had been used, then the context may have become a discretion or a recommendation. It was, accordingly, submitted that the Assessing Officer had committed a grave error in law by not following the CBDT order, which was binding upon her. Based on the arguments advanced by the assessee, the

Commissioner(Appeals) allowed the claim of the assessee. On appeal the Tribunal held that it was found from records that after original order was passed by BIFR on 16-12-1999, department had objected for not giving any opportunity and, hence, BIFR issued notice for draft modification but despite such opportunity being given to department, it sought adjournment which was not accepted by BIFR and final order was passed on 19-8-2003 therefore it could not be said that department was not given any opportunity and, therefore, direction given by BIFR was binding on Assessing Officer and assessee would be entitled to relief as per BIFR order. (A.Y. 1999-2000)

Kirloskar Oil Engines Ltd. v. Dy. CIT (2012) 54 SOT 201 (Pune)(Trib.)

S. 73 : Losses - Speculation business - Computation of gross total income to be made by applying the normal provisions of the Act - Share loss to be first set-off to determine what gross total income consists of there after Explanation applies

The department's submission that in computing the gross total income for the purpose of the explanation to section 73, income under the heads of "Profits and gains of business" must be ignored and /or that the share loss should not be allowed to be set off against the income from any other source under the head "Profits and gains of business" is not acceptable because it leads to an incongruous situation where in determining whether a company is carrying on a speculation business within the meaning of the Explanation, sub-section (1) of section 73 is applied in the first instance. This is not permissible as a matter of statutory interpretation because the Explanation is designed to define a situation where a company is deemed to carry on speculation business. It is only thereafter that sub-section (1) of section 73 can apply. Applying the provisions of section 73(1) to determine whether a company is carrying on speculation business would reverse the order of application. Legislature has mandated that in order to determine whether the exception that is carved out by the Explanation applies, a computation of the gross total income has to be made in accordance with the normal provisions of the Act and it is only thereafter that it has to be determined whether the gross total income so computed consists mainly of income which is chargeable under the heads referred to in the Explanation to section 73 or not. (A.Y. 1996-97)

CIT v. Darshan Securities Pvt. Ltd. (2012) 341 ITR 556 / 68 DTR 33 / 206 Taxman 68 / 249 CTR 199 / (2012) Vol. 114(2) Bom.L..R. 0794 (Bom.)(HC)

S. 73 : Losses - Speculation business - Interest on securities - Income from house property - Capital gains - Income from other sources - The assessee had only income from other sources hence explanation to section 73 is not applicable

The assessee company filed the return of income showing the loss of Rs. 1.65 crores arising out of purchase and sale of shares. The said loss consisted of business loss of Rs. 1.72 Crores and an income from other sources of Rs. 7 lakhs. The Assessing Officer invoked the Explanation to section 73 and treated the said loss as speculation loss. On appeal the Commissioner(Appeals) held that the Explanation to section 73 refers to the words "income which is chargeable under the heads". Since in the instant case the only income which is included in gross total income was dividend income, the gross total income mainly consisted of "income from other sources" therefore, Explanation to section 73 was not applicable. The order of Commissioner(Appeals) was affirmed by the Tribunal. On appeal to the High Court by revenue the Court affirmed the order of Tribunal. The Court refer the Judgement CIT v. Darshan Securities (P) Ltd. (2012) 341 ITR 556 (Bom.)(HC) and Aman Portfolio (P) Ltd. v. Dy. CIT (2005) 92 ITD 324 (Delhi)(Trib.) (A.Y. 1997-98)

CIT v. HSBC Securities & Capital Markets India (P) Ltd. (2012) 208 Taxman 439 (Bom.)(HC)

S. 73 : Losses - Speculation business - Short term-loss - Assessee company not involved in business of sale and purchase of shares - Loss cannot be assessed as speculation loss - Loss may be allowed as short term capital loss

Assessee-company was not involved in the business of sale and purchase of shares and merely indulging in purchase and sale of shares for investment is not business activity and therefore explanation to section 73 was not attracted. The loss has to be allowed as short term capital loss. The reasoning of CIT(A) that there was no pressing need for the appellant company to sell shares within a short span of its acquisition was held to be perverse. (A.Y. 1991-92, 1996-97)

Standipack (P) Ltd. v. CIT (2012) 78 DTR 252 / 211 Taxman 144 / (2013) 350 ITR 251 / 255 CTR 197 (Cal.)(HC)

S. 73 : Losses - Speculation business - Company - Interest income - Tribunal rightly set off the losses from sale and purchase from the income of the assessee from loans and advances [S. 28(i)]

Section 73(1) and the explanation to section 73 indicate that the income which is chargeable is the income in the relevant year arising from business or profession carried on by the company. Words "carried on" mean actual carrying of the activity. Words "carried on" have to be read in context of what actually was done by the company in the relevant year, rather than what was main object in the memorandum of association of the company. Entire income of the assessee during the relevant years consisted of interest income from loans and advances and the assessee was clearly covered by exclusionary clause of explanation to section 73. Hence, it was held that tribunal rightly set off the losses from sale and purchase from the income of the assessee from loans and advances. (A.Y. 1996-97, 1998-99)

CIT v. Narain Properties Ltd. (2012) 254 CTR 185 / 74 DTR 197 (All.)(HC)

S. 74 : Losses - Capital gains - Carry forward and set off - Option to set off - Right to set off capital loss is a "vested right" not affected by amendment

In A.Y. 2003-04, the assessee earned short-term capital gains ("STCG") of Rs. 2.21 crores and set it off against the long-term capital loss ("LTCL") relating to A.Y. 2001-02. Section 74 was amended w.e.f. A.Y. 2003-04 to provide that brought forward LTCL could only be set-off against LTCG and not against STCG. The assessee claimed, relying on CIT v. Shah Sadiq & Sons (1987) 166 ITR 102 (SC) that the amendment to section 74 w.e.f. A.Y. 2003-04 did not affect the assessee's vested right in A.Y. 2001-02 to have the LTCL set-off against the STCG. The Assessing Officer & CIT(A) relied on Reliance Jute Industries v. CIT (1979) 120 ITR 921 (SC) where it was held that the assessment for one A.Y. cannot be affected by the law in force in another A.Y. and that the law prevailing in A.Y. 2003-04 alone had to be considered. On appeal to the Tribunal, the issue was referred to a Special Bench. Held by the Special Bench:

(i) Section 74(1), as substituted w.e.f. 01.04.2003, uses the present tense and refers to the long-term capital loss of the current year. It applies to the long-term capital loss of A.Y. 2003-04 onwards and not to the long-term capital loss relating to the period prior to A.Y. 2003-04. The set-off of long-term capital loss relating to a period prior to A.Y. 2003-04 is governed by section 74(1) as it stood in that A.Y.;

(ii) The assessee's contention, relying on Shah Sadiq, that it had a "*vested right*" in A.Y. 2001-02 to carry forward the LTCL & set it off against the STCG and that this right cannot be defeated without express language in the statute is also acceptable. In Govinddas and Others (1976) 103 ITR 123 (SC) it was held that unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right otherwise than as regards the matters of procedure [Reliance Jute Industries v. CIT (1979) 120 ITR 921 (SC) distinguished; CIT v. SSC Shoes (2003) 259 ITR 674 (Mad.) followed; Geetanjali Trading (Mum.)(Trib.) approved]. (A.Y. 2003-04)

Kotak Mahindra Capital Co. Ltd. v. ACIT (2012) 138 ITD 57 / 18 ITR 213 / 75 DTR 193 / 148 TTJ 393 (SB)(Mum.)(Trib.)

S. 74 : Losses - Capital gains - Speculation - Derivatives - Loss allowed to be set off against short term capital gains [S. 43(5)]

The Assessing Officer treated the loss on derivative as speculation loss and has not allowed to be set off against the short term capital gains. In appeal Commissioner(Appeals) confirmed the view of Assesing Officer. On further appeal the Tribunal held that in view of amendment with effect from 1-4-2006 the loss suffered by assessee during derivative trading amounted to short term capital loss and same could be set off against short term capital gain during relevant year. Accordingly the appeal of assessee was allowed. (A.Y. 2005-06)

Devendra Exports (P.) Ltd. v. ACIT (2012) 54 SOT 220 (Chennai)(Trib.)

S. 78 : Carry forward and set off of losses - Change in constitution of firm - Succession - Losses suffered by firm could not be set off from income of an individual by soleproprietor.[S. 170]

Assessee, who was an individual, had taken over the running business of a partnership firm in which he was a partner. He claimed the set off of the loss suffered by partnership firm against income earned by him as an individual. Revenue authorities and Tribunal rejected the claim of assessee. On appeal to High Court, the Court held that in view of provisions of section 78(2), only person who incurs or suffers loss would be entitled to carry forward same and set off and no other person except in case of succession by inheritance. Since partnership firm and individual are two separate taxable entities or persons under the Act, loss suffered by partnership firm could not be set off from income of assessee as an individual. Accordingly the order of Tribunal confirmed. (A.Y. 2005-06)

Pramod Mittal v. CIT (2012) 205 Taxman 444/(2013) 356 ITR 456 (Delhi)(HC)

S. 79 : Losses - Carry forward and set off of, in case of certain companies - Change in share holdings - Loss was not allowed to carry forward and set off [S. 2(18)]

The assessee-company was running a hospital. The Assessing Officer noticed that during relevant A.Y. more than 51 per cent of paid up share capital of the assessee-company was transferred to 'P' family. The control and management of company was also transferred to 'P' family. The company was not one, where public was substantially interested as defined in section 2(18). In such circumstances, the Assessing Officer opined that provisions of section 79 applied to assessee's case and loss incurred by company in the A.Y. 2005-06 could not be allowed to carry forward. The Commissioner(Appeals) upheld the order of the Assessing Officer. On second appeal the Tribunal also up held the order of Tribunal. (A.Y. 2007-08)

Peoples Heritage Hospital Ltd. v. Dy. CIT (2012) 54 SOT 225 (Agra)(Trib.)

S. 79 : Carry forward and set off of losses - Change in share holdings - Companies in which public are not substantially interested - Rejection of claim by Assessing Officer was up held

Assessee-company claimed set off of brought forward business loss for A.Y. 1998-99 against income of relevant A.Y. From shareholding pattern, Assessing Officer found that 'C' Ltd. was holding 58.12 per cent share capital of assessee in year 1998 whereas during relevant year, it did not hold even a single share in assessee-company. In this regard, assessee submitted that 'C' Ltd. transferred its entire shareholding to one of its directors and, thus, there was no change in beneficial ownership of shares. Assessing Officer, however, having invoked provisions of section 79, rejected assessee's claim. On facts, it was 'C' Ltd. which was beneficial as well as registered owner of shares and, therefore, when its shareholding was reduced to nil as against more than 51% of shareholding as on year ending 31-3-1998, necessary condition for invoking provisions of section 79 was rightly activated. Therefore, Assessing Officer was justified in rejecting assessee's claim. Matter set aside for considering the additional evidence. (A.Y. 2006-07)

Tainwala Trading and Investments Co. Ltd. v. ACIT (2012) 54 SOT 204 (URO)(Mum.)(Trib.)

S. 80 : Return for losses - Revised return declaring losses is held to be valid and is allowed to carry forward and set off [S. 70, 71, 139(5)]

Assessee filed the original return under section 139(1) declaring the positive income. Assessee found certain mistake thereafter and filed revised return declaring the loss and to be carried forward and set off in future. The Tribunal held that the revised return to be treated as valid return and the assessee is entitled to carry forward of 'long term capital loss'. (A.Y. 2005-06)

Ramesh R. Shah v. ACIT (2012) 65 DTR 104 / 143 TTJ 166 (Mum.)(Trib.)

S. 80 : Return for losses - Carry forward and set off - Return of income - Revised return - Carry forward of loss was not allowed as the loss was claimed in the original return [S. 139(1), 139(3), 139(5), 143(3)]

The assessee filed its return of income declaring positive income. Thereafter, a revised return was filed declaring loss. During the assessment proceedings under section 143(3), the Assessing Officer observed that the revised return filed by the assessee under section 139(5) was non est. He, accordingly, computed the taxable income of the assessee. The assessee filed an appeal before the Commissioner(Appeals) challenging the non-consideration of the revised return. The Commissioner(Appeals) held that the revised return was return which should have been filed within the time specified under section 139(3) and, therefore, the loss return filed beyond the time-limit prescribed under section 139(3) was *null* and *void*. On further appeal the Tribunal held that when assessee was claiming loss for relevant assessment year and also claiming loss to be carried forward of earlier years, assessee was required to file return under section 139(3), however, in instant case in absence of claim of loss or carried forward loss, return filed under section 139(1) could not be treated as a return under section 139(3) and, therefore, revised return filed under section 139(5) could not be accepted and had to be treated as null and void. Accordingly the appeal of assessee was dismissed. (A.Y. 2004-05)

Karnataka Forest Development Corp. Ltd. v. CIT (2012) 54 SOT 76 (URO)(Bang.)(Trib.)

S. 80G : Donation - Literature not filed before Assessing Officer [S. 2(15)]

Deduction under section 80 G of the Act cannot be denied to the assessee trust where the donee trust was approved under section 80G(5) of the Act merely on the ground that the activities of the donee trust were in violation of section 2(15) of the Act as literature of the donee trust was not filed with the assessing officer.

CIT v. Balaji Charitable Trust (2012) 70 DTR 7 / 249 CTR 223 (Raj.)(HC)

S. 80G : Donation - Charitable institution - Charitable and religious purpose - Expenditure on religious activities exceeding 5%, denial of exemption held to be justified [S. 80G(5)]

The assessee society was formed with the objects of evangelizing and edifying the body of Lord Jesus Christ so as to spread teachings to far off villages, to publish Christian magazines and journals, etc. The society incurred major expenses on TV telecast and salaries of preachers. The Commissioner refused the renewal of exemption granted under section 80G, on the ground that the activities of the society are substantially of religious in nature and not for charitable purpose. Commissioner considered the salaries of preachers under the head religious purposes. The assessee claimed that the salaries of preachers are for charitable purposes. The Tribunal confirmed the view of commissioner that salaries of preachers cannot be considered as for charitable purposes. Since the expenditure on religious activities is more than 5 percent of the total income of the assessee, it is hit by sub-section 5(ii) of section 80G, read with sub section 5B, hence the order of Commissioner is up held. (A.Y. 2010-11)

Church of Christ Social Services Society v. CIT (2012) 67 DTR 330 / 144 TTJ 785 / (2011) 48 SOT 1 (Viskaha.)(Trib.)

S. 80G : Donation - Charitable institutions - Approval granted shall continue

Assessee filed its application for renewal of exemption under section 80G on 27-12-2010. Subsequently, assessee vide its application dated 4-2-2011, requested Commissioner to treat application filed for renewal of exemption under section 80G as withdrawn. Commissioner(Appeals) however rejected assessee's request, held that exemption under section 80G could not be allowed to assessee society. On appeal, assessee submitted that in view of omission of proviso to section 80G(5)(vi) by Finance (No. 2) Act, 2009, approval once granted shall continue to be valid in perpetuity and even if assessee by ignorance or inadvertently filed an application for renewal, Commissioner was required to decide same in accordance with amended provisions. The Tribunal held that, the approval under section 80G(5) already granted to assessee would continue unless and until concerned authority takes appropriate action in accordance with law. Hence, the impugned order passed by Commissioner(Appeals) was set aside.Association for Advocacy and Legal Initiatives v. CIT (2011) 130 ITD 573 (Luck.) followed. (A.Y. 2011-12)

Vishav Namdhari Sangat v. ACIT (2012) 137 ITD 74 (Chd.)(Trib.)

S. 80G : Donation - Charitable institution - Renewal of registration - No material brought, suggesting non-fulfillment of conditions stipulated under section 80G(5) and rule 11AA, hence renewal of registration not to be denied [S. 11AA, 12A]

Where the registration granted to the assessee under section 12A is subsisting and no material has been brought suggesting that the assessee society did not fulfill the conditions stipulated under section 80G(5) and rule 11AA, therefore CIT was not justified in denying renewal of approval under section 80G(5)(vi).

Shiv Shankar Memorial Education Society v. CIT (2012) 147 TTJ 753 / 74 DTR 442 / 51 SOT 279 (Delhi)(Trib.)

S. 80G : Donation - Charitable purpose - Registration of Trust - When a particular one clause could not be acted upon, then mere incorporation of the clause in the trust deed would be of no consequence as far as registration under section 80G(5) is concerned [S. 12A, 10(23C)]

In the instant case, a clause in the trust deed empowered the trustees to invest in the properties. It was held that where merely if a provision had been incorporated in the Trust Deed, but by reading of all the clauses together, it is evident that the clause could not be acted upon, mere incorporation of the clause in the trust deed would be of no consequence as far as registration under section 80G(5) is concerned. Therefore, considering all the clauses together, it was evident that the true import of the trust deed was to carry out its activity subject to restrictions laid down under the Act. Since the assessee trust was registered under section 12A as well as under section 10(23C) there could not be any dispute that the trust was established for charitable purposes. In any event the trust deed had also been amended. The assessee trust was entitled to registration under section 80G.

NSHM Academy v. CIT (2012) 134 ITD 304 / 145 TTJ 229 / 69 DTR 299 / 18 ITR 244 (Kol.)(Trib.)

S. 80G : Donation - Charitable purpose - Renewal of registration - Registration of institution under section 12A by itself is a sufficient proof that the institution concerned is created for charitable purpose / purpose of general public utility, hence, registration could not be denied [S. 2(15), 12A]

The assessee society was registered under Societies Registration Act, 1860 and was granted registration under section 12A of the Act. It was granted exemption certificate under section 80G(5)(vi) which was renewed for A.Y. 2007-08 and 2009-10. However, Director(Exemption) rejected the application filed by assessee in Form 10G on the ground that the activities were beneficial to manufacturers only and not covered under section 2(15) of the Act. It was held by the Tribunal that the registration of institution under section 12A by itself was a sufficient proof of the

fact that the trust or institution concerned was created or established for charitable purpose or a purpose of general public utility and it enjoys approval under section 80G. Renewal of registration under section 80G(5)(vi) had been granted for earlier years and there being no change in the facts and circumstances of the year for which renewal was sought for, there was no justification to reject assessee's application for renewal of exemption certificate under section 80G(5)(vi) of the A.Y. 2010-11 onwards.(A.Y. 2007-08 to 2009-10)

Bengal Hosiery Manufacturers Assn. v. DIT (2012) 18 ITR 205 (Kol.)(Trib.)

S. 80G : Donation - Charitable institution - Object of trust purely religious and linked to Hindu religious community, held not entitled to renewal of approval under section 80G

Assessee was a trust for a temple with a deity which was confined only to a particular community for worship. Trust deed provided that income from trust property was to be applied in maintenance and repair of temple property, for worship of deity and in defraying of usual expense of holding festivals of deity. It was held that since objects of assessee trust were purely religious in nature, inextricably linked to Hindu religious community, it was not entitled to renewal of approval under section 80G.

Ramanujam Spiritual Public Charitable Trust v. CIT (2012) 138 ITD 81 / (2013) 82 DTR 121 / 151 TTJ 682 (TM)(Amritsar)(Trib.)

S. 80G : Donation - Hindu - Recognition - Worshipping lord Shiva, Hanumanji and goddess Durga and maintaining of temple cannot be considered as religion hence registration to be granted [S. 80G(5)(vi)]

Hindu is neither a separate community nor a separate religion and the object of worshipping Lord Shiva, Hanumanji and goddess Durga and maintaining of temple cannot be regarded as object for advancement, support or propagation of a particular religion and, therefore, approval under section 80G(5)(vi) could not be refused to the assessee trust on the ground that the trust exists for religious object; CIT is directed to grant approval to the assessee trust.

Shiv Mandir Devsttan Panch Committee Sanstan v. CIT (2012) 79 DTR 276 / 150 TTJ 452 / (2013) 56 SOT 456 (Nagpur)(Trib.)

S. 80HH : Newly established industrial undertakings - Maintenance of accounts unit wise - Neither section 80HH, nor section 80I statutorily obliged to maintain the accounts unit wise hence consolidated accounts held to be valid and revision was held to be not valid [S. 80I, 263]

The Assessing Officer has allowed the deduction under section 80HH, after examining the unit wise profit and loss statement filed by the Assessee. Commissioner revised the order under section and disallowed the deduction on the ground that the assessee should have maintained Segregated Accounts for each of the three units to avail benefit of section 80HH and section 80I. In appeal before the Tribunal the Tribunal held that assessee should submit unit wise audited accounts and claim deduction under section 80HH and 80I. On appeal the High Court set aside the order of Tribunal. On appeal to Supreme Court the Court held that neither section 80HH nor section 80I (as it then stood) statutorily obliged the assessee to maintain its accounts unit wise and it was open to the assessee to maintain its accounts in a consolidated form, in order to put to an end to the litigation between the tax department and the PSU the matter was remitted back to the Assessing Officer to ascertain whether the assessee had correctly calculated the net profits for claiming deduction under section 80HH and 80I. If not done, it could be done if such working is certified by the Auditors, the net profit computation (Unit wise) could be placed before the Assessing Officer who can find out whether such profits is properly worked out and on that basis compute deduction under section 80HH/80I. (A.Y. 1992-93) (From the judgment of Gauhati High Court ITR No. 4 of 2001 dated 6-6-2002)

CIT v. Bongaigaon Refinery & Petrochemical Ltd. (2012) 349 ITR 352 / 210 Taxman 229 / 79 DTR 8 / 254 CTR 98 (SC)

S. 80HH : Newly established industrial undertakings - Manufacture - Production - Forging process - Sub contract receipts

Assessee claimed deduction under section 80HH, in respect of sub-contract receipts. The Court held that Krishnapuran unit of the assessee completes hot forging and after the process comes to Padi where there is further value addition and after assembling nuts and bolts, they are marked. Thus only after the process carried on by the Krishnapuran unit, that the commodities reach a stage of marketability, therefore, it satisfied the test as given in section 80HH, hence receipt of job work done eligible for deduction under section 80HH. (A.Y. 1989-90 and 1992-93)

Sundaram Fasteners Ltd. v. CIT (2012) 246 CTR 95 / (2011) 339 IR 40 / 60 DTR 398 (Mad.)(HC)

S. 80HH : Newly established industrial undertakings - Research expenses of head office - Apportionment of expenses - Apportionment of expenses held to be not proper and deduction was to be allowed without apportionment [S. 37(1), 80I]

The assessee carries on business inter alia of manufacturing Ayurvedic medicines and ointments It has head office and four units. The head office as well as each units have their own R&D departments equipped with a laboratory. The Assessing Officer allocated the head office expenses on the basis of proportionate turnover of various units. On appeal Commissioner(Appeals) and Tribunal confirmed the addition. On appeal to the High Court the Court held that Tribunal was not justified in confirming the allocation of R&D expenses incurred by the head office among the four manufacturing units on the presumption that the expenditure so incurred is for the benefit of these manufacturing units, when in fact such research conducted had no connection with the business of said units, nor any benefit is received by them from the said research. Appeal of assessee was allowed. (A.Y. 1993-94)

Zandu Pharmaceuticals Works Ltd. v. CIT (2012) 80 DTR 322 / (2013) 350 ITR 366/259 CTR 253 (Bom.)(HC)

S. 80HH : Newly established industrial undertakings - Back ward area - Income which has direct nexus alone can be considered [S. 32AB, 80I]

While working out the profits and gains which qualify for deduction under section 80HH, one has to necessarily restrict the income which is derived from the industrial undertaking and nothing beyond. Thus, for the purpose of section 80HH, the income of that industrial undertaking which got into the reckoning of the book profit for the purposes of section 32AB has to be identified and that alone would be included in the profits and gains of the industrial undertaking for the purpose of working out the relief under chapter VI-A. As far as the calculating the income of the industry which goes for deduction under section 80HH is concerned, one should include such of those profits and gains of the industry considered under section 32AB, which have direct nexus with the industrial undertaking alone and nothing beyond, which means, the entirety of the income included for the purpose of section 32AB cannot be included in the "profits and gains by the industrial undertaking". To find out the same, the matter is remitted to the Assessing Officer. (A.Y. 1989-90)

Carborundum Universal Ltd. v. Dy. CIT (2012) 80 DTR 57 / (2013) 255 CTR 372 (Mad.)(HC)

S. 80HH : Newly established industrial undertaking - Backward areas - Doctrine of estoppels - Notification retrospectively, held to be valid, assessee is not eligible for deduction

Asessee had set up an undertaking in a notified backward area in 1986. It started production in December 1986. Taxation Laws (Amendment and Misc. Provisions) Act, 1986 came into effect on 10-9-1986 which gave Government a power to make a retrospective notification subject to a condition that such retrospectivity did not date prior to 1-4-1983 .Thereafter Government issued notification and removed abovementioned area from 1-4-1983 from list of backward area. Unless and until assessee questioned validity of provision which gave such a retrospective power before appropriate judicial forums for arbitrariness and got a ruling in its favour, it will have to be given

effect to. Since by virtue of retrospective notification, concerned area was placed out of backward area, assessee was not eligible to claim deduction and rejection of its claim was to be upheld. (A.Y. 1992-93 to 1994-95)

Arkema Peroxides India (P.) Ltd. v. ACIT (2012) 54 SOT 216 (URO)(Chennai)(Trib.)

S. 80HHA : Newly established small-scale industrial undertakings - Rural area - Industry situated within 15 kms. of municipality is eligible for deduction

Assessee has claimed the deduction under section 80HHA, in respect of unit situated at Kandla. The Assessing Officer disallowed the claim on the ground that Kandla was part of the greater Municipality Limits of Gandhinagar and within fifteen kilometers. The Tribunal held that as the unit is situated beyond eight kilometers the assessee is eligible for deduction under section 8OHHA. The Court held that for denial of exemption under section 80HHA the distance to be considered is of eight kilometers. On the facts as the unit is situated beyond eight kilometers the Tribunal was justified in allowing the claim of assessee under section 80HHA. (A.Y. 1989-90)

CIT v. Friends Salt & Allied Industries (2011) 336 ITR 272 / (2012) 67 DTR 79 (Guj.)(HC)

S. 80HHB : Projects outside India - Foreign currency - Used to repay the loan - Eligible for deduction

The assessee executed certain contracts in Oman and Qatar and the foreign currency earned from the project was partially used for repaying the loan taken in foreign currency in foreign country for executing the project. It was held that the loan amount was paid in foreign currency and even if the entire foreign currency was brought into India, the assessee would have been required to remit the foreign currency to discharge the loan taken in foreign currency for executing the project. Therefore the assessee was entitled to claim deduction under section 80HHB in respect of entire foreign currency earned from the project.

CIT v. Essar Oil Ltd. (2012) 345 ITR 443 (Bom.)(HC)

S. 80HHB : Projects outside India - Set off of loss in project against profits of another project is not permissible

Set off of loss in one project against profits of another project is not permissible. Assessee can derive the vertical benefit of insulating its losses, and carrying them forward for the next year, from profits derived out of similar activities, undertaken in other projects, or elsewhere. (A.Y. 1988-89, 1998-99)

CIT v. Bharat Heavy Electrical Ltd. (2012) 80 DTR 7 / 210 Taxman 155 (Mag.) / (2013) 352 ITR 88 (Delhi)(HC)

S. 80HHC : Export business - Profits of business - DEPB sale proceeds is not profits - The face value of DEPB shall be deducted from the sale proceeds [S. 28(iii)(b), 28(iii)(d)]

The Apex Court held that when assessee sold DEPB his profit on transfer of DEPB, would be the sale value of DEPB less its face value which represents the cost of the DEPB, Ninety percent of the net receipt which has to be included in profits of the assessee as computed under the head "profits and gains of business or profession" and not the gross receipt is to be deducted under clause (1) of Explanation (baa) to section 80HHC for determining the profits of the business. (A.Y. 2001-02 & 2004-05)

Vikas Kalra v. CIT (2012) 345 ITR 557 / 67 DTR 214 / 247 CTR 382 / 3 SCC 611 (SC)

S. 80HHC : Export business - Profits of business - DEPB sale proceeds is not "profits" - The face value of DEPB shall be deducted from the sale proceeds [S. 28(iiid)]

DEPB is "cash assistance" receivable against exports under the scheme of the Government. While the face value of the DEPB falls under clause (iiib) of section 28, the difference between the sale value and the face value of the DEPB (the "profit") will fall under clause (iiid) of section 28. DEPB

represents part of the cost incurred by a person for manufacture of the export product and hence even where the DEPB is not utilized by the exporter but is transferred to another person, the DEPB continues to remain as a cost to the exporter. When DEPB is transferred, the entire sum received on such transfer does not become his profits. It is only the amount that he receives in excess of the DEPB which represents his profits on transfer of the DEPB. (A.Y. 2002-03)

Topman Exports v. CIT (2012) 342 ITR 49 / 67 DTR 185 / 247 CTR 353 / (277) E.L.T 10 / 3 SCC 593 / Vol. 42 Tax L R 255 / 205 Taxman 119 (SC)

S. 80HHC : Export business - Interest - Netting - Explanation (baa) to section 80HHC, refer netting of income from expenditure

Under Clause (1) of Explanation (baa) to section 80HHC, 90% of any receipts by way of brokerage, commission, etc. "included in any such profits" have to be deducted from the profits & gains of business. The expression "included any such profits" means such receipts by way of brokerage, commission, etc included in the profits & gains. Therefore, if any quantum of receipts by way of brokerage, commission, etc is allowed as expenses under section 30 to 44D and is not included in the profits of business, 90% of such quantum of receipts cannot be reduced under clause (1) of Explanation (baa) to section 80HHC. In other words, only 90% of the net amount of any receipt of the nature mentioned in clause (1) which is actually included in the profits of the assessee is to be deducted from the profits of the assessee for determining "profits of the business". (Principle in Distributors (Baroda) P. Ltd. v. UOI (1985)155 ITR 120 (SC) followed; CIT v. Shri Ram Honda Power Equip (2007) 289 ITR 475 (Delhi)(HC) approved). (A.Y. 2003-04)

ACG Associated Capsules Pvt. Ltd v. CIT (2012) 343 ITR 89 / 67 DTR 205 / 247 CTR 372 / 3 SCC 321 / Vol. 42 Tax LR 406 / 205 Taxman 136 (Mag.)(SC)

CIT v. Bharat Rasayan Ltd. (2012) 343 ITR 89 / 67 DTR 205 / 247 CTR 372 / 3 SCC 321 (SC) / Asian Star Co. Ltd. v. CIT (SLP No. 19364 of 2010 dt 11-5-2012)(SC)

S. 80HHC : Export business - Telecasting rights of T.V.Serials are entitled to benefit of section 80HHC

The question involved was whether telecasting rights of a T.V.Serial are entitled to the benefit of section 80HHC. Following the decision in CIT v. B. Suresh (2009) 313 ITR 149 (SC), the civil appeal filed by the department was dismissed. (A.Y. 1995-96)

CIT v. Faquir Chand (HUF) (2012) 210 Taxman 232 / 254 CTR 107 / 79 DTR 45 / (2013) 350 ITR 207 (SC)

S. 80HHC : Export business - Leasing rights - Leasing rights is considered to be 'goods' and transfer of such rights constitute 'sales' for the purpose of section 80HHC

The issue involved in the appeals were whether leasing rights can be considered to be 'goods' and whether transfer of such rights would constitute 'sale', for the purpose of deduction under section 80HHC. Following the ratio of decision in CIT v. B. Suresh (2009) 313 ITR 148 (SC), appeal filed by the department were dismissed. (A.Y. 1994-95)

CIT v. Romesh Sharma (2012) 210 Taxman 260 /(2013) 354 ITR 229/88 DTR 216/ 260 CTR 68(SC)

S. 80HHC : Export business - Excise duty and sales tax - Total turnover - Excise duty and sales tax need not be included in total turnover in formula 'Business income' multiplied by 'export turnover'

The question which was raised before the Apex court was, whether excise duty and sales tax need to be included in the total turnover in the formula 'Business income' multiplied by 'export turnover' and divided by 'total turnover' in section 80HHC(3) of the Income-tax Act 1961. Following the ratio of in

the case of CIT v. Lakshmi Machne Works (2007) 290 ITR (SC), the civil appeal filed by the department was dismissed. (A.Y. 2001-02)
CIT v. Shiva Tex Yarn Ltd. (2012) 210 Taxman 256 / 254 CTR 104 / 79 DTR 43 (SC)

S. 80HHC : Export business - Supporting manufacturer - 90 percent of export benefits disclaimed in favour of supporting manufacturer have to be reduced in terms of Explanation (baa) of section 80HHC, while computing deduction admissible to such supporting manufacturer under section 80HHC(3A)
Department has raised the question whether 90% of export benefits disclaimed in favour of a supporting manufacturer (assessee herein) have to be reduced in terms of Explanation (baa) of Section 80HHC of the Income-tax Act, 1961, while computing deduction admissible to such supporting manufacturer under Section 80HHC(3A) of the Act.?. Following the ratio in the case of CIT v. Baby Marine Exports (2007) 290 ITR 323 (SC), the appeal of revenue was dismissed.
CIT v. Sushil Kumar Gupta (2012) 210 Taxman 251 (SC)

S. 80HHC : Export business - Granite - Export of granite, is not entitled to deduction under section 80HHC
The question before the Court was whether the assessee is entitled to deduction to the extent of profits referred to in sub-section I-B of section 80HHC of the Income-tax Act, derived from export of goods. In this case, for the A.Y. 1988-89, Apex Court following the judgment in Gem Granites v. CIT (2004) 141 Taxman 528 (SC), held that the assessee is not entitled to deduction on export of granite. The question was answered against the assessee. (A.Y. 1988-89)
Tamil Nadu Minerals Ltd. v. CIT (2012) 349 ITR 695 / 210 Taxman 257 / 254 CTR 105 / 79 DTR 44 (SC)
Editorial:- Decision of Madras High Court in CIT v. Tamila Nadu Minerals Ltd. (2005) 274 ITR 482 (Mad.)(HC) affirmed.

S. 80HHC : Export business - Validity - Transfer Petition - Cases pending in various High Courts - Some already transferred to Supreme Court - Consolidated hearing of all cases before one High Court (Constitution of India - Arts. 139-A, 226, 32 and 136)
Since question related to the vires of a statute, it would be more convenient and beneficial if all matters are decided by one High Court in the country. Matters before Supreme Court as well as other High Courts directed to be transferred to High Court of Gujarat within two weeks where maximum numbers of such matters are pending.
UOI and Ors. v. Vijay Silk House (Bangalore) Ltd. (2012) 10 SCC 289 (SC)

S. 80HC : Export business - Export from third country
Assessee is engaged in purchase and sale of non ferrous metals, scraps, skimming ashes etc., who made purchases from one country and made exports to another country at margin of profit by arranging direct shipment from the purchasing country to the selling country. The Court held that in section 80HHC, there is no express words which provide that the export of such goods to be from India. There need not be two way traffic of bringing the goods from a foreign country into the Indian shores and thereafter exporting that goods from Indian shores to the off shore, because it is a mere empty formality and meaningless ritual in which the country gains nothing. If the object of earning of foreign exchange is achieved then the assessee is entitled to deduction under section 80HHC. (A.Y. 1998-99 to 2002-03)
Anil Kumar v. ITO (2012) 343 ITR 30 / 65 DTR 49 / 246 CTR 194 / 204 Taxman 162 (Mag.)(Karn.)(HC)

S. 80HHC : Export business - A new industrial undertaking - Deduction eligible on both the sections on the gross total income independently [S. 80IA, 80IB]

The assessee is engaged in the manufacture and export of garments. The assessee claimed and the Assessing Officer allowed the deduction under section 80HHC without reducing the deduction allowable under section 80IB(13), read with section 80IA(9). The Commissioner set aside the order. The Tribunal restored the order of Assessing Officer. On appeal by the revenue the High Court held that the view of Tribunal is correct. The Karnataka High Court preferred to follow the view of Bombay High Court in Associated Capsules P. Ltd. v. Dy. CIT (2011) 332 ITR 42 (Bom.) and dissented from the view of Delhi and Kerala High Court. (A.Y. 2001-02)

CIT v. Millipore India P. Ltd. (2012) 341 ITR 219 / 77 DTR 49 / (2013) 256 CTR 432 (Karn.)(HC)

S. 80HHC : Export business - Computer software recorded on magnetic tapes, floppies, discs or CDs is goods or merchandise and entitled to deduction for export thereof [S. 80HHE]

Computer software recorded on magnetic tapes or floppies, discs or CDs, etc., would amount to goods or merchandise and entitled to deduction under section 80HHC. Though special provision is introduced for export of software with effect from April 1, 1991, the assessee is entitled to deduction under general provision for period prior thereto under section 80HHC. (A.Y. 1989-90)

CIT v. Ajay Automation (P) Ltd. (2012) 341 ITR 577 / 70 DTR 465 (AP)(HC)

S. 80HHC : Export business - Sale in India - Export - Sale to UNICEF in India is not considered as "export outside India" hence not eligible for deduction under section 80HHC

The assessee is engaged in the business of metal printing, coating, etc. During the year it sold certain goods to UNICEF in India and treated the sale as "export sales" for the purpose of relief under section 80HHC. The payment for the said goods were received in "convertible foreign exchange''. The assessee treated the sale as deemed export. The Assessing Officer held that the said goods never crossed the territory of India and therefore, it could not be said that the assessee had exported the goods outside India or that it was engaged in the business of export outside India In an appeal the Commissioner(Appeals) and Tribunal upheld the view of Assessing Officer. On appeal to High Court, the Court held that plain and simple meaning of the term "export outside India" would entail the transfer of goods out of territory of India; goods must physically move out of India at least in so far as tangible goods are concerned, therefore the assessee is not entitled to deduction under section 80HHC in respect of sale to UNICEF in India. (A.Y. 1988-89)

Indian Del (P) Ltd. v. CIT (2012) 349 ITR 330 / 68 DTR 225 / 250 CTR 344 (Delhi)(HC)

S. 80HHC : Export business - Premium on sale of export quota - Business income - Premium on sale of export quota is not covered by clauses 28(iiia) to 28(iiic) hence not to be considered for deduction. Revision of order under section 263 is held to be valid [S. 28(iiia), 28(iiib), 28(iiic), 263]

The assessee earned export quota premium of Rs. 27,68,991/- in the A.Y. 2003-04. 10 percent of the amount was taken in to consideration under Explanation (baa) to section 80HHC. However, the export quota premium was not taken into consideration while applying the proviso to section 80HHC on the ground that it did not fall within the section 28(iiia), (iiib) and (iiic). On appeal Commissioner(Appeals) held that export quota premium should be given the same treatment as the DEPB for the A.Y. 2003-04. The Tribunal held that the assessee is entitled to the benefit of increase to the profit as provided in the proviso to section 80HHC(3) for the A.Y. 2003-04). The assessment of the assessee was completed under section 143(3) for the A.Y. 2001-02 and 2000-01 accepting the computation of assessee. Commissioner under section 263 has held that Assessing officer had wrongly included premium on sale of quota rights as covered for deduction under section 80HHC. The Tribunal held that the revision was not justified in view of circular issued by the Board. On appeal the Court held that the premium on sale of export quota is not covered by clauses 28(iiia) to

28(iiic) and therefore cannot be taken into consideration. The Court also held that the Tribunal was wrong in holding that the order passed by Commissioner under section 263 was bad in law and contrary to the provisions of the Act. Accordingly the matter was decided in favour of revenue. (A.Y. 2000-01, 2001-02, 2003-04)

CIT v. Nagesh Knitwers P. Ltd and others (2012) 345 ITR 135 / 74 DTR 170 (Delhi)(HC)
CIT v. Orient Crafts Ltd. (2012) 345 ITR 135 / 74 DTR 170 (Delhi)(HC)
CIT v. Vogue Setters (2012) 345 ITR 135 / 74 DTR 170 (Delhi)(HC)

S. 80HHC : Export business - DEPB - Proviso - Constitutional validity - Retrospective effect given to 3rd & 4th Provisos to section 80HHC is ultra vires, amendment is prspective, retrspectivity is held to be not valid. [Constitution of India - Art. 14, 19(1)(g), 226]

The Third & Fourth Provisos to section 80HHC were inserted by the Taxation Laws (Second Amendment) Act, 2005 with retrospective effect from 1.4.1998 to provide that the deduction in respect of exporters having a turnover of more than Rs. 10 Crore would be available only if he has evidence to prove that he had an option to choose either duty drawback or DEPB and that he chose DEPB, even when he was entitled to higher benefit under the duty drawback scheme. The assessee claimed that this was an absurd condition because no sensible person would ever exercise the option to choose a scheme under which he would get lesser benefit. The retrospective of the amendment was challenged on the basis that it was arbitrary and discriminatory under Articles 14 & 19 of the Constitution. Held upholding the challenge:

(i) The assessee's contention that the classification based on turnover is arbitrary cannot be accepted because this is a recognized way of classification throughout the world. Progressive levy is based on income classification in terms of both, the basis of taxation and the rate of tax is not arbitrary;

(ii) The assessee's contention that the amendment should be declared ultra vires being violative of the principles of promissory estoppel and legitimate expectation is also not acceptable because there is no estoppel against legislation. The legislature is not bound by the doctrine of promissory estoppel;

(iii) However, the amendment is violative of Article 14 of the Constitution of India because two assessees of the same class are placed on different footing. While some assessees whose export turnover is more than Rs. 10 Crore and who have claimed deduction under section 80HHC on DEPB / DFRC in their ROI and the assessments have become final are given the benefit of deduction without compliance of the conditions imposed by the Taxation Laws (Second Amendment) Act, 2005, assessees whose turnover is more than Rs. 10 Crore, and who have claimed deduction under section 80HHC on DEPB/DFRC and whose assessments are pending either before the Assessing Officer or the appellate authority would be required to comply with those two conditions retrospectively. Two assessees of similar description having export turnover of more than Rs. 10 Crore are discriminated in as much as the assessees whose assessments have become final is not required to comply with the two conditions and would avail deduction under section 80HHC as against the assessees whose assessments are pending and who would be required to comply with the two conditions. A benefit based on pendency of proceedings of assessment and discrimination based thereon definitely violates Article 14 of the Constitution. In the matter of completion of assessment, the assessees have little role to pay. After the assessees have submitted their returns within the time fixed by law, if for any reason the Assessing Officer delays in making the assessment, taking advantage of their own delay, the Revenue cannot deprive a class of the assessees of the benefit whereas other assessees of the same class whose assessment have already been completed would get the benefit;

(iv) Although in taxing statute laxity is permissible and a benefit given to the assessee can be curtailed, the same must be effective from a future date and not from an earlier point of time. If after inducing a citizen to arrange his business in a manner with a clear stipulation that if the existing statutory conditions are satisfied, in that event, he would get the benefit of taxation and thereafter, the Revenue withdraws such benefit and imposes a new condition which the citizen at that stage is

incapable of complying whereas if such promise was not there, the citizen could arrange his affairs in a different way to get similar or at least some benefit, such amendment must be held to be arbitrary and if not, an ingenious artifice opposed to law. Consequently, the amendment is quashed to the extent it is retrospective. (A.Y. 1988-89 to 2004-05)

Avani Exports and others v. CIT (2012) 348 ITR 391 / 74 DTR 97 / 252 CTR 473 / 209 Taxman 59 (Mag.)(Guj.)(HC)

S. 80HHC : Export business - Depreciation - Supporting manufacture - Loss in business - Depreciation is to be allowed even if not claimed by assessee in the return - If there is loss the same has to be adjusted from the composite business

While computing the total income, the assessee did not claim depreciation in respect of assets used for the purpose of assessee's business. Depreciation was also not claimed while computing the deduction under section 80HHC. Following the full bench decision in Plastiblends India Ltd. v. Addl. CIT (2009) 318 ITR 352 (FB)(Bom.)(HC), the court held that depreciation has to be allowed to the assessee while working out deduction under section 80HHC and also while working out income under then head "Business" even if not claimed by the assessee in the return. In calculating the profits under section 80HHC(3)(c)(i), the profits determined under section 80HHC(3)(c)(ii) has to be reduced from the composite profits and if there is loss, same has to be adjusted, same analogy, if the assessee has issued certificate to supporting manufacturer. (A.Y. 1994-95 to 1996-97)

CIT v. V. M. Salgaonkar & Brothers Ltd. (2012) 72 DTR 369 / 253 CTR 59 (Bom.)(HC)

S. 80HHC : Export business - Constitutional validity - Retrospective effect given to 3rd & 4th Provisos to section 80HHC is ultra vires [S. 28(iiid), 28(iiia), Constitution of India- Art. 14]

The assessee filed a Writ Petition to challenge the constitutional validity of clause (iiid) and (iiie) to section 28 and the insertion of the third and fourth provisos to section 80HHC by the Taxation Laws (Amendment) Act, 2005. Similar matters had been filed before various High Courts. Pursuant to the department's application, the Supreme Court directed that the matter should first be decided by the Gujarat High Court. The Gujarat High Court allowed the Petition in Avani Exports v. CIT and held that retrospective effect given to 3rd & 4th Provisos to section 80HHC is ultra vires. Held by the Bombay High Court:

In Avani Exports, it was held that the amendment is violative for its retrospective operation in order to overcome the decision of the Tribunal, and at the same time, for depriving the benefit earlier granted to a class of the assessees whose assessments were still pending although such benefit will be available to the assessees whose assessments have already been concluded. In other words, in this type of substantive amendment, retrospective operation can be given only if it is for the benefit of the assessee but not in a case where it affects even a fewer section of the assessee. The amendment was quashed to the extent that the operation of the said section could be given effect from the date of the amendment and not in respect of earlier A.Y. of the assessees whose export turnover is above Rs. 10 Crore. In other words, the retrospective amendment should not be detrimental to any of the assessee. As the Supreme Court had transferred all the matters to the Gujarat High Court in order to avoid confusion and difficulties in enforcement of conflicting judgments of different High Courts, it would be appropriate to follow the judgment of the Gujarat High Court.

Vijaya Silk House (Bangalore) Limited v. UOI (2012) 349 ITR 566 / (2013) 83 DTR 241 / (2013) 257 CTR 67 / 213 Taxmnan 30 (Mag.)(Bom.)(HC)

S. 80HHC : Export business - Duty drawback and credit under Duty Entitlement pass Book scheme - DEPB credit would fall under clause (iiib) and premium received would represent profits chargeable under clause (iiid) of section 28, deduction to be allowed accordingly [S. 28(iiib), (iiid)]

The Assessing Officer treated the gross amount of DEPB (i.e. premium received on transfer plus the credit to the DEPB) as profit of business under clause (iiid) of section 28 and excluded the same from the eligible profits. In appeal Commissioner(Appeals) following the Topman Exports v. ITO (2009) 33 SOT 337 held that section 28(iiid) will only cover profit on transfer on DEPB credit. He held that the conditions of the third proviso to section 80HHC(3) of the Act were not fulfilled and therefore only conditional; benefit would be granted. Appeal was filed by revenue and assessee. The matter was restored to the file of Assessing officer to follow CIT v. Kalphataru Colurs & Chemicals (2010) 328 ITR 451 (Bom.)(HC). On appeal to the High Court by assessee the court following the judgment of Supreme Court in Topman Exports v. CIT (2012) 205 Taxman 119 (SC) drawback and credit under Duty Entitlement pass Book scheme. DEPB credit would fall under clause(iiib) and premium received would represent profits chargeable under clause (iiid) of section 28, deduction to be allowed accordingly. [S. 28(iiib), (iiid)] (A.Y. 2002-03)
Pal Enterprises v. CIT (2012) 209 Taxman 11 (Delhi)(HC)

S. 80HHC : Export business - Surrender in the course of survey - Profits of business -Treating the surrendered amount as business income will lead to anomalies while computing deduction under section 80HHC(3). The formula itself is unworkable [S. 133A]
In the course of survey the assessee surrendered an amount of Rs. 75 lakhs under the head business income to by peace with department. In the return of income the assessee claimed the surrendered income as business profits and claimed deduction under section 80HHC. The Assessing Officer disallowed the claim on the ground that the surrendered income was not business profits and the same was not related with foreign exchange. In appeal the Commissioner(Appeals) held that amount surrendered has to be assessed under section 68 and 69A under the head income from other sources. On further appeal to Tribunal, the Tribunal accepted the surrendered amount as business income and entitled to deduction under section 80HHC. On appeal to the High Court by revenue the court held that treating the surrendered amount as business income will lead to anomalies while computing deduction under section 80HHC(3). The formula itself is unworkable. The Court held that there cannot be any presumption that the surrendered income should be treated as income from exports. Accordingly the appeal of revenue was allowed. (A.Y. 1997-98)
CIT v. Goel Jewellers (2012) 74 DTR 345 (Delhi)(HC)
Goel Jewellers v. CIT (2012) 74 DTR 345 (Delhi)(HC)

S. 80HHC : Export business - Manufacturing - Trading - Consolidated export activity of manufactured goods and trading goods are to be taken in to account for claiming relief under section 80HHC [S. 80AB]
The Assessee-company has claimed deduction under section 80HHC with regard to profit of trading goods in which it gained the profit. It had suffered the loss in respect of its manufactured goods. The Assessing Officer denied the deduction by considering both business together to compute deduction. High Court up held the view of Assessing Officer and appeal of revenue was allowed. *(*A.Y. 1992-93)
CIT v. Harrisons Malayalam Ltd. (2012) 76 DTR 335 / 210 Taxman 115 (Ker.)(HC)

S. 80HHC : Export business - Interest income - Deduction is not allowable
Assessee, an exporter, invested its surplus funds with its sister-concern and earned interest income. It claimed deduction under section 80HHC. Nothing was presented to indicate that said investments were pursuant to any business activity and assessee was engaged in money lending business. Therefore, section 80HHC deduction was not allowable to assessee in respect of interest income. (A.Y. 1989-90)
Tanna Exports Ltd. v. CIT (2012) 211 Taxman 76 / 78 DTR 395 (Mag.)(Bom.)(HC)

S. 80HHC : Export business - Total turnover - Unrealized sale proceeds should be included in total turnover

Assessee could not realize certain sale proceeds for exported goods due to objections raised by foreign buyer. It sought for deduction of unrealised sale proceeds from export turnover while calculating deduction under section 80HHC. Assessing Officer worked out deduction under section 80HHC on total turnover including export turnover and business profit. The Court held that Tribunal was right in concluding that unrealized sale proceeds should be included in total turnover for purposes of computing allowable deduction under section 80HHC, though it was not treated as export turnover. Appeal of assessee was dismissed. (A.Y.1996-97)

Galaxy Granites (P.) Ltd. v. CIT (2012) 211 Taxman 78 (Mag.)(Mad.)(HC)

S. 80HHC : Export business - Remission or cessation of liability - Not eligible for deduction [S. 41(1)]

The assessee is an exporter and eligible for deduction under section 80HHC. In the course of assessment, assessee agreed to surrender a sum as arising out of cessation of liability in its books and claimed the deduction under section 80HHC in respect of amount surrendered which was rejected. On appeal the Court held that since said sum could not be treated to have been earned from business of export, it would not form part of turnover of export business and thus, would not be eligible for section 80HHC deduction. Legal fiction of section 41(1) cannot be extended any further and provisions of section 80HHC have to be understood excluding legal fiction created by deeming provisions contained in section 41(1) as source of income which is chargeable cannot be related to export of goods or merchandise. Appeal of assessee was dismissed. (A.Y. 2000-01)

Monte International v. CIT (2012) 211 Taxman 51 (Mag.)(P&H)(HC)

S. 80HHC : Export business - Addition as unexplained cash credits [S. 68]

Assessee is engaged in export business. Assessing Officer made addition under section 68 on account of unexplained cash credits appearing in books of assessee. Assessee claimed deduction under section 80HHC in respect of addition made on account of creditors. The Tribunal held that since creditors in assessee's case represented purchasers, benefit of section 80HHC was to be allowed to assessee. (A.Y. 2001-02)

Divine International v. Dy. CIT (2012) 134 ITD 148 (Delhi)(Trib.)

S. 80HHC : Export business - Export oriented undertaking - Profits of business - Profits of EOU unit shall form part of head 'profits and gains of business or profession' and therefore same is includible in 'profits of business of assessee' [S. 10B]

The assessee had two units namely EOU unit and DTA unit and both have domestic as well as export turnover. While the EOU unit was entitled for deduction under section 10B, the DTA Unit was entitled for deduction under section 80IA. The DTA unit is entitled to deduction under section 80HHC on its export profit. The assessee has included export sales of EOU in the export turn over of it while computing deduction under section 80HHC. The Assessing Officer and Commissioner(Appeals) rejected the inclusion of export sales of EOU. The Tribunal held that section 10B is amended by the Finance Act, 2000, with effect from 1-4-2001 and also section 80A(4) with effect from 1-4-2003. These amended provisions contains adequate expressions in them to infer and interpret that the provision of section 10B is a 'deduction' provision and not exemption provision. Accordingly following the ratio of judgment in Hindustan Unilever Ltd. v. Dy. CIT (2010) 325 ITR 102 (Bom.)(HC), the Tribunal held that the profit of EOU unit shall form part of the head of income 'profits and gains of business or profession' and therefore same shall be includible in the 'profits of the business' of the assessee. (A.Y. 2001-02)

Serum Institute of India Ltd. v. Addl. CIT (2012) 135 ITD 69 / 147 TTJ 594 / 72 DTR 89 (Pune)(Trib.)

S. 80HHC : Export business - Excise duty - Excise duty should not be included in total turnover for the purpose of computation under section 80HHC - Mistake of Chartered Accountant in the form 10CCAC cannot be relied upon by revenue for reducing the legitimate claim allowable as per provisions of the Act

The Chartered Accountant of assessee in the form 10CCAC has included the excise duty as part of total turnover. The assessee made the claim that in the export sales there is no excise duty and therefore adding the excise duty was not correct. In appeal Commissioner confirmed the addition. On appeal to Tribunal the Tribunal held that the tax liability has to be determined in accordance with law and mistake made in the certificate of Chartered Accountant in form No. 10CCAC should not have been relied upon by the revenue for reducing the legitimate claim for deduction under section 80HHC. Accordingly the claim of the assessee was allowed. (A.Y. 2004-05)

Schrader Duncan Ltd. v. Addl. CIT (2012) 50 SOT 68 / 150 TTJ 559 / 79 DTR 25 (Mum.)(Trib.)

S. 80HHC : Export business - Unabsorbed business loss - Depreciation - As there was no profit after set-off of unabsorbed business losses and depreciation of earlier year claim of deduction under section 80HHC is rejected

While determining the business profit for the purpose of Section 80HHC of the Act unabsorbed business losses and depreciation of the earlier years is to be set-off. Where after set-off of business losses and unabsorbed depreciation there are no eligible profits, claim of deduction under Section 80HHC has to be rejected. (A.Y. 2003-04, 2004-05, 2006-07)

Mafatlal Denim Ltd. v. Dy. CIT (2012) 135 ITD 483 / 147 TTJ 346 / 72 DTR 281 (Mum.)(Trib.)

S. 80HHC : Export business - Turnover - EOU eligible for dedeuction under section 10B - For computing deduction under section 80HHC on other units turnover of EOUs cano not be included in the total turnover

Where an exporter has both Section 10B eligible units as well as non-eligible units, turnover of 100% export oriented undertaking, whose profits have been claimed as deduction under Section 10B, cannot be included in total turnover for purpose of computing deduction under Section 80HHC. (A.Y. 2003-04)

Crew B.O.S. Products Ltd. v. ACIT (2012) 135 ITD 542 / 147 TTJ 628 / 74 DTR 203 (Delhi)(Trib.)

S. 80HHC : Export business - Trading goods - Indirect cost - Only indirect cost attributable to export have to be reduced first and not all costs other than direct costs

Only indirect cost attributable to export have to be reduced for computing the deduction under section 80HHC in respect of export of trading goods and not all costs other than direct costs. In other words, first, attribution of indirect costs to the export of trading goods is to be made and then only scaling down in proportion is to be resorted to. (A.Y. 2003-04)

B. Parameswaran Bharathan v. Dy. CIT (2012) 136 ITD 119 / 72 DTR 354 / 147 TTJ 154 (TM)(Cochin)(Trib.)

S. 80HHC : Export business - Trading goods - Only indirect cost attributable to export have to be determined

While computing deduction under Section 80HHC, indirect costs attributable to export of trading goods has to be first determined and then proportion of trading goods turnover to total turnover be applied to it. (A.Y. 2002-03 and 2003-04)

Dy. CIT v. Kerela Nut Food Co. (2012) 136 ITD 219 / 147 TTJ 564 / 73 DTR 124 (TM)(Cochin)(Trib.)

S. 80HHC : Export business - Turnover - Export house - Held turnover of Export House can not be considered as turnover of assessee

Exports through export houses Turnover of Export House cannot be treated as export turnover of the assessee for the purpose of second proviso to section 80HHC(3); since the export turnover of the assessee from direct exports is less than Rs. 10 crores, it is entitled to benefit of second proviso to section 80HHC(3). (A.Y. 2001-02)

Baby Marine Products v. ACIT (2012) 147 TTJ 385 / 73 DTR 169 (TM)(Cochin)(Trib.)

S. 80HHC : Export business - Direct cost - Direct cost in respect of goods exported but sales proceeds not brought in India within specified period, cannot be reduced while computing deduction

Direct cost incurred in respect of goods which have been exported but sale proceeds not brought in India within specified period, cannot be reduced while computing deduction under section 80HHC. The appeal of revenue was allowed. (A.Y. 1998-99 & 1999-2000)

Dy. CIT v. Sandoz (P.) Ltd. (2012) 137 ITD 326 / 80 DTR 129 (Mum.)(Trib.)

S. 80HHC : Export business - Deduction under section 80IA should be reduced in proportion of export turn over to total turnover [S. 80IA]

Export profits of the export units which have been allowed as deduction under section 80IA/80IB should be reduced in proportion of export turnover to total turnover while allowing deduction under section 80HHC and not the entire deduction allowed under section 80IA/80IB subject to the condition that total deduction should not exceed the eligible profits of the undertaking. (A.Y. 2002-03)

Reliance Industries Ltd. v. Addl. CIT (2012) 79 DTR 315 / (2013) 55 SOT 8 (URO)(Mum.)(Trib.)

S. 80HHC : Export business - DTAA - India-Canada - Non-resident - Permanent residence - Deduction denied as the assessee has not filed the required details]S. 6, 90, Art. 5]

The assessee was carrying on the business of export. He filed return of income for relevant years claiming that he was resident of India and entitled to the benefits provided under section 80HHC. Subsequently, the department conducted a survey on the assessee whereby it transpired that the assessee had settled down in Canada and the entire business was managed by his brother on the strength of general power of attorney. The copies of the passport submitted by the power of attorney holder revealed that the assessee was not a resident of India and, hence, was not entitled for benefits under section 80HHC. Accordingly, department reopened assessment for relevant years. The assessee submitted that even if it was presumed that he was a non-resident then as per provisions of Art. 5 of the India-Canada DTAA there was no PE in India. It was the submission of the assessee that it was merely making purchases in the course of exports and, hence, there was no PE in India. Number of letter had been submitted by the assessee claiming that he was a citizen of Canada but there was no trace of any evidence submitted to show that the assessee was tax resident of Canada. Assessing Officer therefore, held that in absence of any tax residency certificate, the assessee could not claim benefits of the Indo-Canada DTAA. On appeal, the Commissioner(Appeals) allowed claim of the assessee. Before the Tribunal, the brother of the assessee submitted that of late the assessee (who was residing in Canada), had not been co-operating in the matter and his whereabouts were also not known, and he was finding difficulty in representing the matter before the Tribunal. He also submitted that it seems that the assessee did not want him to represent the matter before the Tribunal. He accordingly, withdraw his Power of Attorney and did not pursue appeals of revenue. The Tribunal held that no useful purpose would be served by adjourning the matter, as there is no possibility of getting the notices served on the assessee when the duly constituted power of attorney holder acknowledges the receipt of notice but refused to co-operate for the reasons specified in the letter and due to lack of assistance from the assessee in defending revenue's appeals and as being

convinced with the submissions of the Department, the grounds raised in all the appeals preferred by the revenue is to be allowed. Insofar as the cross objections preferred by the assessee are concerned, due to non-prosecution, the same are dismissed. (A.Y. 1999-2000 to 2004-05)
ITO v. Nasiruddin A. Jesani (2012) 53 SOT 526 (Mum.)(Trib.)

S. 80HHC : Export business - Separate books of account - Turnover of separate unit -Claim was allowed
Assessee Company made export of electronic hardware. It claimed deduction under section 80HHC by taking into account total turnover of one unit which was a technology park from which said export was made. Assessing Officer took a view that while computing deduction under section 80HHC, total turnover of assessee Company was required to be taken into consideration and not just total turnover of one unit. When separate books of account are maintained by assessee in respect of concerned unit and profit eligible for deduction under section 80HHC can be worked out directly on basis of such separate books of account, same needs to be preferred over formulae given in sub-section (3) of section 80HHC which works out such profit only on pro rata basis. Therefore, claim raised by assessee on basis of turnover of a particular unit was to be allowed. (A.Y. 1998-99 to 2001-02)
TATA Consultancy Services Ltd. v. ACIT (2012) 54 SOT 221 (URO)(Mum.)(Trib.)

S. 8OHHC : Export business - Interest on refund - Income from business or other source - Matter remanded
The assessee was engaged in the business of 'manufacturing' as well as 'import and export of diamonds' Assessee had received interest on refund of income-tax on which it claimed deduction under section 80HHC treating it as business income. Assessing Officer treated it as income from other sources and computed deduction under section 80HHC accordingly. Commissioner(Appeals) took it as interest received on Bank deposits and allowed assessee's claim. Since there was a contradiction in findings recorded by Assessing Officer and Commissioner(Appeals), matter was to be decided afresh. (A.Y. 2004-05)
ACIT v. D.A. Jhaveri (2012) 54 SOT 219 (URO)(Mum.)(Trib.)

S. 80HHC : Export business - Computation - Total turnover - Export turnover
The Tribunal held that the expenditure incurred in foreign currency which was excluded from the export turnover should also be excluded from the total turnover in order to grant benefit of the provisions of the section. Expenditure incurred in internet charges excluded from export turnover also be excluded from total turnover. (A.Y. 2005-06)
ACIT v. Charon Tech. P. Ltd. (2012) 20 ITR 487 (Chennai)(Trib.)

S. 80HHC : Export business - Eligible profit - Book profit - On net profit of both activities - Deduction to be on the adjusted book profit [S. 115JA]
The assessee is having profit from trading export and loss from manufacturing export. Deduction only from net profit from both activities. Profit eligible for deduction under section 80HHC to be computed on basis of adjusted book profit not on basis of profit computed under normal provisions of the Act. **(**A.Y. 1999-2000)
KEC International Ltd. v. Dy. CIT (2012) 20 ITR 282 (Mum.)(Trib.)

S. 80HHE : Export business - Computer software - Foreign currency - Development and export of software
The Tribunal has not considered the relevant documents which would clearly show that the expenses incurred in foreign exchange was towards technical services rendered outside India and not for development of software outside India. Once it is held that expenditure incurred for the relevant A.Y. pertains to technical services outside India, the same has to be excluded from the export turnover for

the purpose of arriving at the deduction admissible under section 80HHE, therefore, High Court set aside the finding of Tribunal. (A.Y. 1993-94, 1994-95 & 1996-97)
CIT v. Infosys Technologies Ltd. (No. 2) (2012) 349 ITR 588 / 65 DTR 353 / 246 CTR 371 (Karn.)(HC)

S. 80HHE : Export business - Computer software - Fluctuation in valuation of currency which has direct nexus of export of software has to be taken into consideration for allowing deduction under section 80HHE
The Court held that fluctuation in the valuation of currency which has to be converted to foreign currency has direct nexus to the export of software should be taken into consideration for computation of deduction under section 80HHE, said amount cannot be assessed as income from other sources. (A.Y. 1998-99)
CIT v. Infosys Technologies Ltd. (2012) 349 ITR 606 / 205 Taxman 59 (Karn.)(HC)

S. 80HHE : Export business - Computer software - Exchange rate fluctuation Rate variation gain has not to be excluded from total turnover and export turn over - In favour of assessee
The Assessing Officer held that exchange rate fluctuation gains had to be excluded from total turnover and export turnover for computation of deduction under section 80HHE of the Act in view of explanation (e) to section 80HHE of the Act, which contemplates only actual amount of foreign exchange received in India. In appeal the Tribunal set aside the said finding. On appeal by revenue to High Court, the court up held the view of Tribunal and held that the exchange rate variation gain has not to be excluded from total turnover and export turnover for computing of deduction under section 80HHE. (A.Y. 1999-2000)
CIT v. Infosys Technologies Ltd. (No. 5) (2012) 349 ITR 610 / 205 Taxman 250 (Karn.)(HC)

S. 80HHE : Export business - Computer software - Assessee has no option to claim deduction under section 80O [S. 80O]
It is no doubt true that prior to the introduction of section 80HHE under the Finance (No. 2) Act, 1991 w.e.f. 1st April, 1991, there was no specific head under which technical or professional services would qualify for deduction other than under section 80-O. However, with the introduction of section 80HHE w.e.f. 1st April 1991, one finds a specific provision for granting deduction of any income earned on providing technical services outside India in connection with the development or production of computer software. Specific provision excludes a general provision. Given the fact that cl. (ii) to sub-section (1) of section 80HHE restricts technical services rendered outside India as one in connection with the development or production of computer software, the assessee could not fall back on section 80-O for the purpose of claiming a better deduction. In the circumstances, Tribunal was not correct in holding that the assessee had a choice of choosing either section 80HHE or section 80O, depending on the nature of the profession. (A.Y. 1993-94 & 1995-96)
CIT v. B. T. System & Service Ltd. (2012) 79 DTR 118 / 254 CTR 411 (Mad.)(HC)

S. 80HHE - Export business - Computer software - Turnover - Turnover of foreign branches has been reduced by revenue from export turnover, excludible from figure of 'Turnover' for purpose of computing deduction under section 80HHE
Where turnover of foreign branches has been reduced by revenue from export turnover, same is excludible from figure of 'Turnover' for purpose of computing deduction under Section 80HHE. (A.Y. 2002-03 & 2003-04)
Patni Computer Systems Ltd. v. Dy. CIT (2012) 135 ITD 398 / 16 ITR 533 / (2011) 60 DTR 113 / 141 TTJ 190 (Pune)(Trib.)

S. 80HHF : Export business - Transfer of film software - 90% of net commission received by assessee from profits of business to be reduced for computation of deduction under section 80HHF, matter remanded back to High Court

The question before the court was "whether on the facts and in the circumstances of the case and in law, the Income-tax Appellate Tribunal was correct in directing the department to reduce 90% of the net interest commission received by the assessee from the profits of the business for computation of deduction under section 80HHF of the Income-tax Act, 1961".

The department argued that the provisions of section 80HHF may not be identical to the provisions section 80HHC. The assessee contended the provisions are identical. Supreme Court remitted the matter back to the High Court to decide expeditiously, if possible within three months. It may also consider the judgment in case of ACG Associated Capsules (P) Ltd. v. CIT (2012) 343 ITR 89 / 205 Taxman 136 / 247 CTR 372 / 67 DTR 205 (SC)

CIT v. Star India (P) Ltd. (2012) 210 Taxman 575 / 254 CTR 335 / 79 DTR 287 (SC)

S. 80HHF : Export business - Transfer of film software - EOU - Deduction is not available in both the sections [S. 10B]

Assessee set up an EOU unit. It claimed deduction under section 10B. With regard to its other businesses it claimed deduction under section 80HHF. While computing deduction under section 80HHF it included export profit of EOU. The Commissioner(Appeals), however, reduced profit derived from EOU on ground that profit derived by EOU was exempt from tax under section 10B. The Tribunal held that the express intention of Legislature with regard to sections 10B and 80HHF is not to allow deduction under both sections and further, both of said sections expressly prohibits to allow deduction other than allowable under respective sections. Therefore, order of Commissioner(Appeals) was confirmed (A.Y. 2001-02)

ACIT v. Sri Adhikari Brothers Television Network Ltd. (2012) 137 ITD 154 / 149 TTJ 324 / 76 DTR 244 (Mum.)(Trib.)

S. 80I : New industrial undertakings - Manufacture - Cutting of jumbo rolls of photographic films in to smaller marketable sizes would constitute 'manufacture' for purpose of deduction under section 80I

The question before the Court was whether cutting of jumbo rolls of photographic films in to smaller marketable sizes would constitute 'manufacture' under section 80I. The Apex Court following the ratio in India Cine Agencies v. CIT (2009) 308 ITR 98 (SC), held that the activity will amount to manufacture, accordingly civil appeal of the assessee was allowed. (A.Y. 1988-89)

India Cine Agencies v. Dy. CIT (2012) 210 Taxman 253/(2013) 87 DTR 72/259 CTR 274 (SC)

S. 80I : New industrial undertakings - Manufacture - Dry cleaning charges do not constitute income derived from industrial undertaking hence not eligible for deduction

Assessee which is engaged in the business of manufacturing and sale of cotton hosiery goods, claimed deduction under section 80I in respect of dry cleaning charges. The Court held that dry cleaning charges do not constitute income derived from industrial undertaking, hence, not eligible for deduction. (A.Y. 1990-91 & 1991-92)

Nahar Spinning Mills Ltd. v. CIT (2012) 66 DTR 257 (P&H)(HC)

S. 80I : New Industrial undertakings - Substantial expansion - Despite "Dependence" on Old unit, unit can be "New Industrial Undertaking" and entitled to deduction

The assessee had a plant to produce caustic soda. It increased capacity from 37425 MT to 70425 MT by installing "12 new cells" and incurred expenditure of Rs. 7.5 crore towards new machinery and plant added to the existing plant. The assessee claimed that a "new industrial undertaking" had come into being which was eligible for relief under section 80-I. The Assessing Officer, CIT(A) & Tribunal

disallowed the claim on the ground that it was a case of substantial expansion and not a "new industrial undertaking" on the ground that though new plant and machinery by investing substantial funds had been installed, the undertaking was not an "integral unit by itself" but was dependent on the old undertaking for its functioning. On appeal by the assessee to the High Court, held reversing the lower authorities:

The principal object of section 80-I is to encourage setting up of new industrial undertakings by offering tax incentives. A reasonable and purposive construction should be adopted. There is no logic in the argument of the department that the true test would be as to whether a new industrial undertaking can function independently of the existing industrial undertaking. If this argument is accepted, it will amount to adding a new clause in section 80-I of the Act. The fact that the new unit is not capable of independently producing the goods without taking the assistance of the existing plant and machinery of the old unit is no ground to reject the claim under section 80-I. The test laid down in Textile Machinery Corporation Ltd. v. CIT (1977) 107 ITR 195 (SC), namely that the new unit should have a "separate and distinct identity" is not violated only because the new undertaking is to a certain extent dependent on the existing unit. It all depends on the nature of the technology and the mechanism of production. One cannot ignore the fact that new machinery and new plant have been installed at an investment of Rs. 7 crore and the fact that production has gone from 34000 MT to 75000 MT [CIT v. Associated Cement Companies Ltd. (1979) 118 ITR 406 (Bom.)(HC) distinguished / explained]. (A.Y. 1982-83)

Gujarat Alkalies & Chemicals Ltd. v. CIT (2012) 249 CTR 82 / 69 DTR 57 / Vol. 42 Jan. T.L.R. 59 / (2013) 350 ITR 94 (Guj.)(HC)

S. 80I : New Industrial undertakings - Computer data processing - Activity of computer data processing services and sale of computer stationary amounted to manufacture or production of any article or thing, thus deduction allowed

The assessee is an industrial undertaking carrying out activity of computer data processing services and sale of computer stationary amounted to manufacture or production of any article or thing. It was held that assessee was entitled to special deduction under section 80I. (A.Y. 1989-90 and 1990-91)

CIT v. Business Information Processing Services (2012) 345 ITR 548 / 74 DTR 21 (Raj.)(HC)

S. 80I : New Industrial undertakings - Deduction under section 801 - Schedule XI - Zarda Yukta Pan Masala is a tobacco preparation under Item 2 of Schedule XI and not eligible for section 80-I deduction

The assessee, engaged in manufacturing of Pan Masala and other pan flavouring products including Zarda Yukta Pan Masala, claimed deduction under section 80-I. The Assessing Officer found that Zarda Yukta Pan Masala had a significant portion of Zarda pungent flavour of tobacco, which was consumed by persons, who are addicted to tobacco. The Assessing Officer disallowed the claim of the assessee for deduction under section 80I. The Commissioner(Appeals) dismissed the appeal. The Tribunal allowed deduction under section 80I. On appeal to High Court by revenue the Court held that the 'Zarda Yukta Pan Masala' is a tobacco preparation under item 2 of Schedule XI hence not eligible for deduction under section 80I. Appeal of revenue was allowed. (A.Y. 1990-91 to 1993-94, 1995-96)

CIT v. Kothari Pouches Ltd. (2012) 211 Taxman 521 (All.)(HC)

S. 80IA : Industrial undertakings - Books of account - In absence of separate books, Assessing Officer is entitled to estimate eligible profits [S. 145]

The assessee manufactured yarn and also sold raw wool, wool waste and textile and knitting cloth. It claimed a deduction of 30% in respect of the profits of the "manufacturing activity". As the assessee had not maintained accounts for manufacture of yarn actually produced as a part of industrial undertaking, the Assessing Officer worked out the manufacturing account giving a bifurcation in

terms of quantity of raw wool produced. The assessee challenged the preparation of separate trading account by the Assessing Officer in respect of manufacturing and trading activities. The CIT(A) upheld the assessee's claim though the Tribunal and High Court upheld the Assessing Officer's stand. On appeal by the assessee to the Supreme Court, held dismissing the appeal:
The findings given by ITAT and the High Court are findings of fact. We are not concerned with the interpretation of Section 80IA of the Act. On facts, we find that the assessee ought to have maintained a separate account in respect of raw material which it had sold during the assessment year. If the assessee had maintained a separate account, then, in that event, a clear picture would have emerged which would have indicated the income accrued from the manufacturing activity and the income accrued on the sale of raw material. We do not know the reason why separate accounts were not maintained for the raw material sold and for the income derived from manufacture of yarn. (A.Y. 1998-99)
Arisudana Spinning Mills Ltd. v. CIT (2012) 348 ITR 385 / 78 DTR 393 / 210 Taxman 233 / 254 CTR 226 (SC)

S. 80IA : Industrial undertakings - Duty drawback - Duty drawback is not eligible for deduction under section 80IA
Following the ratio of decision of apex court in Liberty India v. CIT (2009) 317 ITR 218 (SC) , the court held that deduction under section 80IA is not allowable on amount of duty draw back and the appeal of the department was allowed.
CIT v. Orchev Pharma (P) Ltd. (2012) 210 Taxman 236 / (2013) 354 ITR 227 / 259 CTR 495 / 89 DTR 328 (SC)
Editorial:- CIT v. Orchev Pharma (P.) Ltd. (2012) 25 Taxman.com 379 (para 4) reversed.

S. 80IA : Industrial undertakings - Manufacture - Texturing and twisting of polyester yarn amount to 'manufacture'
The question raised before the Supreme Court was whether texturing and twisting of polyester yarn amount to 'manufacture' for the purpose of computation of deduction under section 80IA of the Income-tax Act, 1961. Following the ratio in the case of CIT v. Emptee poly-yarn (P) Ltd. (2010) 320 ITR 665 / 188 Taxman 188 / 229 CTR 1 / 2 SCC 720 (SC), the question was answered in favour of assessee and the civil appeal filed by the department was dismissed. (A.Y. 1998-99, 2001-02)
CIT v. Yashasvi Yarn Ltd. (2012) 210 Taxman 262 / 254 CTR 112 / 79 DTR 98 / (2013) 350 ITR 208 (SC)

S. 80IA : Industrial undertakings - Manufacture - Production of film - Matter remitted back to the High Court to decide in accordance with law
The question which was raised before the Court was whether production of film amount to manufacture under section 80IA of the Income-tax Act. On going through the records the court found that the assesse had not claimed the benefit of deduction under section 80IA either before the Assessing Officer or Commissioner(Appeals). It was first time before the Tribunal the assessee has raised the additional ground, which was admitted and the matter was set aside before the Assessing Officer. The High Court dismissed the appeal, as there was delay of 761 days. The Supreme Court set aside the order and directed the High Court to decide the issue on merit whether producing a film would amount to 'manufacture' within the meaning of section 80IA. (A.Y. 1994-95)
CIT v. Zee Tele films Ltd. (2012) 210 Taxman 283 / 79 DTR 148 / 254 CTR 224 (SC)

S. 80IA : Industrial undertakings - Infrastructure development - In land port - Inland container depots - Inland container depots are inland ports and entitled to exemption as per section 80IA(4) as infrastructure facility

The assessee is a public sector undertaking engaged in the business of handling and transportation of containerized cargo to and from industrial centers used to face bottlenecks at the sea ports due to logistical and handling issues and issues relating customs. From the A.Y. 1999-2000 that inland ports started enjoying deduction under section 80IA as infrastructure facility. Assessee claimed deduction in respect of income from Inland container depots. Tribunal has disallowed the claim. On appeal to High Court by the assessee, it was held that having regard to the provisions the Customs Act, the communications issued by the CEBC as well as the Ministry of Commerce and industry, the object of including "inland port" as an infrastructure facility and also having regard to the fact that customs clearance also takes place in the Inland container depot, the assessee' claim the Inland container depots are in land ports under explanation (d) to section 80IA(4). (A.Y. 2003-04 to 2005-06)

Container Corporation of India Ltd. v. ACIT (2012) 346 ITR 140 / 72 DTR 297 / 252 CTR 67 / 208 Taxman 62 (Delhi)(HC)

S. 80IA : Industrial undertakings - Infrastructure development - Industrial park - Application for notification was not made before cutoff date i.e. 31st March, 2006 on which date the 2002 scheme came to an end, the assessee is not entitled to claim benefit under section 80IA(4)(iii)

The petitioner company filed an application on 23rd September, 2006 with the Ministry of Commerce and Industries for registration of the Industrial park under the Industrial Park Scheme, 2002, to avail of benefits / exemption under section 80IA of the Income-tax Act. On the said date the 2002 Scheme was not in operation and was not applicable. On the facts the industrial park set up by it not being operational by 31st March, 2006 and completion certificate for the park having been issued on 29th August, 2007, the petitioner's industrial park could not be notified / approved under Industrial Park Scheme, 2002 for claiming benefit of section 80IA(4)(iii). The Court also rejected the plea of promissory estoppels. The Court held that Application for notification was not made before cutoff date i.e 31st March, 2006 on which date the 2002 scheme came to an end, the assessee is not entitled to claim benefit under section 80IA(4)(iii).

Regency Soraj Infrastructures v. UOI (2012) 345 ITR 105 / 249 CTR 280 / 70 DTR 29 / 205 Taxman 62 (Delhi)(HC)

S. 80IA : Industrial undertakings - Deduction allowed in initial year (A.Y. 2004-05), hence deduction cannot be disallowed in A.Y. 2006-07 on ground of fulfillment of conditions of sub-section (3) thereof r/w. cl. (ii) of sub-section (4) of section 80IA inserted w.e.f. 1/4/2005

Assessee engaged in providing fax and email services was granted license for carrying on internet and internet telephony services w.e.f. October, 2000. The assessee having been allowed deduction under Section 80IA in A.Y. 2004-05 as an undertaking engaged in business of internet and internet telephony services, same could not have been disallowed in A.Y. 2006-07 on the ground of fulfillment of conditions of sub-section (3) thereof r/w. cl. (ii) of sub-section (4) of section 80IA inserted w.e.f. 1/4/2005. (A.Y. 2006-07)

CIT v. TATA Communications Internet Services Ltd. (2012) 71 DTR 303 / 204 Taxman 606 / 251 CTR 290 (Delhi)(HC)

S. 80IA : Industrial undertaking - Expansion of existing unit - New unit - Commencement of commercial production - Installation of new plant and machinery will amount to new industrial undertaking hence the assessee is entitled to deduction

The assessee has claimed deduction under section 80IA of the Income-tax Act, in respect of its Silvasa Unit and its Achhad Unit. The Assessing Officer has rejected the claim. The Commissioner(Appeals) also up held the order on the ground that the deduction under section 80IA is applicable only on those undertakings which had commenced commercial production before March 31, 2000. The Tribunal held that the assessee had started manufacturing some new items of the same nature and for the purpose installed some new plant and machinery along with the old plant and machinery, in the same unit, at the same factory site without any basic change in the administrative

set up or business organisation. The Tribunal also noted that earlier the assessee had engaged in the manufacture of stationery items and the new products were of the same nature. The Tribunal held that the assessee is entitled to deduction. On appeal by the revenue the High Court also held that on subsequent installation of new plant and machinery deduction cannot be denied as the commencement of commercial production was before 31-3-2010.

CIT v. Hindustan Pencils Ltd. (2012) 343 ITR 379 / 74 DTR 343 (Bom.)(HC)

S. 80IA : Industrial undertakings - Manufcature - Development, preparation of voters identify card amounts to manufacture

Development, preparation of voters identify card amounts to manufacture as its preparation requires to process the data, print the same on cards, held hologram containing the state emblem, taking photograph of the voter, match the photo with voter's data, affix the same on the cards and lamination of the cards and lastly take its master copy. All these processes give a complete new final product. Therefore, it amounts to manufacture and the unit engaged in the production of voters identity cards is an Industrial undertaking eligible for the claim of deduction under section 80-IA. (A.Y. 2000-01)

CIT v. Haryana State Electronic Dev. Co-operation (2012) 250 CTR 316 / 71 DTR 322 (P&H)(HC)

S. 80IA : Industrial undertakings - Infrastructure development - Industrial development park - Rejection of application - Rejection of application was not justified only on the ground that development park was completed beyond 31-3-2006

It is not a condition precedent for grant of approval under section 80IA(4)(iii) of the Act that the undertaking must commence operations by 31.03.2006. Therefore the Empowered Committee was held to be not justified in rejecting the application for notification of approved units under section 80IA(4)(iii) of the Act under the Industrial Park Scheme of 2002 only on the ground that development of park was completed beyond 31.03.2006.

Silver Land Developers (P) Ltd. v. Empowered Committee & Ors. (2012) 70 DTR 15 / 249 CTR 255 / (2011) 203 Taxman 529 / 343 ITR 439 (Bom.)(HC)

S. 80IA : Industrial undertakings - Manufacture - Conversion of HDPE bags in to laminated HDPE bags will amount to manufacture or production of goods

The assessee is a small scale industrial undertaking located in back word area which is engaged in the manufacturing of laminated sacks. The assessee claimed deduction under section 80IA. The Assessing Officer held that the activity of assessee cannot be considered as manufacturing of article or things hence disallowed the claim. This was confirmed by the Tribunal. On appeal to the High Court held that, process under taken by the assessee brings about a structural change in semi finished HDPE bags and brings in to existence laminated HDPE bags which are put to entirely different kind of use and thus assessee was manufacturing an article or thing and therefore, was entitled to section 80IA deduction. (A.Y. 1995-96)

Jhaveri Coaters (P) Ltd. v. ACIT (2012) 74 DTR 145 (Guj.)(HC)

S. 80IA : Industrial undertakings - Infrastructure development - Manufacture or production - providing engineering drawings, designs, fabricating and installing drilling equipment for oil platforms, etc.

The capital asset acquired by the assessee, namely, the technical know how in the shape of drawings, designs, charts, plans processing data and other literature falls within the definition of "plant" and is, therefore, a depreciable asset. The assessee brings into existence new and distinct product and designs which are client specific as per their requirement and thereafter advise the clients in manufacture, production according to the designs and also advise the clients in manufacture, production according to the designs and also advise the client in its installation after the manufactured goods are brought

into country for installation. In other words, what is transferred to the client is not the intellectual property, the consideration of which is for supply of drawings and design. Instructions given for preparing the equipment according to the drawings and also its installation when it is installed. Therefore, the said activity of the assessee falls within the meaning of the word 'manufacture' or 'produce' used in section 80IA. Even if the assessee as ancillary or incidental or in connection with the aforesaid activity renders some service by way of advice or review or procurement of materials, the said service is a part of the manufacturing or a production activity with which it carriers on and therefore, the Tribunal was justified in exitending the benefit of section 80IA to the assessee in the light of the undisputed and admitted facts on record. The material on record discloses that the assessee has employed nearly about 400 persons as work force to carry out it activities. The word 'worker' used in the section cannot be construed in the context of the Inds. Disputes Act, 1947. The meaning of the word 'worker' has to be noted in the context of manufacture or production activity carried on by the assessee, which in turn earns foreign exchange certainly which requires highly qualified persons such as engineers. Even otherwise, the material on record shows the assessee is carrying on its activities with the aid of power and it has engaged more than the requisite number of draftsmen, supervisors and even persons who are technically qualified. Therefore, the Tribunal was justified in extending the benefit of section 80IA to the assessee. (A.Y. 1994-95 to 1999- 2000)

CIT v. John Brown Technologies India (P) Ltd. (2012) 77 DTR 58 (Karn.)(HC)

S. 80IA : Industrial undertakings - Infrastructure development - Simultaneous claim under section 80O [S. 80O]

Section 80IA and section 80O both are independent of each other, hence assessee is entitled to claim deduction under both the sections but the overall claim under both sections has to be restricted to the total profits and gains of eligible business from the total profits and gains. (A.Y. 1994-95 to 1999-2000)

CIT v. John Brown Technologies India (P) Ltd. (2012) 77 DTR 58 (Karn.)(HC)

S. 80IA : **Industrial undertakings - Infrastructure development - Windmill for power generation - Depreciation - Set off of depreciation loss / income from power generation business against profits of manufacturing of copper wires**

The assessee installed a windmill for power generation and claimed depreciation. It showed the profits from its business activities at Rs. 60 lakhs and after claiming depreciation of Rs. 55.56 lakhs, furnished "nil" income. The depreciation was disallowed by the Assessing Officer on the ground that the windmill was not installed during the A.Y. 2005-06. Thereafter, it filed a revised statement of income. In the revised computation, it claimed deduction of depreciation on windmill of Rs. 73.20 lakhs against the business profit of Rs. 60 lakhs and the remaining balance of Rs. 13.19 lakhs was carried forward to the next accounting year. Even then the total income under the revised statement of income was nil. The assessee also made a claim under section 80IA. The Assessing Officer held that the non taxable income under section 80IA could not be set off against eligible business income and thus loss / depreciation of Rs. 73.20 lakhs from the windmill was carried forward to the subsequent year to set off against the eligible income of the assessee. The Tribunal held the carried forward loss of the eligible business was required to be set off first against the income of the subsequent years of the eligible business while determining the profits eligible for deduction under section 80IA and set off losses from other sources under the same head was not permissible. On appeal it was held that the order of the Tribunal directing the Assessing Officer to set off the loss/unabsorbed depreciation of the eligible business under section 80IA(4) against the income from other non eligible business carried out by the assessee was not perverse and arbitrary. Accordingly the appeal of revenue was dismissed. (A.Y. 2005-06)

CIT v. Swarnagiri Wire Insulations P. Ltd. (2012) 349 ITR 245 (Karn.)(HC)

S. 80IA : Industrial undertaking - Export incentives earned from DEPB scheme is not entitled to deduction

Following the judgment of Supreme Court in Liberty India v. CIT (2009) 317 ITR 218 (SC) the court held that the assessee was not entitled to deduction under section 80IA on export incentives being profits arising from the DEPB scheme. (A.Y. 2005-06)

M. M. Forgings Ltd. v. Addl. CIT (2012) 349 ITR 673 (Mad.)(HC)

S : 80IA - Industrial undertakings - Manufacture or production - Process of converting limestone into limestone powder is a manufacturing activity

Court held that, converting limestone into limestone powder was a manufacturing activity and income derived from such activity was eligible for deduction under section 80IA and 80IB.

CIT v. Supriya Gill (Smt.) (2012) 254 CTR 559 / 79 DTR 265 / (2013) 214 Taxman 4 (Mag.)(HP)(HC)

CIT v. Vir Singh Gill (2012) 254 CTR 559 / 79 DTR 265 (HP)(HC)

S. 80IA : Industrial undertakings - Infrastructure development - Joint venture - Consortium

Assessee company formed joint venture which was awarded a contract by irrigation department. 40 percentage of works awarded was to be executed by assessee as one of constituents of JV and 60 percent by other constituent. Similarly the assessee also formed consortium along with one 'CT' of Moscow and assessee was to execute 100 percent of works which were awarded to said consortium. Assessee claimed deduction under section 80IA(4) on profits of aforesaid works. Assessing Officer disallowed the claim. The Tribunal held that (1) on facts the joint venture is only a de-jure contractor and assessee is de-facto contractor. (2) The joint venture and assessee cannot be held to be main contractor and members as sub-contractors. (3) Each joint venture would stand in relation to a principal as well as agent of others (4) Since Joint venture and consortium was formed only to obtain the contract from Government body, benefit of deduction under provisions of section 80IA(4) was to be allowed to any enterprise carrying on business of developing or operating and maintaining any infrastructure facility subject to fulfillment of other conditions. (A.Y. 2006-07)

Transstory (India) Ltd. v. ITO (2012) 134 ITD 269 / 70 DTR 66 / 146 TTJ 364 (Visakha.)(Trib.)

S. 80IA : Industrial undertakings - Infrastructure development - Computation of revision of claim was allowed - When assessee maintained separate books of account apportionment of other expenses of other unit on turn over basis held to be not proper

Assessee in the return of income claimed the excess depreciation due to mistake. The same was rectified and revised chart was filed due to which claim under section 80IA was increased. The Tribunal held that assessee is entitled to deduction as per revised chart. Assessee maintained separate books of account, and also allocated the expenses. The Assessing Officer allocated the expenses in "total turn over ratio". The Tribunal held that when the assessee maintained a separate books of account apportionment of expenses on the basis of "total turn over ratio" was not proper and dismissed the appeal of department. (A.Y. 2006-07)

ACIT v. P. I. Industries (2012) 144 TTJ 353 / 67 DTR 153 (Jodh.)(Trib.)

S. 80IA : Industrial undertaking - Infrastructure development - Eligible business -Windmill - Loss of earlier year - Set off cannot be considered - Only the loss from the initial A.Y. to be brought forward

The assessee which is running a spinning mill, installed three wind mills, the first year of commencement of business was the A.Y. 2003-04. The assessee opted for A.Y. 2007-08 as the initial assessment year for the purpose of claiming deduction under section 80IA, in respect of wind mills. The assessee in the initial years set off the losses of wind mills against the profit of spinning mill division. The assessee did not claim deduction during the prior years it suffered losses. The Assessing

Officer has held that the initial year should be taken as the year of commencement of business and not the year of claim of deduction and unabsorbed depreciation of the earlier years which had already been absorbed could be notionally carried forward and taken for computing the deduction. On appeal the Commissioner(Appeals) allowed the claim of assessee and directed the Assessing Officer to compute the profits under section 80IA(5) of the Act, as if such eligible business beginning from the initial assessment year were to be brought forward and not loss of the earlier years which had been already set off against the other income of the assessee. On appeal by revenue the Tribunal up held the order of Commissioner(Appeals) following the judgment in Velayudhasamy Spinning Mills P.Ltd v. ACIT (2012) 340 ITR 477 (Mad.)(HC). (A.Y. 2007-08, 2008-09)

ACIT v. Eveready Spinning Mills Ltd. (2012) 14 ITR 491 (Chennai)(Trib.)

S. 80IA : Industrial undertakings - Infrastructure development - Industrial Undertaking Electricity - Annual loading cost - Profits in case of electricity collected by Electricity Board at lower rate to be determined on the basis of annual loading cost

The Electricity Board purchased power produced by assessee who was manufacturer of Yarn and had installed windmill for the purpose. Where electricity generated by assessee was collected by Electricity Board at lower rate and released to assessee whenever required, it was held that profits of the eligible undertaking were to be determined on the basis of the annual loading cost of electricity purchased by assessee from Electricity Board. (A.Y. 2007-08)

Excel Cotspin (India) P. Ltd. v. Dy. CIT (2012) 15 ITR 57 (Chennai)(Trib.)

S. 80IA : Industrial undertaking - Profit earned from related parties more in relation to unrelated parties, allowance of deduction under section 80IB not to be restricted to same proportion at which profit was derived from unrelated parties - Working of deduction to be made on individual basis and not on an average basis [S. 80IB]

The assessee company was engaged in the business of generation and distribution of power. The assessee claimed deduction under section 80IA. The Assessing Officer by invoking Section 80IA(10) restricted the allowance of deduction by determining the difference between the average price at which power was sold to sister concern and to other related parties. It was held that this section does not provide that if assessee earns more profit from related parties in relation to unrelated parties, then allowance of deduction under section 80IB is to be restricted to same proportion at which profit was derived from unrelated parties, even in circumstances where profits derived from related parties were such that it could be expected to arise to such eligible business as ordinary profit. It was further held that working for provisions of section 80IA(10) has to be made on individual basis and not on an average basis. (A.Y. 2008-09)

OPG Energy (P.) Ltd. v. Dy. CIT (2012) 52 SOT 321 (Chennai)(Trib.)

S. 80IA : Industrial undertakings - Infrastructure development - Inland port - Container freight station(CFS) is inland port hence entitled to deduction

Container freight station engaged in performing functions such as warehousing, customs clearance, and transport of goods from its location to sea –ports and vice-versa by railway or by trucks in containers, has to be regarded as an inland port whose income is entitled to deduction under section 80IA(4) The Tribunal followed the ratio of judgment in Container Corporation of India Ltd v.ACIT (2012) 21 taxman.com 317 (Delhi)(HC).In this case it has been held that an ICD is not port but it is an inland port.The case of container Freight stations(CFS) is similar situated in the sense that both carry out similar functions .ie supports and vice –versa by railway or by trucks in containers .Thus, issue is no longer res-integra .Respectfully following this decision , it is held that a CFS is aninland port whose income is entitled to deduction under section 80IA(4).(A.Y. 2004-05 to 2009-10)

All Cargo Global Logistics Ltd. v. Dy. CIT (2012) 137 ITD 287 / 74 DTR 89 / 147 TTJ 513 / 18 ITR 106 (SB)(Mum.)(Trib.)

S. 80IA : Industrail undertaking - Demerger - Assessee was held entitled to deduction in respect of three units pursuant to demerger scheme approved by Rajathan High Court [S. 80IB]

Assessee's three units demerged with effect from 1-7-2005 pursuant to demerger scheme approved by Rajasthan Hiigh Court. Assessing Officer disallowed the deductions under section 80IA and 80IB in respect of three units .In appeal Commissioner(Appeals) held that action of Assessing Officer was justified in view of the provisions of section 80IA(12), as per which, where the eligible undertaking stands transferred in a scheme of Amalgamation or Demeger, the deduction is allowable only to resulting company. The Tribunal held that as per Circular No. 15/5/1963 IT(AI) dated 13-12-1963, assessee was entitled to deduction under section 80IA and 80IB of the Act..Assessees cross objection was allowed. (A.Y. 2006-07)

ACIT v. SIL Investment Ltd. (2012) 73 DTR 233 / 148 TTJ 213 / 54 SOT 54 (Delhi)(Trib.)

S. 80IA : Industrial undertaking - Infrastructure development - Post amendment - Infrastructure facility is only required to be developed and there is no condition that assessee should also operate same

After amendment by Finance Act, 2002 for claim of deduction under section 80IA(4) infrastructure by Finance Act, 2002 for claim of deduction under section 80IA(4) infrastructure facility is only required to be developed and there is no condition that assessee should also operate same. Assessee, engaged in construction of roads for Govt. Departments, claimed deduction under section 80IA. In view of post amendment situation, Assessing Officer was required to examine terms and conditions of each and every contract entered into by assessee with Govt. to find out whether assessee had worked simplicitor as a contractor or as a developer of infrastructure facility as a whole. The matter was remanded on this account. (A.Y. 2007-08)

Sanee Infrastructure (P) Ltd. v. ACIT (2012) 138 ITD 433 / 80 DTR 310 / 150 TTJ 815 (Indore)(Trib.)

S. 80IA : Industrial undertakings - Infrastructure development - Development and operation of bio-medical waste treatment facility - Entitled to exemption

Assessee entered into an agreement with Surat Municipal Corpn. and Municipal council of Udaipur for development of infrastructure meant for solid waste management system. As per the terms of the agreements, assessee has to set up bio medical waste treatment facility at its own cost. Local body only provided land for the purpose of construction of the said facilities. Agreement with Surat Municipal Corpn. has been entered into for seven years. Assessee has to install necessary equipment and machinery. It is entitled to charge for the treatment at the rate fixed by the Municipal Corpn. from time to time. As per the agreement with Udaipur Municipal Council, the said facility is to be operated without any hindrance during the term of lease for thirty years on payment of token lease amount of Rs. 1. Simply because the collector is authorized to observe the operation and maintenance of the facility, it does not mean that the Municipal Council has financed the said project. Further, assessee has shown the said "infrastructure" as fixed assets in its balance sheets and claimed depreciation thereon which has been allowed by the Revenue. Therefore, assessee has acted as a "developer" and not merely as a "contractor". Assessee has raised bills and TDS certificates have been issued by the Municipal Corporation for waste treatment charges and the services rendered to various hospitals and not in respect of any construction or development. Thus, the contention of the Revenue that since the assessee has been mentioned as "contractor" in the TDS certificates it has not acted as a "developer" cannot be accepted. These TDS certificates were only in respect of the charges for treatment of waste and not in respect of developing or construction of said infrastructure facility. Therefore, the assessee is entitled for deduction under section 80IA(4). (A.Y. 2004-05, 2005-06 & 2007-08)

En-Vision Enviro Engineers (P) Ltd. v. Dy. CIT (2012) 79 DTR 357 / 150 TTJ 621/(2013) 57 SOT 270 (Ahd.)(Trib.)

S. 80IA : Industrial undertakings - Infrastructure development - Income from generation of power - Work in progress does not qualify for deduction

Capitalisation of the expenditure on renovation and modernisation in the books of account is a condition precedent for allowing claim of deduction under section 80IA(4)(iv)(c); expenditure shown in books as capital work in progress does not qualify for deduction under section 80IA(4)(iv)(c). (A.Y. 2005-06)

Bangalore Electric Supply Company Ltd. v. Dy. CIT (2012) 138 ITD 413 / 150 TTJ 865 / 80 DTR 153 (Bang.)(Trib.)

S. 80IA : Industrial undertakings - Infrastructure development - Industrial park - Rental income - Which is part of common facilities is eligible for exemption

Rental Income from administrative building not forming part of allocable area. Deduction under section 80IA(4)(iii) is not restricted to income derived from the allocable area only. Assessee for providing world class hassle free services to tenants of industrial park established by it having entered into agreement with one APMS for maintenance and management of industrial park and having provided space in administrative building, which was part of common facilities, rental income received from APMS was eligible for deduction under section 80IA(4)(iii). (A.Y. 2006-07 & 2007-08)

VITP (P) Ltd. v. Addl. CIT (2012) 138 ITD 407 / 80 DTR 147 / (2013) 151 TTJ 388 (Hyd.)(Trib.)

S. 80IA : Industrial undertakings - Infrastructure development - Sub-contractor for civil work of infrastructure undertaking is not eligible to claim exemption

Assessee-company is a marine works contractor. During relevant period, assessee had executed works of refurbishment/repair, i.e., rip-rap masonary on permanent banks of Champakara and Udyog Mandal Canals in Kerala in pursuance of a works contract with developer, viz., IWAI under Ministry of Shipping & Transport; and protection work for Tapi river bank under authority of Surat Municipal Corporation. Tribunal held that work executed by assessee could, at best, be described as work which was a sub-activity in category of repairs and maintenance thereof rather than development of an infrastructure facility and assessee was a mere contractor executing civil works contracts for an infrastructure undertakings/enterprise and was not eligible for deduction under section 80-IA. (A.Y. 2005-06 & 2006-07)

Yojaka Marine (P.) Ltd. v. ACIT (2012) 54 SOT 293 (Bang.)(Trib.)

S. 80IA : Industrial undertakings - Infrastructure development - Manufacture - Processing of bottling of LPG in to small cylenders [S. 80HH]

Process of bottling of LPG into smaller cylinders amounts to 'manufacture' and, thus, assessee's claim for deduction under sections 80HH and 80-I/80-IA in respect of said activity was to be allowed. (A.Y. 1992-93 to 1995-96)

Hindustan Petroleum Corpn. Ltd. v Dy. CIT (2012) 54 SOT 315 (Mum.)(Trib.)

S. 80IA : Industrial undertakings - Infrastructure development - Unit-wise deduction without deducting losses of other eligible units, deduction was to be allowed as claimed

The assessee is engaged in the business of manufacturing and sale of aluminium extrusion and generation of wind energy. It claimed deduction unit-wise under section 80IA without deducting losses pertaining to the other eligible units. The Assessing Officer adjusted the losses of other eligible units against the profit of unit one and disallowed the deduction under section 80IA though the gross total income of assessee was positive and more than the deduction claimed. On appeal, the Commissioner(Appeals) confirmed the order of the Assessing Officer. On appeal to the Tribunal the Tribunal held that the primary step for considering the grant of deductions under Chapter VI-A is to determine the gross total income, which, in turn, is computed by aggregating the income from all the

sources in the year after adjusting the losses of the current year under any head. The brought forward loss or unabsorbed depreciation etc. are also reduced. The resultant figure is determined as gross total income At the stage of aggregation of income there is no question of adjusting loss of any other business against the business income the undertaking eligible for deduction under chapter VI-A of the Act. The Tribunal held that the Commissioner(Appeals) has erred in interpreting the relevant provision when he held that the losses suffered by assessee in two eligible units be reduced from the income of the other eligible unit before granting the deduction under section 80IA. Accordingly, the appeal of assessee is allowed. Deduction under section 80IA is allowed on the profit derived by it from eligible unit. (A.Y. 2004-05)

Jindal Aluminium Ltd. v. ACIT (2012) 54 SOT 283 (Bang.)(Trib.)

S. 80IA : Industrial undertakings - Infrastructure development - Electricity captively consumed - Market value to be taken for claiming deduction under section 80IA

The electricity generated by the assessee was partly captively consumed and the balance was procured by the Electricity Board at Rs. 2.70 per unit. The Electricity Board sold the electricity so procured at Rs. 3.50 per unit. The Assessing Officer held that the market value of power captively consumed was the rate at which the Electricity Board purchased the electricity from the assessee. On appeal the Tribunal held that, the assessee could either captively consume the electricity generated or could sell it to the Electricity Board at Rs. 2.70 per unit. The assessee was not permitted to directly sell electricity to the consumers. The assessee had no other option but to sell the electricity generated to the Board at the pre-determined rates. The assessee could not charge a higher rate from the Board. On the contrary, the Board sold the electricity procured from the assessee and similarly situated power generating units at Rs. 3.50 per unit to the industrial consumers. The market rate of electricity was not determined by the forces of demand and supply, but it was regulated by the Government. The Board, which was a State Government undertaking sold the electricity to the ultimate consumers. Therefore, the rate at which the consumers got electricity, i.e., Rs. 3.50 per unit, was the market rate. The Tribunal directed the Assessing Officer to recompute the profit and gains of the eligible unit for the purpose of section 80IA of the Income-tax Act, 1961, on the basis of the unit price of electricity generated by the assessee at Rs. 3.50 per unit. (A.Y. 2007-08)

Sri Matha Spinning Mills P. Ltd. v. Dy. CIT (2012) 20 ITR 317 / (2013) 141 ITD 238 (Chennai)(Trib.)

S. 80IA : Industrial undertakings - Infrastructure development - Computation - Loss from business of power generation by windmill can be set off against profits from other businesses is justified

The assessee carried on the business of power generation through windmills and was entitled to claim deduction under section 80IA. For the A.Y. 2008-09, the assessee incurred loss in respect of this business and sought to set off the loss against the profits derived from his other businesses. The Assessing Officer disallowed the claim of the assessee but the Commissioner(Appeals) allowed it. On appeal the Tribunal held that the order of the first appellate authority directing the Assessing Officer to set off loss from the windmill business against the other heads of income of the assessee was justified. (A.Y. 2008-09)

Dy. CIT v. V. B. Koujalgi (2012) 20 ITR 618 (Bang.)(Trib.)

S. 80IB : Industrial undertakings - Other than Infrastructure development small-scale industrial unit - Not affected by limitation in Eleventh Schedule - Manufacture - Blending and bottling of Indian Manufactured Foreign liquor(IMFL), would amount to 'manufacture' for the purpose of deduction 80IB

The question before the Apex Court was whether blending and bottling of Indian Manufactured Foreign Liquour (IMFL), would amount to 'manufacture' for purpose of claiming deduction under

section 80IB, the court answered the question in favour of assessee and civil appeal of the department was dismissed. (A.Y. 2003-04, 2004-05)

CIT v. Vinbros & Co. (2012) 210 Taxman 252 / 254 CTR 110 / 79 DTR 48 (SC)

Editorial:- Decision of Madras High Court in CIT v. Vinbros & Co. (2009) 177 Taxman 217 / (2012) 349 ITR 698 (Mad.)(HC), affirmed.

S. 80IB : Industrial undertakings - Other than Infrastructure development - Income derived - The deduction is not available to service income, interest income, commission compensation for delayed payments and imported materials

The assessee which is involved in manufacturing activities and selling of additives on commission basis, claimed deduction under section 80IB on service income, interest on deposits interest received from employees, commission received, compensation from sundry debtors for delayed payments and income on imported materials. Though the assessee preferred appeal against all the issues the court has admitted the appeal only in respect of service income and commission received. The Court held that section 80IB and 80IA are code by themselves. As the finding has been given by the Tribunal that the income is not derived from industrial undertaking, deduction under section 80IB is not eligible. Order of Tribunal confirmed. (A.Y. 1999-2000)

Indian Additives Ltd. v. Dy. CIT (2012) 67 DTR 389 / 2012 Tax LR 479 (Mad.)(HC)

S. 80IB : Industraial undertakings - Other than Infrastructure development - Manufacture - Perfumed hair oil - Production of perfumed hair oil by using coconut oil and mineral oil amount to manufacture and entitled to deduction under section 80IB

The assessee is engaged in the business of production of perfumed hair oil using coconut oil and mineral oil as per the requirement of Hindustan Lever Ltd. The assessee claimed the deduction under section 80IB. The Assessing Officer rejected the claim. On appeal before the Tribunal, the Tribunal allowed the claim of assessee. On appeal by revenue the Court following the ratio of supreme Court in CCE v. Zandu Pharmaceutical Works Ltd. (2006) 12 SCC 453, wherein it has been held that addition of perfume to coconut oil to produce perfumed oil constitute a manufacturing process, hence decision of Tribunal holding that the assessee is engaged in manufacturing activity is justified. The appeal of revenue was dismissed. (ITA No. 5779 of 2010 dt. 30-11-2011)

CIT v. Beta Cosmetics (2012) March P. 31 - 683 (2012) 43-B BCAJ (Bom.)(HC)

S. 80IB : Industrail undertakings - Other than Infrastructure development - Manufacture or production - Rule of consistency - Appeal - High Court [S. 10BA(2)(e), 260A]

Department has not challenged the decision of Tribunal in the case of assessee for earlier years holding that the assessee is engaged in manufacturing activity and thus entitled to deduction under section 80IB. High Court refused to entertain the question applying the rule of consistency. (A.Y. 2005-06)

CIT v. Arts & Crafts Exports (2012) 66 DTR 85 / 246 CTR 463 (Bom.)(HC)

Editorial:- Refer Arts & Crafts Exports v. ITO (2012) 66 DTR 69 / 144 TTJ 56 / (2011) 45 SOT 415 (Mum..)(Trib.)

S. 80IB : Industrial undertakings - Other than Infrastructure development - Factory licence - Deduction is available only in cases where application for license was made before the end of previous year (31st March, 2004) and not where it was not made at all or made after the end of previous year

The assessee had started to manufacture its article or things before 31st March, 2004, however the factory license was not obtained on the date of manufacture, the license was issued on 3rd May 2005. The assessee claimed deduction under section 80IB for the A.Y. 2005-06. The Assessing Officer disallowed the claim, which was confirmed by Commissioner(Appeals). On appeal to the Tribunal,

the Tribunal decided in favour of assessee holding that the conditions of section 80IB is satisfied. On appeal to the High Court the Court held that before starting a factory, intending manufacturer has to obtain license under Factories Act, running a factory without a valid licence is not only prohibited but is also personal offence, deduction under section 80IB was therefore allowable only in cases where application for license was made before end of previous year (31st March, 2004) and not where it was made at all or made after the previous year. (A.Y. 2005-06)

CIT v. Jolly Polymers (2012) 342 ITR 87 / 249 CTR 421 / 69 DTR 212 (Guj.)(HC)
CIT v. Jitsan Enterprse (2012) 342 ITR 87 / 249 CTR 421 / 69 DTR 212 (Guj.)(HC)
CIT v. Adarsh Packaging (2012) 342 ITR 87 / 249 CTR 421 / 69 DTR 212 (Guj.)(HC)
CIT v. Padmey Impex (2012) 342 ITR 87 / 249 CTR 421 / 69 DTR 212 (Guj.)(HC)
CIT v. Samrath Health Care (2012) 342 ITR 87 / 249 CTR 421 / 69 DTR 212 (Guj.)(HC)

S. 80IB : Industrial undertakings - Other than Infrastructure development - Workers -Casual or contractual - Casual or contractual workers are workers for the purpose of section 80IB(2)(iv) hence the assessee is entitled to deduction

The Assessing Officer denied the deduction on the ground that the assessee had not employed ten or more workers as required under section 80IB(2)(iv). The Assessing Officer has not considered the casual or the contractual employees and not treated them as workmen. On appeal the Appellate authorities treated the casual and contractual employees as workmen and allowed the claim of assessee. On appeal by revenue the Court up held the view of Tribunal and held that casual or contractual workers are workers and assessee is entitled to deduction under section 80IB. (A.Y. 2006-07)

CIT v. Nanda Mint and Pine Chemicals Ltd. (2012) 345 ITR 60 / 80 DTR 329 /(2013) 260 CTR 290(Delhi)(HC)

S. 80IB : Industrial undertakings - Other than infrastructure development undertakings - Development of software - Claim was allowed as sales tax authorities also granted exemption - Genuineness cannot be doubted [S. 80IA]

Assessee engaged in business of software development, established a new unit at Silvassa, on 13-3-1999 and showed an income of Rs. 72.32 lakh there from against investment of Rs. 2.06 lakh, amounting to 94.8 per cent profit in 18 days on which deduction of Rs. 60.43 lakh was claimed under section 80-IA. For next two years also assessee claimed deduction under section 80-IB. Assessing Officer denied deductions on ground that no documents were produced to prove that assessee had manufactured any product at its Silvassa unit. Assessing Officer was of the view that the assessee had only diverted sales and profit from Bangalore unit. From records it was noted that assessee had been granted sales tax exemption by sales tax authorities. Further, software products unlike other commercial products can be developed within a short span of time and once a software is developed, any number of copies can be made within a short span of time. Furthermore, assessee had a strong customer base in India and abroad due to its existent business. In view of above facts it was very difficult to doubt genuineness of business activities of assessee at Silvassa, therefore, assessee's claim for deduction under sections 80-IA and 80-IB was to be allowed. Accordingly appeal of revenue dismissed. (A.Y. 1999-2000 to 2001-02)

CIT v. Vesesh Infotechnics Ltd. (2012) 210 Taxman 522 / 80 DTR 312 (Karn.)(HC)

S. 80IB : Industrial undertakings - Other than Infrastructure development - Assessee not applied for factory licence before 31 March, 2004 - Necessary condition of deduction not fulfilled

To qualify for deduction under Section 80IB(4) of the Act, one of the essential requirement is that the industrial undertaking should have begun to manufacture or produce articles or things on or before March 31, 2004. It was held that where the assessee had not even applied for a factory licence before

31 March 2004, the necessary condition under Section 80IB was not fulfilled. However, where application for licence was already made before 31 March 2004, but licence was obtained shortly thereafter, such lapse must be viewed as purely technical. The grant of licence would not relate back to the original date of application. (A.Y. 2005-06)

CIT v. Jolly Polymers (2012) 342 ITR 87 / 249 CTR 421 / 69 DTR 21 (Guj.)(HC)

S. 80IB : Industrial undertakings - Other than Infrastructure development - Excise duty income - Insurance claim

Excise income and insurance claim received for shortage of material is entitled to deduction under section 80IB. (A.Y. 2006-07)

ITO v. Electro Ferro Alloys Ltd. (2012) 13 ITR 594 (Ahd.)(Trib.)

S. 80IB : Industrial undertakings - Form - Reassessment - Deduction has to be allowed though the form no 10CCB was filed in the course of reassessment proceedings [Form No. 10CCB]

By filing Form No.10CCB in the course of reassessment proceedings (which form was not filed with the return of income, nor was it filed in the course of assessment proceedings, the assessee is not making any fresh claim for deduction under section 80IB but merely furnishing the documents to substantiate its claim made during the course of assessment and even reassessment proceedings and hence deduction to be allowed. (A.Y. 2003-04)(ITA No. 20151/Kol/10 dated 20-1-2012.)

Dy. CIT v. Tide Water Oil Co. (I) Ltd.,(2012) BCAJ Pg. 27, Vol. 43 B Part 5, February 2012 (Kol.)(Trib.)

S. 80IB : Industrial undertakings - Other than Infrastructure development - Small Scale - Computation - Cost of equipments such as tools, jigs dies, moulds, spare parts and consumable stores as well as vehicles have to be excluded for determining the status of assesses industrial undertaking as a small scale industrial undertaking

The assesse claimed the deduction under section 80IB as a small scale industrial under taking treating the investment in Plant and machinery being less than Rs. 1 crore if items are considered as per notification dated 10th December, 1999 issued under section 11B of the IDR Act i.e. tools, jigs, dies, moulds, fixtures patterns and spare parts for maintenance and cost of consumable stores are excluded and its net balance of plant and machinery comes to Rs. 34,80,428/-. The Assessing Officer has not accepted the contention of assessee. On appeal the Tribunal held that cost of equipments such as tools, jigs dies, moulds, spare parts and consumable stores as well as vehicles value has to be excluded while computing the status as a small scale industrial undertaking and allowed the claim of assessee. (A.Y. 2004-05)

KHS Machinery (P) Ltd. v. ITO (2012) 69 DTR 283 / 146 TTJ 692 / 18 ITR 479 / 53 SOT 100 (URO)(Ahd.)(Trib.)

S. 80IB : Industrial undertakings - Other than Infrastructure development - Investment in fixed asset exceeding prescribed limit, provision of section 80IB(2)(iii) is not complied, hence deduction not allowed

The assessee made investment in fixed asset in plant & machinery exceeding prescribed limit. Deduction could not be allowed where the assessee was not considered a small scale industrial undertaking under section 11B of Industrial (Development & Regulations) Act, 1951 thereby not complying the provisions of Section 80IB(2)(iii). (A.Y. 2008-09)

Sawaria Pipes Ltd. v. ACIT (2012) 18 ITR 573 (Hyd.)(Trib.)

S. 80IB : Industrial undertakings - Other than infrastructure development undertaking - Mere handling and transportation of food grains and storing same at godowns - Not eligible for deduction, nothing attributed towards infrastructure development

Main purpose of section 80IB(11) is construction of godowns specifically for stocking food grains for greater efficiency in grain management system and minimize post harvest food grain losses. Hence, it was held that mere handling and transportation of food grains and storing same at godowns owned by Food Corporation of India (FCI) would not make assessee eligible for deduction under section 80IB(11) as it is nothing attributed towards infrastructure development. (A.Y. 2005-06 & 2006-07)
ITO v. Shankar K. Bhanage (2012) 139 ITD 39 / (2013) 152 TTJ 21 / 82 DTR 281 (Mum.)(Trib.)

S. 80IB : Industrial undertakings - Other than Infrastructure development - Export incentive is eligible for deduction
Tribunal held that relief under section 80-IB was allowed on export incentives. (A.Y. 2007-08)
R. R. Kabel Ltd. v Addl. CIT (2012) 54 SOT 374 (Mum.)(Trib.)

S. 80IB : Industrial undertakings - Other than Infrastructure development - Storage charges - Not eligible for deduction
Charges received by assessee for storage of goods manufactured by it on account of the fact that buyer of goods was unable to give despatch clearance for the goods could not be said to be derived from industrial undertaking, hence not eligible for deduction under section 80IB. Appeal of revenue was allowed. (A.Y. 2005-06, 2006-07)
Dy. CIT v. Parekh Plast India (P) Ltd. (2012) 137 ITD 208 / 80 DTR 411 / (2013) 151 TTJ 400 (Mum.)(Trib.)

S. 80IB : Industrail undertakings - Other than Infrastructure development - Incentive -Interest - Conversion charges - Receipt on account of DFRC and DFIA sales and interest income are not eligble for deductions, however conversion charges are eligible for deduction
The assessee was engaged in the business of manufacturing and sale of biscuits. It also exported its finished product. It claimed deduction of Rs. 38.88 lakh under section 80IB. The Assessing Officer found that the total receipt shown in the profit and loss account included other income of Rs. 7.27 crore representing receipts on account of DFRC sales, DFIA sales, interest receipts and conversion charges. The Assessing Officer was of the opinion that the aforesaid receipts could not form part of business income for the purpose of claiming deduction under section 80IB, since they were not directly derived from the incentive profit from sale of DFRC and DFIA being in the nature of export incentives like DEPB, could not be treated as profits derived from the eligible business under section 80IB as they belonged to the category of ancillary profit of the industrial undertaking. So far as conversion charges of Rs. 5.30 crore were concerned, the Assessing Officer found that the same had been shown as other income by the assessee, received from company, ITC Ltd. As per the Assessing Officer, the assessee had only done job work with the materials supplied by the ITC Ltd. Hence, the income could not be considered as income derived from the industrial undertaking and was to be treated as other income only. The Assessing Officer, therefore, disallowed the claim of deduction under section 80IB. Being aggrieved with the assessment order, the assessee filed an appeal before the Commissioner(Appeals). The Commissioner(Appeals) confirmed the order of Assessing Officer. On second appeal by assessee the Tribunal held that profit from sales of DFRC and DFIA could not be treated as profit from eligible business of industrial undertaking for computation of deduction under section 80IB since they were from independent source beyond first degree nexus between profits and industrial undertakings. On same reasoning interest income also could not form part of profits derived from eligible business of industrial undertaking. In so far as conversion charges were concerned since they were received in course of manufacturing activity by using same machinery and labour which were used for manufacturing assessee's own product, profit derived therefrom, had direct nexus with eligible business of assessee and, therefore, such profit was to be considered for computing deduction under section 80IB. Appeal of assessee partly allowed. (A.Y. 2008-09)
Disha Food (P.) Ltd. v. ACIT (2012) 54 SOT 101 (URO)(Hyd.)(Trib.)

S. 80IB : Industrial undertakings - Other than Infrastructure development - Manufacture - Crushing lump ore is not manufacturing

Where assessee had not carried on integrated activity of mining, processing and polishing and was only engaged in crushing lump ore extracted from mines for obtaining smaller pieces of various sizes, such activity could not be considered as manufacture in terms of section 80IB(2)(iii) and, thus, assessee's claim for deduction under section 80IB was to be rejected. (A.Y. 2006-07)

Imerys Ceramics (India) (P.) Ltd. v. ACIT (2012) 54 SOT 84 (URO)(Hyd.)(Trib.)

S. 80IB : Industrial undertakings - Other than Infrastructure development - Surrender of claim before Assessing Officer - Can be challenged on merits - Assessee entitled to deduction

The assessee, a partnership firm, was engaged in manufacturing of pre-fabricated steel buildings and its business was claimed to have started in the A.Y. 1999-2000 itself when its balance sheet as on 31-3-1999 disclosed installed machinery of Rs. 5,25,155/- but deduction under section 80IB was claimed for the first time in the A.Y. 2000-01. The assessee's balance sheet as on 31-3-2000 showed an addition of Rs. 29,61,117/- towards factory, building, land, plant and machinery. A survey under section 133A was conducted at office and factory premises of assessee on 12-12-2003 and assessee's assessment for the A.Y. 2000-01 was reopened under section 148 and thereupon the assessee vide letter dated 15-10-2004 intimated the Assessing Officer that the return filed originally on 31-10-2000 should be treated as 'return' in response to notice under section 148, wherein the claim for deduction under section 80-IB was made. Subsequently, on 9-3-2005, said return was revised, whereby the entire claim made under section 80-IB was withdrawn by the assessee. The 'revised return' was accompanied by a letter dated 7-3-2005 giving the reasons for withdrawing the claim. Assessing Officer held, based on the revised return and the accompanying letter, that the assessee was not eligible for deduction under section 80-IB. Accordingly, the claim for deduction was withdrawn and a sum of Rs. 69,42,870/- was added to the taxable income of the assessee. Before Commissioner(Appeals), the assessee again claimed deduction contending that the conditions precedent for availing deduction under section 80IB stood satisfied in its case. On the issue of withdrawing the claim for deduction through its revised return, the assessee submitted that the revised return itself was invalid as the return filed in response to the notice under section 148 could not be revised as per law and, hence, cognizance of revised return could not be taken for denying the benefit of claim. The Commissioner (Appeals) though agreed that the assessee seemed to fulfil all the conditions stipulated under section 80IB, but decided the matter against the assessee on the ground that the assessee itself had withdrawn the claim *suo motu* by filing revised return on 9-3-2005, and therefore, the action of the Assessing Officer was justified. Even though an assessee has surrendered its claim for deduction before Assessing Officer, same can be challenged on merits if it has a strong case for such a claim based on facts and material on record and conditions relevant for claiming such deduction stand fulfilled. It is duty cast upon Assessing Officer or appellate court to see that if deduction or claim for exemption is statutorily allowable, then same has to be allowed, if assessee fulfils prescribed conditions required under statute. Accordingly the Assessing Officer was directed to allow the claim of assessee. (A.Y. 2000-01)

Steelfab Engineering Corpn. (India) v. ACIT (2012) 54 SOT 79 (URO)(Mum.)(Trib.)

S. 80IB : Industrial undertakings - Other than Infrastructure development - Interest -Duty drawback - Interest income is not eligible - Duty drawback is eligible

Interest income not derived from industrial undertaking, hence not includible for purpose of computation and net interest to be reduced from profits of business. Duty drawback equal to duty paid hence includible for purposes of computation.

That there are two types of duty drawback which can be allowed. The first category is where payment of duty drawback is equal to the amount of duty actually paid on an imported material used in

manufacturing or processing of goods or carrying out any operation on the goods. The second category is where as specified in the rule, an average amount of duty is paid on the material of that class or description used in manufacturing or processing of export goods or carrying out any operation on export goods of this case etc. In the first category, the duty drawback is arithmetically equal to the duty paid by the assessee on import of material used in the manufacture or processing of the goods. In the second category, the average amount of duty drawback is paid without any correlation with the actual duty paid by the assessee on import. In the present case duty drawback received by the assessee had a direct and arithmetic correlation with the customs duty paid by the assessee and therefore, there was no income as such on account of duty drawback received by the assessee because whatever customs duty was paid by the assessee had been received back by the assessee and it left no income with the assessee. Duty drawback received by the assessee was eligible for deduction under section 80-IB. (A.Y. 2005-06, 2006-07)

Suzlon Energy Ltd. v. Dy. CIT (2012) 20 ITR 391 / 57 SOT 54 (URO)(Ahd.)(Trib.)

S. 80IB : Industrial undertakings - Other than Infrastructure development - Small Scale Undertakings - Limit - Matter remanded

Assessee's claim for deduction under section 80IB was disallowed on ground that its investment in plant and machinery had exceeded Rs. 1 crore and as such it could not be considered as small scale industrial unit. However, Press Note dated 23-3-2000 issued by Government stated that if assessee had obtained Registration before 24-12-1999 it will continue to enjoy SSI status so long as investment in plant and machinery did not exceed Rs. 3 crores notwithstanding revised investment limit of Rs. 1 crore notified on 24-12-1999. Assessee contended that it commenced production on 6-3-1999 which was prior to 24-12-1999 and, hence, disallowance of deduction by Assessing Officer was not justified. In case registration was found to have been obtained prior to 24-12-1999 assessee would be entitled to deduction under section 80IB, matter remanded. (A.Y. 2005-06, 2006-0, 2008-09)

Dy. CIT v. Shree Nidhi Secure Prints (P.) Ltd. (2012) 54 SOT 211 (URO)(Hyd.)(Trib.)

S. 80IB : Industrial undertakings - Other than Infrastructure development - Scientific research and development - Approval not withdrawn, deduction to be allowed [Rule 18DA(2)]

Assessee company, engaged in scientific research and development, provided services of bio-equivalence of international standards to pharmaceutical companies. It claimed deduction under section 80IB(8A). Assessing Officer took a view that assessee company was selling services to pharmaceutical companies without prior permission of prescribed authority and thus, there was violation of Rule 18DA(2)(a). He accordingly rejected assessee's claim. On appeal, it was noted that prescribed authority had not withdrawn approval of assessee-company for violating sub-rule (2) of Rule 18DA, rather it had granted extension of approval for a further period of three years. Moreover, Assessing Officer himself had allowed deduction to assessee in subsequent A.Y. after discussing relevant provisions of Act. In view of aforesaid, assessee's claim for deduction was to be allowed. (A.Y. 2007-08)

Dy. CIT v. Fortis Clinical Research Ltd. (2012) 54 SOT 206 (URO)(Delhi)(Trib.)

S. 80IB(10) : Undertaking - Developing and building - Housing project - Works contract - Eligible even if developer not "owner" of land

The assessee entered into a 'development agreement' with the owner of the land pursuant to which it agreed to develop the land. Deduction under section 80IB(10) in respect of the profits arising from the said activity was claimed on the ground that it was "derived from the business of undertaking developing and building housing project approved by the local authority". The Assessing Officer & CIT(A) rejected the claim on the ground that the assessee was not the "owner" of the land and that the approval of the local authority to, and the completion certificate of, the "housing project" was given

to the owner and not to the assessee. However, the Tribunal allowed the claim. On appeal by the department to the High Court, HELD dismissing the appeal:
Section 80IB(10) allows deduction to an undertaking engaged in the business of developing and constructing housing projects. There is no requirement that the land must be owned by the assessee seeking the deduction. Under the development agreement, the assessee had undertaken the development of housing project at its own risk and cost. The land owner had accepted the full price of the land and had no responsibility. The entire risk of investment and expenditure was that of the assessee. Resultantly, profit and loss also accrued to the assessee alone. The assessee had total and complete control over the land and could put the land to the agreed use. It had full authority and responsibility to develop the housing project by not only putting up the construction but by carrying out various other activities including enrolling members, accepting members, carrying out modifications engaging professional agencies and so on. The risk element was entirely that of the assessee. The assessee was a "developer" in common parlance as well as legal parlance and could not be regarded as only a "works contractor". The Explanation to section 80IB inserted w.e.f. 1.4.2001 has no application as the project is not a "works contract". Further, as the assessee was, in part performance of the agreement to sell the land, given possession and had also carried out the construction work for development of the housing project, it had to be deemed to be the "owner" under section 2(47)(v) r.w.s. 53A of the TOP Act even though formal title had not passed [Faqir Chand Gulati v. Uppal Agencies (2008) 10 SCC 345 distinguished].
CIT v. Radhe Developers (2012) 341 ITR 403 / 204 Taxman 543 / 249 CTR 393 / 69 DTR 185 (Guj.)(HC)

S. 80IB(10) : Undertaking - Developing and building - Housing project - Multiple housing projects - Multiple housing projects on 1 Acre Plot is permissible, assesses eligible for deduction
The High Court had to consider the following questions on interpretation of section 80IB(10): (i) what is a "housing project" under section 80IB(10)?, (ii) whether if approval for construction of 'E' building was granted by the local authority subject to the conditions set out in the first approval granted on 12.5.1993 for construction of A and B building, construction of 'E' building is an "extension" of the earlier housing project for which approval was granted prior to 1.10.1998 and, therefore, benefit of section 80IB(10) cannot be granted?, (iii) whether the housing project must be on a vacant plot of land which has minimum area of one acre and if there are multiple buildings and the proportionate area for each building is less than one acre, s. 80-IB(10) can be denied?, whether the merger of two flats into one so as to exceed the maximum size of 1000 sq feet violates the condition set out in section 80IB (10)? Held by the High Court:
(i) As the expression 'housing project' is not defined, it must have the common parlance meaning and means constructing a building or group of buildings consisting of several residential units. The approval granted to a building plan constitutes approval granted to a housing project. Construction of even one building with several residential units of the size not exceeding 1000 square feet would constitute a 'housing project' under section 80IB(10);
(ii) 'E' building is an independent housing project and not an extension of the housing project already existing on the plot because when the earlier plans were approved, 'E' building was not even contemplated and came into existence much later. The fact that the approval was granted on the same terms as that granted to the other buildings does not make it an "extension";
(iii) Section 80IB(10)(b) specifies the size of the plot of land but not the size of the housing project. While the plot must have a minimum area of one acre, it need not be a vacant plot. The object of section 80IB(10) is to boost the stock of houses. There can be multiple housing projects on a plot of land having minimum area of one acre;
(iv) On facts, as there was no merger of flats and no application was made to the local authority seeking merger of two flats, there was no violation. (A.Y. 2004-05 & 2005-06)
CIT v. Vandana

Properties (2012) 206 Taxman 584 / 76 DTR 363 / 254 CTR 258 / (2013) 353 ITR 36 (Bom)(HC)
Editorial:- Vandana Properties v. ACIT (2009) 27 DTR 282 (Mum.)(Trib.) is affirmed

S. 80IB(10) : Undertaking - Developing and building - Housing project - Built up area - Common area - Common area has to be excluded from the built up area
The assessee is engaged in the business of construction. The assessee claimed the deduction under section 80IB(10). The Assessing Officer has rejected the claim for the reasons that the built up area of some of the flats exceeded 1500 sq. ft. On appeal the Commissioner(Appeals) held that the assessee is entitled to deduction on pro rata basis. The appeal of revenue was dismissed by Tribunal. On appeal by the revenue to the High Court, the Court held that if the area does not exclusively belong to the owner of residential unit and if he has to share that common area with the owner of another residential unit, then that common area has to be excluded from the built up area, it is not necessary for such exclusion whether that area is shared by all the owners of the building. The Court held that if balcony space is excluded all the 160 units are less than 1500 sq. ft. therefore, the assessee is entitled to 100 percent exemption on the project. As the assessee has not preferred any appeal against the said order, it will not be appropriate for Court to extend the said benefit in these proceedings, however as the law stands today the assessee has not violated the provisions of section 80IB(10) hence entitled to exemption. (A.Y. 2007-08)
CIT v. Raghavendra Constructions (2013) 354 ITR 194 / (2012) 70 DTR 257 / 208 Taxman 366 / 250 CTR 285 (Karn.)(HC)
Editorial:- SLP of revenue is dismissed. (2013) 354 ITR 81 (St.) / 214 Taxman 25 (Mag.)(SC)
(2013) 216 Taxman 205(Mag.)(SC)

S. 80IB(10) : Undertaking - Developing and building - Housing project - Approval having been granted on 28th March 2005, assessee entitled to deduction for the A.Y. 2005-06, 2006-07 and 2007-08
The assessee company undertook a project with regard to construction of residential flats. The approval was granted on 28th March, 2005, however the sanction plan came in to effect from 4th April 2005 and will be in force till 3rd April 2007. The Assessee claimed the deduction under section 80IB(10), from the A.Y. 2005-06 on words. The Assessing Officer denied the exemption. Commissioner(Appeals), allowed the exemption, which was confirmed by the Tribunal. On further appeal to High Court, the Court held that approval having been granted on 28th March 2005, the assessee was entitled to deduction under section 80IB(10) from the A.Y. 2005-06 notwithstanding the fact that the sanction letter was communicated to the assessee on 4th April, 2005 mentioning that the time for completing the construction starts from 4th April 2005 and it ends on 3rd April, 2007. (A.Y. 2005-06 to 2007-08)
CIT v. Akshy Eminence Developers (P) Ltd. (2012) 72 DTR 406 / 206 Taxman 99 (Mag.) (Karn.)(HC)

S. 80IB(10) : Undertaking - Developing and building - Housing project - Balcony area - Built up area - Since housing project of assessee was approved prior to 1-4-2005 the definition of built area inserted by Finance (No. 2) Act, which came in to effect from 1-4-2005 is only prospective in nature and it has no application to housing projects approved prior to that date
The assessee is engaged in building housing projects. The Assessing Officer found that some of the units sold to purchasers were more than 1500 sq. ft. if the balcony area is taken into consideration. The assessee contended that if the balcony area is not considered none of the residential units exceeds 1500 sq. ft. The Assessing Officer relying on the built definition of built up area inserted by Finance (No. 2) Act which came in to effect from 1-4-2005 held that Balcony can be excluded only if it was used as common area. He held that the said amendment being retrospective in nature, the Assessee is not entitled to exemption. On appeal the Commissioner(Appeals) upheld the order of Assessing

Officer. The Tribunal up held the order of lower authorities however, allowed the relief in respect of those flats which are within 1500 sq. ft. On cross appeal by the assessee the Court held that since housing project of assessee was approved prior to 1-4-2005 the definition of built area inserted by Finance (No. 2) Act, which came into effect from 1-4-2005 is only prospective in nature and it has no application to housing projects approved prior to that date. The Court allowed the cross appeal and set aside order of Tribunal. The court also held that one of the purchasers has taken two flats, in order to prevent such transaction, law is amended preventing a person from purchasing two flats in the same project which is prospective in nature, hence the assessee is entitled to exemption. (A.Y .2005-06, 2006-07)

CIT v. Anriya Project Management Services (P) Ltd. (2012) 209 Taxman 1 / 78 DTR 198 / (2013) 255 CTR 435/(2013) 353 ITR 12 (Karn.)(HC)

S. 80IB(10) : Underatking - Developing and building - Housing project - Joint development agreement - Developer of housing project is also entitled to exemption

The assessee purchased certain agricultural land in a village of Bangalore City. The sale deed was not registered. A joint development was entered in to and the assessee were allotted 40 flats. The assessee sold the flats and claimed exemption under section 80IB(10) on the profits of said flats. The Assessing Officer denied the exemption on the ground that the conditions laid down in section 80IB(10) was not satisfied which was confirmed by Commissioner(Appeals). On appeal the Tribunal held that the assessee has not only obtained the permission / sanction for the construction but also had done the work of making the land useful for the apartment construction, providing roads, supervised the construction activity. The assessee being an integral part of the development and construction activities. It was not merely the land owner, who had agreed to part with the land the developer is also entitled to the benefit under section 80IB(10). On appeal to the High Court by revenue, the Court held that keeping in mind the object which the provision is introduced all persons who have made investments in this housing project which is for the middle and lower class people and they have complied with all the conditions prescribed under the provision hence the order of Tribunal is confirmed. (A.Y. 2004-05)

CIT v. Shravanee Constructions (2012) 209 Taxman 6 (Karn.)(HC)

Editorial:- SLP of revenue is dismissed. (2013) 214 Taxman 22(Mag)(SC)

S. 80IB(10) : Undertaking - Developing and building - Housing project - Commercial area - Ceiling on commercial area inserted w.e.f. 1.4.05 does not apply to projects approved before that date - Amendmens of section 80IB(10) and insertion of clause (d) w.e.f. 1st April, 2005 is prospective only and can not be applied retrospectively

The assessee's housing project was commenced pre 1.4.2005 when section 80IB(10) did not impose any ceiling on the commercial area that could be embedded in the project. Section 80IB(10)(d) was inserted by the Finance (No. 2) Act, 2004 to impose a ceiling on the extent of commercial area that could be contained in the housing project. The Tribunal held that as the assessee's project was completed after 1.4.2005, the question of eligibility for section 80IB(10) deduction had to be considered as per the law then prevailing and not at the time that the project was approved. As the commercial area exceeded the ceiling stipulated in section 80IB(10)(d), the claim for deduction was denied. On appeal by the assessee to the High Court, held reversing the Tribunal:

The judgement of the Bombay High Court in CIT v Brahma Associates (2011) 333 ITR 289 (Bom.) that w.e.f. 1.4.2005, deduction under section 80-IB(10) would be governed by the restriction on commercial area imposed by clause (d) does not mean that even projects approved prior to 1.4.2005 would be governed by the said restriction. Neither the assessee nor the local authority responsible to approve the construction projects are expected to contemplate future amendment in the statute and approve and/or carry out constructions maintaining the ratio of residential housing and commercial construction as provided by the amended Act. The entire object of section 80-IB(10) is to facilitate

the construction of residential housing project and if at the stage of approving the project, there was no such restriction in the Act, the restriction subsequently imposed has to be necessarily construed on a prospective basis and as applying to projects approved after that date. (A.Y. 2006-07)

Manan Corporation v. ACIT (2012) 78 DTR 205 / (2013) 255 CTR 415 / 214 Taxman 373/356 ITR 44 (Guj.)(HC)

S. 80IB(10) : Undertaking - Developing and building - Housing project - Plot size - subsequent acquisition

Though the assessee owned only 38 guntas of land when he started the construction, he acquired an extent of 1,440 sq. ft. of land adjoining the said land, thus making the total land in which the project was put up, to 44,470 sq. ft. more than 43,480 sq. ft. which is prescribed under the law. Modified housing project was approved in the year 2001 after the aforesaid land was acquired. Construction was completed on 20th May, 2003, i.e. within four years period. Fact that purchasers are using the flats as service apartments for which the assessee cannot be held liable in any way and on that ground he cannot be denied the benefit. Further, prior to 1st April, 2005, balconies and common areas were to be excluded for the purpose of calculating the built up area. If those two areas are excluded, admittedly the apartments measure less than 1,500 sq. ft. Deduction under section 80IB(10) could not therefore be denied. (A.Y. 2004-05)

CIT v. Mystic Investments (2012) 78 DTR 202 / (2013) 255 CTR 439 (Karn.)(HC)

S. 80IB(10) : Undertaking - Developing and building - Housing project - Date of commencement - Date of commencement of development and construction of housing project was date when assessee actually started and carried out the work of development and not when the project was first approved - Residence flats sold to company was let out by company for commercial use, exemption to assessee cannot be denied - Two flats exceeded 1000 square feet each, exemption can be allowed proportionately after excluding profits from two flats

Assessee received the first commencement certificate dated 15-5-1991, however the assessee could not start the project construction said commencement certificate was lapsed. Latter on construction was started in year 2002, in pursuance of commencement certificate dated 2-3-2001. The claim of deduction under section 80IB(10) was denied on the ground that project had commenced prior to 1-10-1998. The Tribunal held that date of commencement of development and construction of housing project was date when assessee actually started and carried out work of development and construction and not when the project was first approved .The issue was decided in favour of assessee. The assessing officer has also held that the residential flats which were sold to company were let out by company for non residential purpose hence the assessee is not eligible for deduction. The Tribunal held that the shops are less than 10% of built up area; hence claim cannot be rejected. The Tribunal also held that subsequent use by end user for non-residential purpose cannot be a ground for denying exemption. The Tribunal also held that two flats were exceeding 1000 square feet limits. The Commissioner(Appeals), has directed to work out proportionate deduction under section 80IB(10), after excluding profit from sale of two flats. Hence, the order of Commissioner(Appeals) was confirmed. (A.Y. 2002-03 to 2007-08)

Maju Gupta (Smt) v. ACIT (2012) 134 ITD 503 / 70 DTR 312 / 146 TTJ 189 (Mum.)(Trib.)

S. 80IB(10) : Undertaking - Developing and building - Housing project - Developer - Developer is entitled to deduction under section 80IB(10)

The assessee has entered into 'Development agreement' with Kalpataru Park Millenium Co-Operative Housing Society Ltd. for the purpose of developing the housing project. The Assessing Officer has rejected the claim under section 80IB(10), holding that the assessee is not the developer. The Commissioner(Appeals) held that the assessee is entitled to deduction. On appeal by the revenue the Tribunal held that the developer had all dominant control over the project and developed the land at

his own cost and risks. All transactions pertaining to the project have been entered in entirety in the books of account of the assessee. The Co-operative Society did not account for any receipts or expenditure in connection with the building of house .The Tribunal has analysed various clauses in the agreement and come to the conclusion that the assessee is the developer. The Tribunal also held that the decision of Apex Court in K. Raheja Development Corporation is dealing with Karnataka Sale Tax Act, hence ratio cannot be applied to interpret the provisions of section 80IB(10). Accordingly the Tribunal held that the assessee is eligible for deduction under section 80IB(10), accordingly the appeal of revenue was dismissed. (A.Y. 2006-07)

Dy. CIT v. Parshwanath Reality P. Ltd. (2012) 143 TTJ 69 (UO) / BCAJ January, 2012 477 (Ahd.)(Trib.)

S. 80IB(10) : Undertaking - Developing and building - Housing project - Completion certificate - Residential units - Built up area as defined under local authority - Assessee's claim was allowed

Assessee is a builder engaged in construction and development of residential units. For the relevant years the assessee filed its return of income declaring nil income after claiming deduction under section 80IB(10). The Assessing Officer rejected the claim on the ground that completion certificate was issued on later date by Municipal Authorities and covered area /built up area of residential units was more than prescribed limit. Tribunal found that as the housing project was approved by local authority on 22-3-2001 (Before 1st day of 2004), same had to be completed on or before 31-3-2008. As per the clarification issued by Municipal corporation date of completion of project was 27-2-2008. When the launch of project the Income-tax Act did not define the 'built up area' As per M. P. Nagar Grah Nirman Adhiniyaam and M. P. Bhumi Vikas Niyam, 1984, which were applicable to assesse's case, built up area was less than prescribed limit of 1500 sq. ft. In view of the facts the order of Assessing Officer was set aside and the assessee's appeal was allowed. (A.Y. 2004-05 to 2006-07)

Global Reality v. ITO (2002) 134 ITD 407 (Indore)(Trib.)

S. 80IB(10) : Undertaking - Developing and building - Housing project - Areas of open land / garden and also merger of flats exemption cannot be denied - Revision of order held to be invalid [S. 263]

The assessee firm started construction of residential project at Aundh, Pune. The total area of the plot was shown to be 3995.34 mts. i.e. marginally less than the prescribed area of 1 acre. The assessee submitted that an additional area of land measuring 5 'Acre' was also acquired by the assessee for the approach road to the said project vide separate agreement with same land lord. On including this area it exceeded 1 acre. The assessee further submitted that without this local authority would not have sanctioned the plan and issued commencement certificate. Assessing Officer visited the site and allowed the deduction. Commissioner found this order to be erroneous and prejudicial to the revenue on the ground that (1) the area of the plot of project is less than 1 acre; (2) As per sale agreement of row house, the saleable area mentioned is more than 1500 sq. ft.; (3) in A.Y. 2005-06 the Assessing Officer in order passed under section 143(3) denied deduction under section 80IB(10) and (4) flats have been merged together and the modification is not as per approved plans. The assessee filed an appeal before the Tribunal against the order under section 263. The Tribunal held that, Areas of open land / garden / store / gym room meant for common use are not to be included for calculating built up area of the residential unit. Merger of flat after purchase, by owners thereof to make it larger flat for their convenience cannot be denied exemption. Tribunal held that the revisional order is not valid. (A.Y. 2004-05, 2005-06, 2006-07)

Baba Promoters & Developers v. ITO (2012) 54 SOT 89 (URO)(Pune)(Trib.)

S. 80IB(10) : Undertaking - Developing and building - Housing project - Cap on commercial area inserted w.e.f. A.Y. 2005-06 applies to projects approved earlier

Though the assessee's project, when it was commenced in the year 2003, was in compliance with section 80IB(10) as it then stood, the law prevailing in the year of completion of the project has to be seen. As the Project breached the ceiling of maximum commercial area imposed by section 80IB(10)(d) inserted w.e.f. 1.4.2005 (lesser of 2000 sq. ft. or 5% of aggregate BU area), the assessee is not eligible for section 80IB(10) relief [Saroj Sales Corp. v. ITO (2008) 115 TTJ 485 (Mum.) not followed; CIT v. Brahma Associates (2011) 333 ITR 289 (Bom.) & Reliance Jute & Industries Ltd. (1979) 120 ITR 921 (SC) referred]. (A.Y. 2006-07)

ITO v. Everest Home Construction (India) P. Ltd. (2012) 139 ITD 1 (Mum.)(Trib.)

Editorial:- The view of Tribunal is contrary to the view of Gujarat High Court in Manan Corporation v. ACIT (2012) 78 DTR 205 / (2013) 255 CTR 415/356 ITR 44 (Guj.)(HC)

S. 80IB(10) : Undertaking - Development and construction - Housing project - Charitable institution - Held income derived from business cannot be considered as income derived from property held for charitable purpose, hence deduction allowed [S. 11, 12A, 13 and 263]

The assessee was a charitable institution registered under section 12A. The assessee trust was engaged in the business of construction and earned profits out of it. The assessee claimed deduction under section 80IB(10). It was held that the income derived from business cannot be considered as income derived from property held for charitable purpose i.e. it will no longer be income within meaning of section 11(1)(a) and said income will form part of total income under Act and assessee would be entitled to deduction under section 80IB(10). (A.Y. 2009-10)

India Heritage Foundation v. Dy. DIT (2012) 138 ITD 28 / 149 TTJ 908 / 78 DTR 319 (Bang.)(Trib.)

S. 80IB(10) : Undertaking - Development and construction - Housing project - Entitled for benefit under section 80IB(10) in respect of flats completed before prescribed limit even though the housing project was not completed in time due to reasons beyond control

The assessee was entitled for benefit under section 80IB(10) in respect of flats completed before prescribed limit even though the housing project was not completed in time due to reasons beyond control. (A.Y. 2007-08)

Ramsukh Properties v. Dy. CIT (2012) 138 ITD 278/(2013) 153 TTJ 211 (Pune)(Trib.)

S. 80IB(10) : Undertaking - Developing and building - Housing project [S .263]

According to the CIT the project consists of some commercial portion and the deduction is allowable only to a purely residential project. In case project is having some commercial area, it does not mean that it is not a housing project. Secondly, it was pointed out of behalf of the assessee that the project had commenced much before 1st April, 2005 from which date of sub-cl. (d) of section 80IB(10) was introduced. The assessee had no occasion to comply with the new conditions with effect from 1st April, 2005 that the commercial portion should not exceed 2,000 sq. ft. and hence it was not applicable in respect of the projects which have commenced prior to 1st April, 2005. The A.Y. involved in the present appeal is 2004-05 and therefore, the question of applicability of the sub. cl. (d) of section 80IB(10) does not arise. (A.Y. 2004-05, 2005-06)

Brahma Builders v. Dy. CIT (2012) 77 DTR 249 / 149 TTJ 624 (Pune)(Trib.)

S. 80IB(10) : Undertaking - Developing and building - Housing project - Revalidation of the project

The housing project consisted small commercial area. Project started wide commencement certificate 17th March, 2001. Assessing Officer was not justified to take the date of commencement as 20th April, 2005 which was the date of revalidation. Thus project had already commenced on 17th March, 2001. i.e. prior to 1st April, 2005. Similarly in respect of another project, plan was sanctioned on 27th June, 2003 i.e. much before 1st April, 2005. If a housing project is started prior to 1st April, 2005, the limit

for commercial area prescribed in section 80IB(10) viz., 2000 sq. ft. or 5% whichever is less, is not applicable and deduction is to be allowed to entire project. Therefore, deduction under section 80IB(10) was allowable in respect of both the projects. (A.Y. 2004-05, 2005-06)
Brahma Builders v. Dy. CIT (2012) 77 DTR 249 / 149 TTJ 624 (Pune)(Trib.)

S. 80IB(10) : Undertaking - Developing and building - Housing project - Disallowance of expenses - Built up area of on unit excceds 1500 sq. ft. - Joining the falts by purchasers - Enhenced Income eligible for dedcition.Entire housing project cannot be denied the exemption [S. 36(1)(va), 40(a)(ia), 43B]
The Tribunal held that the assessee is entitled to deduction under section 80IB(10) on enhanced income on account of stutory disallowances under sections 40(a)(ia), 43B and 36(1)(va). Tribinal also held that one of the unit in the project is in excess of 1500 square feet deduction has to be allowed under section 80IB(10) in respect of profits from other buildings. It also held that deduction under section 80IB(10) cannot be denied merely because some of the purchasers have joined adjoined flats where by the combind built up rea exceeds 1500 square feet. (A.Y. 2007-08)
Dy. CIT v. Mangarpatta Township Development & Construction Co. (2012) 79 DTR 150 / 150 TTJ 590 (Pune)(Trib.)
Mangarpatta Township Development & Construction Co. v. Dy. CIT (2012) 79 DTR 150 / 150 TTJ 590 (Pune)(Trib.)

S. 80IB(10) : Undertaking - Developing and building - Housing project - Assessee constructs a building as a developer at its own cost and gets a percentage of built up area in consideration from land owner is called as builder
Where assessee constructs a building as a developer at its own cost and gets a percentage of built up area in consideration from land owner, assessee is said to be a builder and not a contractor and, therefore, is eligible for deduction under section 80IB(10). (A.Y. 2006-07)
Kura Homes P. Ltd. v. ITO (2012) 139 ITD 445 (Hyd.)(Trib.)

S. 80IB(10) : Undertaking - Developing and building - Housing project - Developer follows percentage completion method - Profit attributable to completed project is taxed in respective year - Deduction be granted in that year
Where a developer follows percentage completion method, and profit attributable to completed project is taxed in respective year, deduction under section 80IB(10) is also to be granted simultaneously in that year. (A.Y. 2006-07)
Kura Homes P. Ltd. v. ITO (2012) 139 ITD 445 (Hyd)(Trib.)

S. 80IB(10) : Undertaking - Development and construction - Housing project - Project completed before 31-3-2010 deduction to be allowed, verification for area of plot matter set aside
First approval for project was obtained by earlier developer on 12-9-2003. Subsequently, there was substantial change in plan and project. Assessee's plan was approved by local authorities on 28-9-2005. The Tribunal held that since project in question was sanctioned after 1-4-2004, as per clause (a)(ii) of section 80IB(10), it was required to be completed within four years from end of financial year in which it was approved by local authorities and since project was completed by assessee on 11-9-2008, i.e., before due date of completion on or before 31-3-2010, its claim for deduction was to be allowed. when area of plot is more than one acre, then deduction under section 80IB cannot be denied merely on ground that area of plot shown in particular record was less than one acre, matter remanded. (A.Y. 2006-07)
ITO v. Kasturi Construction (2012) 54 SOT 384 (Mum.)(Trib.)

S : 80IB(10) : Undertaking - Development and construction - Housing project - Project completion method - Separate accounts not required, certificate of Chartered Accountant is sufficient

The Assessing Officer disallowed the assessee's claim of Rs. 23,63,612/- in respect of the residential housing projects "Metropolis" under section 80IB by holding that the assessee had sold flats in a semi-finished stage as revealed by sale deeds. In fact, the assessee had sold undivided share of land with superstructure of semi-finished built-up area for a certain consideration and also, on the same date of execution of sale deed, a construction agreement was entered into with the transferee for further construction of the same flat by the builder itself. Thus, the assessee sold only semi-finished residential units which would not make the company eligible for claiming deduction under section 80IB. Further, the Assessing Officer concluded that since the assessee did not maintain any separate accounts in respect of the eligible project it was not possible to work out the deduction under section 80IB and, hence, no deduction. The Commissioner(Appeals), allowed the claim. On appeal by revenue the Tribunal held that:

As per Circular Instruction No. 4 of 2009, it was clear that deduction under section 80IB(10) can be claimed on year-to-year basis where the assessee was showing profit from partial completion of the project in each year. In case it was found later that the project was not completed within four years, the deduction granted to the assessee in earlier years would be withdrawn. Therefore, it was to be concluded that the assessee could claim deduction under section 80IB(10) on year-to-year basis. As regard to semi-finished condition of flats was devoid of merit inasmuch as what was sought to be constructed and sold by the assessee was residential units and what was sought to be purchased by the individual buyer was the ownership of a residential unit and registration of flat in semi-finished condition was only to facilitate the convenience of the parties and agreement for development and completion of the balance work in relation to the flats registered was only an incidental formality to protect the interest of the parties which need not be viewed as fatal to the claim of the assessee for deduction under section 80IB(10). Ultimately, the entire work from the stage of commencement to the stage of making residential units habitable had been carried out by the assessee only and the Revenue had no dispute whatsoever on this count. Accordingly the order of Commissioner(Appeals) confirmed. **(**A.Y.2005-06 & 2006-07)

Dy. CIT v. SMR Builders (P.) Ltd. (2012) 54 SOT 105 (URO)(Hyd.)(Trib.)

S. 80IB(10) : Undertaking - Development and construction - Housing project - Project must be completed before 31-3-2008, in respect of approval granted on or before 1-4-2004, assessee was not entitled to exemption under section 80IB(10)

Assessee-builder constructed a residential housing complex project approval for which was granted before 1-4-2004. It claimed deduction under section 80IB. Assessing Officer held that, though approval to housing project was granted before 1-4-2004, but in fact it was completed only on 23-10-2009 when completion certificate was issued to assessee by local authority and, hence, second requisite condition for claiming deduction under section 80IB(10) i.e., completion of project before 31-3-2008 was not satisfied rendering assessee ineligible for deduction under section 80-IB(10). On appeal Commissioner(Appeals) also confirmed the disallowance. On further appeal to Tribunal the Tribunal also confirmed the order of lower authorities. Once assessee was not found entitled to deduction under section 80IB(10), deduction already granted to assessee in earlier years would be withdrawn in view of CBDT instruction No. 4 of 2009, dated 30-6-2009. Accordingly the appeal of assessee was dismissed. (A.Y. 2006-07)

Fortuna Foundation Engineer & Consultants (P.) Ltd. v. ACIT (2012) 54 SOT 99 (URO)/(2013) 90 DTR 80/ 155 TTJ 501(Luck.)(Trib.)

Editorial:- Contrary Judgement of Mumbai Tribunal in favour of assessee, Shri Ramprasad Agarwal v. ITO ITA No. 2435/Mum/2010 dated 5-9-2012 Bench 'D' (A.Y. 2006-07), ITO v. Sai Krupa

Developers ITA No. 3661/Mum/2011 dated 14-3-2012 Bench 'E'. A.Y. 2008-09, Sanghvi & Doshi Enterprise v. ITO (2011) 131 ITD 151 (TM)(Chennai)(Trib.)

S. 80IB(10) : Undertaking - Development and construction - Housing project - Even if constructed excess area than approved and had also not paid compounding fee, assessee was entitled to deduction

The assessee was engaged in developing residential flats. It obtained sanction/approval from the local authority for construction of 183748 sq. ft. area, which consisted of 180 flats. It claimed deduction under section 80IB(10) in respect of the sale of flats. The Assessing Officer having noticed that as per the sale deeds the total area constructed and sold by the assessee was 191436 sq. ft. and after increasing by the common area at 18.5 per cent the constructed area came to 226851 sq. ft. held that the project constructed by the assessee was not an approved housing project. He, therefore, disallowed the assessee's claim for deduction under section 80IB(10).

On appeal, the assessee contended that though it had not made payment of the compounding fee for regularization of the excess area constructed, it could not be said that the housing project was not approved. The Commissioner(Appeals) held that the assessee was entitled for deduction under section 80IB(10). On appeal by revenue the Tribunal held that even if it had constructed excess area than approved and had also not paid compounding fee, assessee was entitled to deduction. Accordingly the appeal of revenue was dismissed. (A.Y. 2007-08, 2008-09)

ITO v. Mahaveer Calyx (2012) 54 SOT 263 (Bang.)(Trib.)

S. 80IB(10) : Undertaking - Development and construction - Housing project - Developer - Project completion method - Deduction cannot be denied only for want of completion certificate, where assessee follows percentage completion method

The assessee was engaged in construction of residential buildings and sales of flats. One of housing project of assessee situated at Bangalore was approved by local authority on 1-4-2004 and due date for completion of the project was 31-3-2008. The assessee claimed deduction under section 80IB(10) in respect of said project. Lower authorities denied deduction for non-production of completion certificate of the project. The non-production of completion certificate, which is technical in nature, cannot be a reason for denying deduction under section 80IB(10). Section 80IB(10) is a beneficial provision and while granting deduction under section 80IB(10), a liberal view has to be taken. The project was completed which was evident from the property assessment tax, water connection document, pollution control permission issued by the competent authority. Accordingly the Tribunal held that the assessee is entitled to deduction. The Tribunal also held that where an assessee is following the percentage completion method it is not necessary to obtain such completion certificate for each year of assessee's claim but it is sufficient that certificate is obtained on the completion of the housing project as a whole. (A.Y. 2007-08)

Keerthi Estates (P.) Ltd. v. Dy. CIT (2012) 54 SOT 273 (Hyd.)(Trib.)

S. 80IB(10) : Undertaking - Development and construction - Housing project - Residential flats were sold away at semi-finished stage, assessee is entitled to deduction - Matter set aside - Expenditure on temple is part of housing project

The assessee is engaged in the business of construction and sale of flats. It claimed the entire income derived by it from the business of sale of flats as deduction under section 80IB. The Assessing Officer held that the assessee was selling away flats at semi-finished stage leaving much work to be done afterwards and therefore, they could not be said that the flats sold by the assessee were residential units because without constructing further, they would not be in a condition to live in. He, therefore, held that the assessee was not entitled for deduction under section 80IB. On appeal, the Commissioner(Appeals) upheld the Assessing Officer's order. On appeal to the Tribunal the Tribunal held that when the developer is offering profits under percentage-completion method, the estimated

profits that the developer will have on completion of the project is spread over the earlier years and it offered every year a percentage of that profit based on percentage of project completed that years. Obviously except in the last year, the assessee will be offering income even though the project (and the individual flats) would not have been completed. As clarified in the circular Instruction No. 4 of 2009, dated 30-6-2009 such profits offered are also entitled relief under section 80IB. The Assessing Officer is at liberty to determine the correct profit under the percentage completion method and also withdraw the relief granted, if, at a later period of time on completion of the project, the assessee has not complied with any of the requirements of section 80IB(10). In view of the above discussion, the claim of deduction of the assessee is to be restored for relief under section 80IB, to the file of the Assessing Officer with a direction to decide the issue following the said findings and in accordance with law after providing reasonable opportunity of being heard to the assessee in the matter. Assessing Officer was of view that assessee was not under any obligation to construct a temple for residents and, accordingly, amount spent for construction of temple was disallowed. Tribunal held that expenditure incurred towards construction of temple was a part of housing project, which was allowable as capital expenditure. (A.Y. 2003-04 to 2005-06)

Maytas Housing (P.) Ltd. v. ACIT (2012) 54 SOT 302 (Hyd.)(Trib.)

S. 80IB(10) : Undertaking - Development and construction - Housing project - Completion certificate - Completed within the extended time of five years hence eligible for deduction

Assessee-company derived income as developer of housing project and civil contractor. It entered into a joint development agreement dated 20-6-2006 with FPPL which was absolute owners of a land. Local authority (BBMP) had issued approval for construction on 15-10-2005. On completion of project, registered architect furnished a completion certificate dated 21-1-2010 to Joint Director of Town Planning. Thereupon, BBMP vide its communication dated 22-4-2010 had conveyed occupancy certificate. The Assessing Officer noted that the local authority [BBMP] had issued the approval for the construction on 15-10-2005 and, the date of commencement of the project in the assessee's case was 15-10-2005. Therefore, the project should have been completed on or before 31-3-2010. Assessing Officer denied the deduction, which was confirmed by the Commissioner(Appeals). On appeal to Tribunal the Tribunal held that since construction of subject project was complete in all respects well before due date of 31-3-2010 and it was only formal 'occupancy certificate' that was issued belatedly, same could not vitiate date of completion of project. Even otherwise, if date of completion taken to be only on 22-4-2010, date of occupancy certificate, it was still within extended time limit of five years i.e., vide amendment by Finance Act, 2010, and, hence, assessee's claim for deduction was to be allowed. (A.Y. 2008-09)

RNS Infrastructure Ltd. v. Dy. CIT (2012) 54 SOT 95 (URO)(Bang.)(Trib.)

S. 80IB(10) : Undertaking - Development and construction - Housing project - Sanction plan - Revised plan and expenditure not incurred for construction Denial of exemption is not justified - Certification by department valuer has to be accepted

Assessee started a housing project on basis of building plan of 22-1-2002. He claimed deduction under section 80-IB. Assessing Officer denied deduction on grounds that first layout plan was sanctioned on 28-8-1997, thus, project started before 1-10-1998 and some expenditure was incurred towards said project before 31-3-2002. It was found that construction of project was as per revised plan and expenses incurred were not towards development and construction of housing project. Therefore, assessee was eligible for section 80IB deduction. Since departmental valuation officer had certified that area of even combined flat was less than 1500 sq. ft. deduction under section 80IB could not be denied to assessee. (A.Y. 2004-05 to 2006-07)

ITO v. Ashray Premises (P.) Ltd. (2012) 54 SOT 209 (URO)(Mum.)(Trib.)

S. 80IC : Special category States - Eligible business - Head office expenses - Apportionment of expenses - Financial expenses

One unit of the assessee is eligible for deduction under section 80IC, where as other two units are not eligible for deduction under section 80IC. The Assessee has filed a consolidated statement without substantiating individual items as to how and why they should not be considered for the purpose of allocation of common expenses. The Court held that allocation of financial expenses to the eligible unit has to be in the ratio of turnover of the eligible business to the total turnover for the purpose of computing deduction under section 80IC. (A.Y. 2006-07)

Controls & Switchgear Co. Ltd. v. Dy. CIT (2012) 66 DTR 161 (Delhi)(HC)

S. 80IC : Special category States - Manufacture - Assembling of TV sets would amounts to manufacture and entitled to deduction

Assessee which is in the business of producing of TV sets by purchasing and assembling items like cabinet, chassis, IC, Picture tube, etc., could be held to be manufacturing activity and entitled to deduction under section 80IC. (A.Y. 2004-05)

CIT v. I. Tech Electronics (2012) 341 ITR 533 / 67 DTR 257 / 248 CTR 108 (Gau.)(HC)

S. 80IC : Special category States - Standing charges - Deduction is not available in respect of standing charges received for not producing articles.

Standing charges payable to the assessee by its purchaser for not purchasing agreed quality of goods could not form part of profits / gain derived from manufacturing or production activities and therefore, assessee is not entitle to deduction under section 80IC with respect to standing charges received. (A.Y. 2007-08)

Pine Packaging (P) Ltd. (2012) 70 DTR 357 / 250 CTR 45/(2013) 356 ITR 222 (Delhi)(HC)

S. 80IC : Special category States - Interest income is eligible for deduction

Interest received from the Irrigation Department, Govt. of Assam as per the order of the Court for the delay involved in the payment in connection with delivery of goods to Irrigation Department constituted income derived from the industrial undertaking of the assessee and is eligible for deduction under section 80IC. (A.Y. 2004-05)

CIT v. Universal Pipes (P) Ltd. (2012) 79 DTR 175 / 211 Taxman 420 / 254 CTR 311 (Gau.)(HC)

S. 80IC : Special category States - Manufacture or production of fragrance, attar, etc. Deduction is available [S. 2(29BA)]

Assessee engaged in manufacture of fragrance, attar, etc. in the state of Uttarkhand was entitled to deduction under section 80IC; end product manufactured by the assessee and sold is altogether different from distilled oil. Distilled oil is one of the raw material for producing fragrant, fragrant compound or attar. (A.Y. 2007-08)

Natural Fragrances v. Dy. CIT (2012) 79 DTR 181 / 150 TTJ 211 / 51 SOT 261 (Delhi)(Trib.)

S. 80IC : special category states - Manufacture - Making Natural Fragrance by mixing and steaming different floral / distilled oil [S. 2(29BA)]

Activity of making Natural Fragrance by mixing and steaming different floral / distilled oil, is a manufacturing activity eligible for deduction under section 80IC. (A.Y. 2008-09 & 2009-10)

ITO v. Natural Fragrances (2012) 54 SOT 215 (URO)(Delhi)(Trib.)

S. 80O : Royalties - Foreign enterprises - Services from India - Computation

Explanation to section 80O makes it clear that service rendered outside India shall include service rendered from India, but not service rendered in India. Therefore, assessee was entitled to claim

deduction since the service was being made use of by the foreign enterprise outside the country notwithstanding the fact that the foreign enterprise making use of the service rendered by the assessee after manufacturing the equipments though brought it again into the country and erect the same. Expenditure has to be necessarily deducted out of the gross total income in order to arrive at the taxable income, whether that expenditure was incurred by way of foreign exchange or in Indian currency goes to the background and therefore, the expenditure incurred either by way of foreign exchange or Indian currency is to be deducted. (A.Y. 1994-95 to 1999-2000)

CIT v. John Brown Technologies India (P) Ltd. (2012) 77 DTR 58 (Karn.)(HC)

S. 80P : Co-operative societies - Underwritting commission - Interest - Income earned from underwriting commission and interest on PSEB Bonds and IDBI Bonds is eligible for deduction under section 80P(2)(a)(i)

The question raised before the apex court was whether the assessee was entitled for deduction under section 80(P)(2)(a)(i) of the Income-tax Act, 1961 in respect of income from underwriting commission and interest on PSEB Bonds and IDBI Bonds. Following the ratio in CIT Jalandhar v. Nawanshahar Central Co-Operative Bank Ltd. (2007) 160 Taxman 48 (SC), appeals filed by the department were dismissed.

CIT v. Nawanshahar Central Co-Operative Bank Ltd. (2012) 349 ITR 689 / 210 Taxman 263 / 254 CTR 108 / 79 DTR 46 (SC)

S. 80P : Co-operative societies - Marketing of agricultural produce grown by its members - Manufacture - Sugar into sucrose - To decide what is manufacture the department should have a panel of experts

The assessee is a co-operative sugar Mill. The assessee buys sugarcane from its members. It undertakes a particular operation whose final outcome is final product in the form of sugar. The assessee claimed the deduction under section 80P(2)(iii) of the Act. The question before the Apex Court was whether the final product (Sugar) would make the assessee(s) entitled to claim the benefit of section 80P(2)(iii) of the Income-tax Act 1961, in respect of marketing of the agricultural produce grown by it members.? Whether the operation undertaken by the assessee(s) constitute manufacture? The assessee contended that the process undertaken by the assessee is not a 'manufacture'. Broadly, according to the assessee sugar (also called 'sucrose') hence the process is not manufacture. According to department process constitute 'manufacture'. The Department referred the judgment of Apex Court in CIT v. Oracle Software India Ltd. (2012) 340 ITR 546 (SC), wherein it has been observed that, the terms 'manufacture' implies a change, but every change is not a manufacture, despite the fact that every change in article is that the result of a treatment of labour and manipulation. However, this test of manufacture needs to be seen in the context of the above process. If an operation/process renders a commodity or article for its use for which it is otherwise not fit, the operation/process falls within the meaning of the word 'manufacture'. The Court said the question whether conversion of sugar in to sucrose is 'manufacture' should be decided by experts. The Court remitted the matter to the file of Commissioner(Appeals) to decide the issue after getting the opinion of experts and giving an reasonable opportunity to the assessee.

Morinda Co-operative Sugar Mills Ltd. v. CIT (2012) 253 CTR 225 / 210 Taxman 237 / 354 ITR 230 / 77 DTR 481 (SC)
CIT v. Budhewal Co-operative Sugar Mills Ltd. (2012) 253 CTR 225 / 77 DTR 481 (SC)
CIT v. Doaba Co-operative Sugar Mills Ltd. (2012) 253 CTR 225 / 77 DTR 481 (SC)
CIT v. Morinda Co-operative Sugar Mills Ltd. (2012) 253 CTR 225 / 77 DTR 481 (SC)
Dy. CIT v. Shabhad Co-operative Sugar Mills Ltd. (2012) 253 CTR 225 / 77 DTR 481 (SC)
JCIT v. Karnal Co-operative Sugar Mills Ltd. (2012) 253 CTR 225 / 77 DTR 481 (SC)

S. 80P : Co-operative societies - Interest income

Interest income of the assessee co-op society from NSC will be treated as income from other sources, which is not exempt under section 80P(2)(a)(i); interest income from post office will be exempt under section 10(15). (A.Y. 1985-86)

CIT v. Mawana Co-op. Cane Development Union (2012) 77 DTR 189 (All.)(HC)

S. 80P : Co-operative societies - Business of banking - Interest on deposit made out of non SLR funds is eligible for deduction

Interest on deposits made out of non SLR funds is attributable to the business of banking; deduction under section 80P(2)(a)(i) is available in respect of such interest income.

CIT v. Kangra Central Co-op. Bank Ltd. (2012) 79 DTR 137 / 254 CTR 306 / 211 Taxman 529 (HP)(HC)

CIT v. Jogindra Central Co-operative Bank Ltd. (2012) 254 CTR 306 (HP)(HC)

S. 80P : Co-operative societies - Banking business - Cancellation of license

Assessee was registered under Multi State Co-operative Societies Act, 1984 and was subsequently notified by Government of Maharashtra as a State Co-operative Bank and Reserve Bank of India also gave assessee, licence under Banking Regulation Act, 1949. Maharashtra State Government's notification and licence by Reserve Bank of India were challenged by Maharashtra State Co-operative Bank Ltd., by a writ petition before Bombay High Court. High Court allowed the petition, thereupon Reserve Bank of India cancelled assessee's licence with effect from 30-10-2003. During the relevant A.Y. the assessee filed the return of income claiming deduction under section 80P(2)(a)(i). Assessing Officer rejected assessee's claim. In an appeal before the Tribunal, the Tribunal held that as the licence was cancelled the income of the society cannot be considered as banking business eligible for deduction under section 80P(2)(a)(i), and that assessee no longer remained a State cooperative Bank. (A.Y. 2005-06)

Apex Urban Co-operative Bank of Maharashtra & Goa Ltd. v. ITO (2012) 134 ITD 118 (Mum.)(Trib.)

S. 80P : Co-operative societies - Banking Regulation Act, 1949 - Primary business is not banking hence not entitled to deduction

Assessee was a society engaged in business of providing credit facilities to its members by granting loans for purposes like business, housing, vehicles, etc. Deduction under section 80P was denied by Assessee Officer in view of amendment brought into section 80P whereby co-operative banks were excluded from purview of section 80P with effect from 1-4-2007. The Tribunal held that on facts, none of assessee's aims and objects allowed assessee to accept deposits of money from public for purpose of lending or investment, hence it could not be said that principal business of assessee was banking business. Therefore, assessee could not be regarded as a primary co-operative bank and, hence, was entitled to deduction under section 80P(2)(a)(i). (A.Y. 2007-08 to 2009-10)

Dy. CIT v. Jayalakshmi Mahila Vividodeshagala Souharda Sahakari Ltd. (2012) 137 ITD 163 / 76 DTR 234 / 149 TTJ 356 (Panaji)(Trib.)

Dy. CIT v. Dwarka Souharda Credit Sahakari Ltd. (2012) 137 ITD 163 / 76 DTR 234 / 149 TTJ 356 (Panaji)(Trib.)

S. 80P : Co-operative societies - Primary co-operative Bank - Deduction is allowable if provision of section 80P(4) is not applicable

If the provisions of section 80P(4) are not applicable to the assessee co-op. society and if the assessee cannot be regarded to be a primary co-op. bank as defined in section 5(ccv) of the Banking Regulation Act, 1949, the assessee is entitled for the deduction under section 80P(2)(a)(i). (A.Y. 2007-08 to 2009-10)

Dy. CIT v. Jayalakshmi Mahila Vividodeshagala Souharda Sahakari Ltd. (2012) 137 ITD 163 / 76 DTR 234 / 149 TTJ 356 (Panaji)(Trib.)

S. 80P : Co-Operative societies - Rental income of bank by letting out property - Be assessed as house property is not eligible for deduction

Rental income of bank by letting out property, even if commercial premises/assets, has to be assessed as 'Income from house property' as it cannot be construed as 'income from banking activity'. It was held that a co-operative bank is not eligible for deduction under section 80P(2)(a)(i) in respect of such rental income. (A.Y. 2006-07)

ITO v. Kerela State Cooperative Bank Ltd. (2012) 139 ITD 601 / (2013) 82 DTR 81 / 151 TTJ 537 (Cochin)(Trib.)

S. 80P : Co-operative societies - Rural bank - Income from investment is eligible exemption

The assessee was a regional rural bank (RRB). It claimed deduction under section 80P on profit arising out of investment. The Assessing Officer disallowed the said claim on ground that deduction could not be allowed in respect of investment income. On appeal, the Commissioner(Appeals) allowed the deduction. On appeal by revenue the Tribunal confirmed the order of Commissioner(Appeals) and held that the section 80P is applicable on regional rural banks. (A.Y. 2004-05)

ACIT v. Bundi Chittorgarh Kshetriya Gramin Bank (2012) 54 SOT 62 (URO)(Jaipur)(Trib.)

S. 80P : Co-operative societies - Banking business - Members and non-members - Income from members is entitled to deduction

The assessee was a registered agriculture co-operative society carrying out banking activities like borrowing, raising or taking up money and lending or advancing money for the purpose of agriculture, sale and purchase of seeds and fertilizers, etc. It was accepting deposits from non-members also. However, credit facilities and supply of seeds, urea, etc. for the purpose of agriculture were given only to the members of the assessee-society. The assessee claimed deduction under section 80P(2)(a)(i) and 80P(2)(a)(iv). The Assessing Officer rejected the assessee's claim holding that income of the assessee was not attributable to the qualifying activity of carrying on the business of banking or providing credit facilities to its members and the purchase of agricultural implements, seeds, livestock or other articles intended for agriculture for the purpose of supplying them to its members as the similar activities were being performed for the non-members also. On appeal, the Commissioner(Appeals) held that merely because the assessee was unable to bifurcate the expenditure for the deposits from the members and non-members, deduction under section 80P(2)(a)(i) and under section 80P(2)(a)(iv) could not be denied. On revenue's appeal the Tribunal held that the exemption under section 80P(2)(a) is available to the income of a cooperative society engaged in the business or activities facilitating to its members as mentioned in clauses (i) to (vi) of sub-section (a) of section 80P(2). Appeal of revenue was dismissed. (A.Y. 2008-09)

ACIT v. Palhawas Primary Agriculture Co-op. Society Ltd. (2012) 54 SOT 53 (URO)(Delhi)(Trib.)

S. 80P : Co-operative societies - Co-operative bank - Co-operative credit society is entitled for deduction under section 80P(2)(a)(i)

The assessee was a Co-operative Credit Society engaged in providing credit facilities to its members. The primary object of the society was to receive the deposits and meet all the financial requirements of its members and to provide credit facilities to the members as per the bye laws. The assessee claimed a deduction under section 80P(2)(a)(i). The Assessing Officer concluded that if a Co-operative Society conducted any business which came within the ambit of the definition of the Banking business, as defined in section 5(b) of the Banking Regulation Act or as described in section

6(1), it could be inferred that the said Co-operative Society was engaged in business and was the primary Co-operative Bank. He thus, denied the deduction to the assessee claimed under section 80P(2)(a)(i). The Commissioner(Appeals), however, allowed the assessee's claim.
On revenue's appeal, the Tribunal held that The co-operative credit society is distinct and separate from the co-operative bank nor it can be said as a primary co-operative bank within the meaning of Banking Regulation Act, 1949. The assessee being a Co-operative Credit Society is entitled for deduction under section 80P(2)(a)(i). In the result, revenue's appeal is dismissed. (A.Y. 2007-08)
ITO v. Jankalyan Nagri Sahakari Pat Sanstha Ltd. (2012) 54 SOT 60 (URO)(Pune)(Trib.)

S. 80P : Co-operative - societies - Credit facilities to its members - Interest from employees, jeep charges and no due certificate charges cannot be assessed as Income from other sources [S. 56]
The assessee, a co-operative society, was engaged primarily in providing credit facilities to its members. It claimed deduction under section 80P(2)(a)(i).
The Assessing Officer while computing said deduction excluded following three items of income holding those items as 'income from other sources'- (i) interest from employees; (ii) Jeep charges which represented recovery of jeep expenses incurred on trips made by the staff to recover the dues from the defaulting borrowers as also for inspection of securities; and (iii) No dues certificates - which represented the fee received from the borrowers to transfer their borrowing or otherwise switch to another bank or co-operative society to issue a 'no dues certificate. On appeal, the Commissioner(Appeals) allowed the claim of the assessee. On revenue's appeal The Tribunal held that, it was undisputed that assessee-society was engaged primarily in providing credit facilities to its members, so that same represented its principal or core business activity. Its employees, under circumstances, could only be considered as non-members, to whom monies had been similarly lent, making it a collateral activity, incidental to its business. As regards jeep charges, it was noted that same was not source of income, but represented only recovery of jeep expenses incurred on trips made by staff to recover dues from defaulting borrowers as also for inspection of securities. As regards 'no due certificates', when borrower wished to transfer his borrowing or otherwise switch to another bank or co-operative society, he had to be issued a 'no dues certificate' from existing lender, i.e., assessee, who charged a nominal fee for same. Thus, said amount could not be assessed as income from other sources, being only integral to assessee's principal business of lending, therefore on facts the amounts in question were not assessable as 'income from other sources' and, thus, impugned action of Assessing Officer was not sustainable. (A.Y. 2005-06)
ITO v. Jhalawar Sahkari Bhoomi Vikas Bank Ltd. (2012) 54 SOT 56 (URO)(Jaipur)(Trib.)

S. 80P : Co-operative societies - Primary co-operative agricultural and rural development bank-Matter set aside for verification
The assessee was a co-operative society, formed under the Rajasthan State Co-operative Societies Act, 2001. It filed its return for the year on 29-2-2008, claiming exemption under section 80P(2)(a)(i). In view of the amendment to section 80P vide Finance Act, 2006, with effect from 1.4.2007, excluding benefit under section 80P to co-operative banks other than the defined categories, the said relief was proposed to be disallowed by the Assessing Officer. The assessee, in response, claimed to be a primary co-operative agricultural and rural development bank, which category of co-operative banks stood excepted under section 80P(4). The same did not find favour with the Assessing Officer as the assessee was engaged in financing activities even other than purely agricultural activities. Also, its area of operation was not confined to one Taluk, as stipulated under the defining clause of the provision of section 80P(4) per Explanation (b) thereto. Accordingly, the Assessing Officer rejected the assessee's claim. On appeal, the Commissioner(Appeals) upheld the order of the Assessing Officer. On appeal to Tribunal the Tribunal held that in order to claim deduction, assessee was required to show that its principal business consisted of providing financial accommodation to its members for agricultural purposes or for purposes connected with agricultural activities (including

marketing of crops) aforesaid requirement had to be satisfied by assessee independently for each year, as there could well be a change in profile of its lending activities with time,, there being no finding in matter by authorities below, case was to be remanded back for disposal afresh. For the A.Y. 2007-08, 'Income of co-operative societies' and, further having regard to fact that area of operation of assessee-society exceeded 'a taluk', there was no basis to consider assessee as being a primary co-operative agricultural and rural development bank as defined in section 80P, so as to be entitled for tax benefit there under on its income. Accordingly the appeal was decided in fvaour of revenue. (A.Y. 2007-08)

Kekri Sahakari Bhumi Vikas Bank Ltd. v. ITO (2012) 54 SOT 64 (URO)(Jaipur)(Trib.)

S. 80P : Co-operative societies - Regional bank - Deduction under section 80P is held to be not allowable

The assessee is a regional rural bank engaged in banking and financing activity. It claimed deduction under section 80P. The Assessing Officer disallowed the deduction on the ground that assessee was neither Primary Agriculture Credit Society nor Primary Co-operative Agricultural and Rural Development Bank. On appeal, the Commissioner(Appeals) upheld the disallowance. On second appeal Tribunal also confirmed the disallowance. (A.Y. 2007-08, 2008-09)

Vidisha Bhopal Kshetriya Gramin Bank, Vidisha v. ACIT (2012) 54 SOT 51 (Indore)(Trib.)

S. 80P : Co-operative societies - A co-operative bank providing banking facilities to members was not eligible to claim the deduction under section 80P(2)(i)(a) after introduction of sub-section (4) to section 80P

Assessee co-operative society was providing banking and credit facilities to its members only. It was found that certain activities carried on by assessee were not as per requirements of principles of co-operative society and that assessee was also engaged in activity of bill discounting and providing accommodation cheques by taking cash from members. In view of aforesaid facts, assessee was not entitled to deduction under section 80P.Assessee society being a co-operative bank providing banking facilities to members was not eligible to claim the deduction under section 80P(2)(i)(a) after introduction of sub-section (4) to section 80P. (A.Y. 2006-07 to 2008-09)

Citizen Co-op. Society Ltd. v. Addl. CIT (2012) 54 SOT 196 (URO)(Hyd.)(Trib.)

S. 80VV : Expenses incurred with regards to income tax proceedings - Amount paid by assessee to various advocates and consultants in relation to conferences, advice and consultation pertaining to income tax matters - Not within purview of section 80VV

Section 80VV restricts deduction in respect of expenses incurred in respect of any proceedings before any I.T. Authority or Appellate Tribunal or any Court relating to determination of any liability under Income tax Act by way of tax, penalty or interest. Thus, amount paid by assessee to various advocates and consultants in relation to conferences, advice and consultation pertaining to income tax mattes did not fell within purview of section 80VV and, hence, no disallowance could be made in respect of these expenditures. (A.Y. 1985-86)

Tata Chemicals Ltd. v. ACIT (2012) 138 ITD 458 (Mum.)(Trib.)

S. 90 : Double taxation relief - DTAA - India-Mauritius

Indo-Mauritius DTAA and Circular No. 789 dated 13-4-2000, would not preclude Income-tax department from denying tax treaty benefits, if it is established, on facts, that Mauritius company has been interposed as owner of share in India, at time of disposal of share to a third partly, solely with a view to avoid tax without any commercial substance. In such a situation, notwithstanding fact that Mauritian Company is required to be treated as beneficial owner of shares under Circular No. 789 and DTAA, the tax department is entitled to look at entire transaction of sale as a whole and take into consideration real transaction between parties and transaction may be subject to tax.

Vodafone International Holdings B. V. v. UOI (2012) 341 ITR 1 / 204 Taxman 408 / 247 CTR 1 / 66 DTR 265 / 6 SCC 613 / Vol. 42 Tax L R 305 (SC)

S. 90 : Double taxation relief - Non-resident-Salary - Indian subsidiary - Taxability - Payment being not taxed in both contracting States assessee is not eligible for exemption - DTAA - India-UK [Art. 16(1)(2)]

The assessee is an employee in a company in UK, and works for its subsidiary in India and is treated as employee of the subsidiary. The assessee has claimed the salary amounting to Rs. 15, 25,577/- as exempt under article 16(1) and 16(2) of the DTAA between India and United kingdom, on the ground that salary paid in India by a foreign employer cannot be brought to tax under article 16(2) of the DTAA. The claim was rejected by Assessing Officer and Commissioner(Appeals), however the Tribunal has allowed the claim of assessee. On appeal by revenue the court held that the amount was not taxed either in the U.K. or in India. The payment was made through the Indian based company by the U.K. company. If it was the contention of the assessee that he was an employee of the U.K. company alone, the payment would have been made by the foreign company and not by Indian company. Therefore, the condition stipulated in article 16(2)(b) was not fulfilled in so far as the Indian company treated the assessee as its employee and issued the certificate deducting tax at source. The Court held that the assessee is not eligible for exemption, accordingly the appeal of revenue was allowed. (A.Y. 2001-02)

CIT v. Ravi Rajagopal (2012) 342 ITR 22 / 71 DTR 60 / 251 CTR 44 (Mad.)(HC)

S. 90 : Double taxation relief - Avoidance of tax - Permanent establishment - Arms length principle - There was no attribution of profit - India -France DTAA [Art. 5(5)]

A French company (FCO) is engaged in the business of operation of ships in international traffic. FCO carried on operations in India through agents who handled the work at most of Indian ports. The agents are responsible for all clearance from the Governments. The Assessing Officer held that FCO had PE in India hence 10% of the gross receipts from India to agency PE. The FCO contended that it did not have a PE in India under DTAA, hence its business profits could not be taxed in India. In any case, due to arm's length principal, there was no attribution of profit. The Tribunal held that under India France DTAA as long as it is shown that the transactions between the agent and the principal are made under arm's length conditions, the agent would be treated as that of independent status even if he deals exclusively for one principal.

The 'profit neutrality' theory on account of arms length remuneration to a dependent agent PE (DAPE) may not always hold good as the dependent agent (DA) may not be compensated for entrepreneurial risk that may arise to the principal. (A.Y. 2006-07)

Delmas France v. ADIT (2012) 144 TTJ 273 / 67 DTR 73 / 14 ITR 1 / 49 SOT 719 (Mum.)(Trib.)

S. 90 : Double taxation relief - Interest - Income tax refund - DTAA - India-Netherland - Interest on income tax refund is held to be chargeable to tax as per the provisions of DTAA [Art. 11]

The assessee, a company declared income tax refund as income from interest under Article 11 of DTAA between India-Netherland and offered it to tax @ 10%. The Assessing Officer denying the claim of the assessee held that the interest on income tax refund was liable to be considered as business profit under Article 7 of the said DTAA and thus chargeable to tax @ 41%. On appeal to Tribunal it was held that there was no difference in the language used in Article 11 of the Indo-Germany DTAA and Article 11(2) of India-Australia DTAA. Thus, following the decision of Hapag Lloyd Container Linie GmbH v. DIT(IT) (2011) 9 Taxmann.com 126 (Mum.) it was held that interest on income tax is liable to be taxed as income from interest and not business profit (A.Y. 2004-05)

International Global Networks BV v. Dy. DIT (IT) (2012) 50 SOT 433 (Mum.)(Trib.)

S. 90 : Double taxation relief - Foreign PE profits - Permanent establishment - Under Article 7 of the DTAA, foreign PE profits may be taxed in India

The assessee, an Indian PSU company, earned Rs. 10.68 crores from foreign projects in Oman, etc. The assessee claimed that it had a "permanent establishment" (PE) in those countries and that in accordance with he DTAA, only the source country was entitled to tax the profits and India was not authorized to tax the foreign PE profits. Held by the Tribunal rejecting the plea:

Article 7 of the DTAA provides that the profits of an enterprise of a Contracting State shall be taxable only in that state of residence unless the enterprise carries on business in other contracting state through a PE situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise "may be taxed" in the other Contracting State but only so much of them as is attributable directly or indirectly to the PE. While the first part gives exclusive taxation right to the State of residency, the second part gives taxation right to the state of residency as well as to the State where the PE is situated. The phrase "may be taxed" shows that the State of source has the non-exclusive right to tax while the State of residence continues to have the inherent right to tax. This interpretation is supported by the OECD Commentary on the Model Convention. P.V.A.L. Kulandagan Chettiar (2004) 267 ITR 654 (SC) turned on different facts and does not lay down the proposition that the profits of a foreign PE cannot be taxed in the State of residence of the assessee. (A.Y. 2000-01, 2005-06, 2006-07)

Telecommunications Consultants India Ltd. v. ACIT (2012) 72 DTR 385 / 148 TTJ 311 / 18 ITR 368 / 53 SOT 1 (URO)(Delhi)(Trib.)

S. 90 : Double taxation relief - Tax - Education cess - Foreign company - DTAA - India-Singapore - "Education cess" is "additional surcharge" & is included in "tax" under DTAA. If DTAA caps the rate of "tax" payable, cess is not payable by foreign assessee. [S. 2(23A), Art. 11, 12]

The assessee, a Singapore company, offered interest and royalty income to tax at the rate of 15% & 10% as specified in Articles 11 & 12 of the India-Singapore DTAA respectively. The Assessing Officer held that the assessee was also liable to pay surcharge and education cess in addition to the tax. The CIT(A) upheld the assessee's claim that surcharge was not leviable though he rejected the claim with regard to cess. On further appeal by the assessee. Held, allowing the appeal:

Articles 11 & 12 of the DTAA provide that the "tax" chargeable in India on interest and royalties cannot exceed 15% and 10% respectively. The expression 'tax' is defined in Article 2(1) to include 'income tax' and includes 'surcharge' thereon. Article 2(2) extends the scope of the 'tax' by laying down that it shall also cover "any identical or substantially similar taxes which are imposed by either Contracting State after the date of signature of the present Agreement in addition to, or in place of, the taxes referred to in paragraph 1". "Cess" was introduced by the Finance Act, 2004 and it is described in section 2(11) of the Finance Act 2004 as "additional surcharge for purposes of the Union", to be called the "Education Cess on income-tax". Accordingly, the "education cess" is in the nature of an "additional surcharge" and is covered by Article 2. Accordingly, education cess cannot be levied in respect of the assessee's tax liability. (A.Y. 2009-10)

DIC Asia Pacific Pte. Ltd. v. ADIT (2012) 147 TTJ 503 / 74 DTR 140 / 52 SOT 447 / 18 ITR 358 (Kol.)(Trib.)

S. 90 : Double taxation relief - Fees for Technical Services - DTAA - India-Singapore - Amount received for rendering technical services [Art. 5.6]

The assessee, a Singaporean company received an amount for technical service rendered to it by its wholly owned Indian subsidiary, the which constitutes service PE of the assessee within the meaning of Art. 5.6(b) of the Indo-Singapore DTAA, is assessable under Article 7 of DTAA by virtue of para 6 of Art. 12. (A.Y. 2003-04, 2004-05)

Addl. DIT (IT) v. Bunge Agribusiness Singapore Pte. Ltd. (2012) 147 TTJ 507 / 53 SOT 119 / 74 DTR 40 (Mum.)(Trib.)

S. 90 : Double taxation relief - Loss on sale of shares - Set of - Assessing Officer cannot thrust the provisions of the Double taxation avoidance agreement on an assessee, who has chosen to be governed by the Income-tax Act. Assessee is entitled to set off loss under "Profits and gains of business or profession" against "Income from other sources" [S. 71, Art. 7]

Assessee, a non-resident disclosed a loss on sale of shares falling under the head 'Profits and Gains of Business and Profession' and claimed a set-off of such loss against income under 'Income from other sources'. The assessee did not have a PE in India and chose to be governed by Income Tax Act and not by DTAA. However, the Assessing Officer superimposed his choice on the assessee considering the case to be under DTAA and holding that since the assessee had no PE in India, there could be no business loss available for set off. However, it was held that the view of the Assessing Officer ran contrary to the manifest prescription of section 90(2) which in unequivocal terms provides that the provisions of DTAA would apply to the extent they are beneficial to assessee. When assessee chose to be governed by the provisions of the Act and not the DTAA by not claiming to have any PE in India or to be regulated by Art. 7 read with Art. 5, the Assessing Officer was not justified in directing that the business loss should be considered under the provisions of DTAA and not the Act. Hence, the loss is allowed to be set-off. (A.Y. 2003-04)

Prudential Assurance Co. Ltd. v. ACIT (2012) 18 ITR 186 / 51 SOT 132 / (2013) 152 TTJ 188 / 82 DTR 199 (Mum.)(Trib.)

S. 90 : Double taxation relief - Ship owned by Iranian company chartered by Dutch company - DTAA - India-Netherland

Ship owned by an Iranian company has been chartered by a Dutch shipping company P which regularly calls Indian ports for loading export cargo. Clause 13 of the charter party document stipulates payment of minimum freight to the owner of the ship (Iranian party) owner of the ship is not only entitled to freight of a minimum 19,500 tonnes but also additional freight depending on the intake of the cargo. Hence, risk and liabilities are undertaken by P only in the event of the tonnage being less than 19,500 tonnes. Raising of invoice by the character and charging 49 Euros per MT is of no relevance since substantial portion of the freight is paid to the owner of the ship. Therefore, relief under the DTAA is not allowable. (A.Y. 2009-10)

Marine Links Shipping Agencies v. ACIT (2012) 77 DTR 292 / 149 TTJ 641 (Bang.)(Trib.)

S. 90 : Double taxation relief - Royalty - Sale of software - DTAA - India-USA [Art. 7]

Assessee, an US company, received a sum of Rs. 58.30 lakhs from NIPL an Indian company, towards the direct sale of software, which were subsequently resold by NIPL to its end customers, without giving any right to duplicate the same in any manner. This is a clear cut case of consideration received for the transfer of copyrighted products and not for the transfer of copyrights in the computer software programme. Same has been received by the assessee not as a consideration 'for the use of' or the 'right to use any copyright' of a computer software but is a consideration for acquisition of the computer software meant for the exclusive use of the end users and it cannot be brought within the ambit of Art. 12(3). As such, it would partake of the character of business profits and not royalties regardless of the fact that the assessee chose to describe its products as 'intellectual value' in its invoices. No disallowance under section 40(a)(i) has been made in the assessment of the NIPL, which implies that the Assessing Officer accepted such payment to the assessee by NIPL as having been made on transaction of purchase and not as royalty. Since assessee does no have any permanent establishment, income arising from such sale of software is not chargeable to tax in India as per Art. 7. (A.Y. 2007-08)

Novel Inc. v. Dy. Director of Income tax (IT) (2012) 78 DTR 158 / 16 ITR 101 / 49 SOT 45 (Mum.)(Trib.)

S. 90 : Double taxation relief - Disallowance under section 43B - DTAA - India-Mauritius [S. 43B, 139(1), Art.7(3)]

Article 7(3) of Indo Mauritius DTAA expressly provides for deduction of all expenses which are incurred for the purpose of the business of the PE in India without any restriction on the allowability of such expenses on the basis of the limitation enshrined in the India IT Act and, therefore, no disallowance under section 43B can be made in respect of the bonus which was not paid before the due date of filing of return under section 139(1). (A.Y. 1999-2000)

State Bank of Mauritius Ltd. v. Dy. DIT (2012) 78 DTR 62 / 149 TTJ 708 / 19 ITR 675 (Mum.)(Trib.)

S. 90 : Double taxation relief - Borrowed amount invested in tax free bonds - Allowability of interest paid thereon - DTAA - India-Mauritius [S. 14A, Art. 7(3)]

Interest expenditure incurred on amount borrowed which was invested in tax free bonds. If an item of income is exempt and gets excluded at the very outset from entering into computation of total income, any expenditure incurred in relation to such income should also meet with the same fate. Once a particular item of income does not itself constitute business profit as per Art. 7 because of its exemption under the IT Act there is no question of allowing any deduction for an expenditure incurred in relation to such income against other taxable business income. If such expenses have been included in the business expenses claimed as deduction under Art. 7(3), then these are required to be reduced accordingly. Section 14A snatches away the deductibility of expenses incurred in relation to an exempt income at the very threshold. Therefore, since the interest income from the tax free bonds per se is not includible in the business profits of the assessee's PE in India, the expenses incurred in relation to such interest income cannot be allowed as deduction. (A.Y. 1999-2000)

State Bank of Mauritius Ltd. v. Dy. DIT (2012) 78 DTR 62 / 149 TTJ 708 / 19 ITR 675 (Mum.)(Trib.)

S. 90 : Double taxation relief - Head office expenses - DTAA - India-Mauritius [S. 44C, Art. 7]

Article 7(3) of Indo Mauritius DTAA does not provide for limiting the deduction of expenses incurred for the business of the PE subject to the limitations contained in the IT Act, therefore, the restriction contained in section 44C for allowing the head office expenditure does not apply for allowing deduction of head office expenses attributable to Indian operations. (A.Y. 2000-01 to 2004-05)

Dy. DIT v. State Bank of Mauritius Ltd. (2012) 78 DTR 86 / 149 TTJ 731 (Mum.)(Trib.)

S. 90 : Double taxation relief - Business profits - DTAA - India-UAE - Head office and other expenses attributable to PE - Protocal is applicable from 1st April, 2008, and has no retrospective effect [S. 44C, Art. 7, 25]

In view of the provisions of Art. 7(3) of the DTAA as they existed prior to 1st April, 2008, there was no restriction on allowance of head office expenses and others expenses attributable to PE in determining the profits of PE in India. However, with the insertion of the phrase "in accordance with the provisions of and subject to the limitations of the tax laws of that state" in Art. 7(3) as amended by protocol notified on 28th Nov., 2007, effective from 1st April, 2008, the mandate of applicability of the domestic law has been provided in allowing the deduction of expenses of the PE and determination of profit under the IT Act. Consequently, section 44C becomes applicable. Once the Govt. Of India and the Govt. of UAE had not used the limitation clause of applicability of domestic law in determining the profits and deduction of expenses of PE in Art. 7(3), the same cannot be read into it even impliedly. When a particular provision in the agreement has been brought from a

particular date, it has to be prima facie taken to be prospective in operation. If retrospective operation is given to Art. 7(3), it would create new obligation and disturb the assessability of the profit of the PE. Thus, the amendment in Art. 7(3) w.e.f. 1st April, 2008, is not applicable retrospectively prior to the said date. Article 25 per se does not provide any rules regarding the mechanism for computing relief. Interpretation of Art. 25 that it extends to Art. 7 for applicability of domestic law would not be correct. Consequently, computation of income and disallowance of expenses relating to head office cannot be made by invoking the provisions of section 44C. Thus, income of the PE of the assessee, a USE banking company, has to be computed after allowing all the expenses attributable to its business in India, including the head office expenses. (A.Y. 1995-96 to 2000-01)

Abu Dhabi Commercial Bank Ltd. v. ADIT (IT) (2012) 138 ITD 83 / 78 DTR 234 / 150 TTJ 85 (Mum.)(Trib.)

S. 90 : Double taxation relief - Avoidance of tax - Gains arising from the transfer of shares is liable to tax in India - DTAA - India-Franel [Art. 14(5)]

French residents transferred shares of a French company to another French resident. The only business/asset of the French company was shares comprising 80% equity shares in an Indian company. Since the transfer resulted in transfer of underlying assets and control of Indian company, on purposive interpretation, gains arising from the transfer were liable to tax in India.

Group Industrail, Marcel, Dassault, In re (2013) 212 Taxman 220 / (2012) 340 ITR 353 / (2011) 245 CTR 353 / 64 DTR 1 (AAR)

S. 90 : Double taxation relief - Business income - Non-resident - Permanent establishment - Dependent agent - Advertisement collection - TV Channels - DTAA - India-Mauritius - Tax implications of a "Dependent Agent Permanent Establishment" explained - On the facts it was held that there was no PE in India hence income cannot be taxed

The assessee, a Mauritius company, was engaged in telecasting TV channels. It had an advertisement collection agent in India who collected revenue from time slots given to Indian advertisers. The assessee claimed that its profits from India were not chargeable under the DTAA because (i) it did not have a PE and (ii) assuming the agent was a PE, the agent had received an arms' length fee from the assessee and further profits could not be attributed. The department relied on DHL Operations B. V. (2005) 142 Taxman 1 (Mag.)(Trib.)(Mum.) and claimed that as the assessee was dependent on the Indian agents, the Indian agents constituted a "Dependent Agent PE" and that despite arms' length fee to the agents, profits were attributable to the DAPE. Held by the Tribunal:

(i) Under Article 5(4) of the DTAA, an "agent" (other than one of independent status) is deemed to be a PE if he "habitually exercises" the authority to conclude contracts. On facts, the agent was not the decision maker and had no authority to conclude contracts or to fix the rate or to accept an advertisement. It merely forwarded the advertisement to the assessee. Accordingly, there was neither legal existence of authority, nor evidence to show "habitual exercise" of authority.

(ii) Under Article 5(5), an agent is deemed not to be of independent status when his activities are devoted exclusively or almost exclusively to the non-resident enterprises. Though in CIT v. DHL Operations B. V. (2005) 142 Taxmman 1 (Mag.)(Trib.)(Mum.) it was held that the question whether the agent is "dependent" has to be seen from the perspective of the non-resident principal, this view cannot be followed because it is contrary to the language of Article 5(5). The wordings refer to the activities of an agent and its devotion to the non-resident and not the other way round. The perspective should be from the angle of the agent and not of the non-resident. As the income from the assessee was only 4.69% of the agent's income, the agent was not a "dependent agent" [Morgan Stanley & Co. International Ltd. (2005) 272 ITR 416 (AAR) & Rolls Royce (Singapore) Pvt. Ltd. (Delhi)(HC) (2011) 202 Taxman 45 (Delhi)(HC) followed];

(iii) Even assuming that there was a DAPE, as the agent had been remunerated at arms' length basis, no further profit is attributable to the PE as per Circular No. 742 dated 2.5.1996, Set Satellite

(Singapore) Pte Ltd. v. Dy. CIT (2008) 307 ITR 205 (Bom.) & DIT v. BBC Worldwide (2011) 203 Taxman 554 (Delhi)(HC). (A.Y. 2001-02)
Dy. DIT v. B4U International Holdings Ltd. (Trib.)(Mum.) www.itatonline.org

S. 90 : Double taxation relief - Management fee - Service PE - DTAA - India-USA - Fees for rendering marketing and management services in India held to be attributable to service PE and chargeable on net basis [Art. 5, 12(4)(b)]
Fees received by the assessee, a US company, for rendering marketing and management services to WNS, an Indian Company, is not in the nature of fees for included services within meaning of Art. 12(4)(b) of India-US DTAA, employees of the assessee having visited India for providing services to WNS in India, the presence of the employees constituted a Service PE of assessee in India within meaning of Art. 5(2)(I) of the DTAA and therefore, the marketing and management fee for services rendered in India is attributable to service PE and chargeable on net basis. (A.Y. 2005-06)
ADIT (IT) v. WNS North America Inc. (2012) 71 DTR 161 (Mum.)(Trib.)
ADIT v. WNS Global services (UK) Ltd. (2012) 71 DTR 161 (Mum.)(Trib.)

S. 90 : Double taxation relief - Transfer pricing - DRP failed to dispose of objections raised by assessee by passing a reasoned and speaking order - Matter remanded back
Assessee, a UAE based company, was engaged in business of shipping operations. It was running feeder service between India and Dubai by using its own vessels as well as Chartered vessels. Assessee received certain amount as 'slot hire charges'. Assessing Officer referred draft assessment order to DRP proposing to tax aforesaid charges received by assessee at rate of 15 per cent under section 44B. Assessee raised objection before DRP submitting that its 'slot hire charges' were from shipping operations and were covered by Article 8 of DTAA between India and UAE, and, therefore, same was not taxable in India. It was held that where DRP failed to dispose of objections raised by assessee by passing a reasoned and speaking order, matter was to be remanded back for disposal afresh. (A.Y. 2007-08)
Orient Shipping Services v. Addl. CIT (2012) 54 SOT 150 (Mum.)(Trib.)

S. 90 : Double taxation relief - Non-resident - Fees for technical services - Business support services - Financial services - DTAA - India-Netherland [S. 195, Art. 12]
SSSABV, a company incorporated in Netherlands, through its branch in the Philippines, is providing back office financial services relating to accounts etc.to the Applicant. Consideration paid by the applicant, an Indian company to SSSAB, a Dutch company is governed by the treaty between India and Netherlands and not the one between India and Philippines and since SSABV is providing back office services to then applicant without any involvement of the latter, the consideration paid for the services is not of fees for technical services within the meaning of Article 12.5(b) of the DTAA between India and Netherlands and therefore, it is not chargeable to tax in India. Since there is no liability to tax in India, applicant has no obligation to with hold tax under section 195.
Shell Technology India (P) Ltd. (2012) 345 ITR 206 / 65 DTR 34 / 246 CTR 158 / 204 Taxman 314 (AAR)

S. 90 : Double taxation relief - Capital gains - Shares - DTAA - India-Mauritius - Capital gains on sale of shares of Indian company by Mauritius company, the applicant is under obligation to file return of income [S. 2(14), 139]
Applicant, a Mauritian company, proposes to transfer shares of an Indian company to a Singaporean company. These shares were held as investments and have not been dealt with till date. It was held that the said shares are held by the applicant as capital assets and its proposed sale will generate gains that would qualify to be capital gains under the Act as well as under the DTAA. Though the applicant is a part of GSK Group and can be said to be under the vertical control of W Ltd. a U.K. company,

the fact remains that it is a legal entity in the eye of law and there is no adequate material to rebut its ownership over the shares. It is not possible to hold that the beneficial owner of the shares is some other entity. Even if it is held that there was treaty. Shopping in this case, same is not a taboo-Also, it cannot be said that the presumption arising out of tax residency certificate has been rebutted. Thus, on facts, it cannot be said that the revenue has established a case of an attempt at tax avoidance. Though the proposed sale would be outside the stock exchange, it is not shown that a company holding shares in another company cannot sell the shares otherwise than through a stock exchange. Thus, the argument that the proposed sale would involve avoidance of securities transaction tax cannot be accepted. There is no obligation on the applicant to sell the shares through a stock exchange. The argument that unless the applicant is actually taxed in Mauritius or is liable to be actually taxed on the capital gains that would arise in Mauritius, DTAA is not attracted cannot be accepted. Therefore, the capital gains would not be chargeable to tax in India in view of para 4 of Art. 13 of the DTAA between India and Mauritius. Consequently, there is no obligation to withhold tax. Obligation under section 139 does not simply disappear merely because a person is entitled to claim benefit of a DTAA. Therefore, the applicant will have the obligation to file return in terms of section 139. (A.Y. 1988-89)

Castleton Investment Ltd. In re (2012) 348 ITR 537 / 252 CTR 131 / 211 Taxman 282 (AAR)

S. 90 : Double taxation relief - Capital gains - Mauritius tax resident - No PE in India - DTAA - India-Mauritius - Capital gains exempt in India as per Article 13 of DTAA (S. 45, Art. 13)

The applicant, a tax resident of Mauritius has invested funds in India which are pooled from various individual & institutional investors from around the world. It is registered with SEBI as a Foreign Venture Capital Investor. It does not have a permanent establishment in India. The applicant proposes to sell the shares of some of the companies that would generate capital gains which should be exempt by virtue of Article 13 of India-Mauritius DTAA. Revenue contended that only 4 out of 55 investors were from Mauritius; also only two of the Directors of the applicant were from Mauritius and the three others were from India and decisions were taken from India by the Board of Directors. Thus this was a case of routing of investments for evasion of taxes. Further, unless the capital gain is actually taxed in Mauritius the DTAA would not apply in the context of section 90(1) and section 90(2) of the Act.

The Authority observed that the applicant being a tax resident of Mauritius in the light of the tax residency certificate produced by it, it is bound to follow the decision in Union of India v. Azadi Bachao Andolan. Further, since chapter X-A introduced into the Act by the Finance Act, 2012 is to come into force only on 1.4.2013, sections 90(2A) & 90(4) of the Act has no relevance at this stage. Accordingly, it ruled that the gain that may arise to the applicant is not chargeable to tax in India.

Dynamic India Fund I (2012) 251 CTR 206 / 74 DTR 294 / 209 Taxman 417 (AAR)

S. 90 : Double taxation avoidance - Non-residents - Capital Gains on transfer of shares - Legal v. Beneficial ownership - India-Mauritius DTAA - Ultimate beneficial owner is Jersey Co. - Benefit of DTAA will be available - Legal ownership prevail over beneficial ownership in absence of any contrary evidence - Gains not chargeable to tax in India hence seller is not bound to deduct tax at source. Minimum alternative tax provision will apply to foreign company [S. 45, 115JB, 195, Art. 13(4)]

The Applicants, Moody's Analytics Inc. Co., USA ("Moody's USA"), Moody's Group Cyprus Limited ("Moody's Cyprus"), CRL Mauritius and CMRL Mauritius, sought a ruling from the AAR with respect to the following transactions: (a) Sale of shares of CRIPL, an Indian company held by CRL Mauritius to Moody's Cyprus; and (b) Sale of Exevo USA shares held by CMRL Mauritius to Moody's USA. Exevo USA held 100% shares of an Indian company.

Revenue contended that the transactions were a scheme for avoiding taxes. The beneficial ownership of the shares transferred in both the transactions were held by CPL Jersey. Since there is no DTAA

between India and Jersey, both the transactions were taxable in India as per the provisions of the Act. The first transaction involved sale of shares of an Indian Company and the second transaction which involved sale of shares of a US company, holding underlying shares in the Indian Company is also taxable as per the amended provisions [Expln.5 to section 9(1)] of the Act. It further contended that the Tax Residency Certificates submitted by CRL Mauritius and CMRL ("the sellers") is not a conclusive evidence for determining their residential status as held by the Supreme Court ("SC") in Vodafone International Holdings BV v. Union of India and Others. The management and control of the seller companies did not lie in Mauritius as the whole transaction was left to the discretion and management of an individual, a resident of UK.

Based on the Supreme Court decision in the case of Azadi Bachao Andolan, the Authority concluded that the applicant was eligible to avail the benefit of the DTAA and the Direct or Indirect transfer of shares of the Indian Company shall not be liable to tax in India under the India-Mauritius DTAA. Further, the AAR also concluded that the concept of legal ownership prevails over beneficial ownership as the concept of legal ownership is recognized under the Company Law as well as on the principle that in the absence of any cogent material to hold otherwise, the legal structure for investments would hold good. On the question of applicability of MAT provisions, as the parties had not posed any arguments, the AAR only observed that MAT provisions were applicable even to a foreign company.

Moody's Analytics Inc., USA (2012) 348 ITR 205 / 252 CTR 19 / 209 Taxman 404 / 75 DTR 155 (AAR)

Moody's Group Cyprus Ltd. (2012) 348 ITR 205 / 252 CTR 19 / 209 Taxman 404 / 75 DTR 155 (AAR)

Copal Research Ltd. (2012) 348 ITR 205 / 252 CTR 19 / 209 Taxman 404 / 75 DTR 155 (AAR)

Copal Market Research Ltd. (2012) 348 ITR 205 / 252 CTR 19 / 209 Taxman 404 / 75 DTR 155 (AAR)

S. 90 : Double taxation relief - Professional income of Swiss law firm - DTAA - India-Switzerland - Swiss Law partnership firm, transparent entity is not a person liable to benefit under treaty, legal fees earned would be taxable in India [Articles 1, 4, 14]

The applicant is a Switzerland based law firm. The partnership firm and all its partners are tax residents of Switzerland. It was appointed by Siemens India to represent it in an arbitration proceedings in Switzerland. Except for a site visit and an adjudication hearing in India for about a week, no other activity was carried on in India by the law firm. The applicant argued that it was entitled to the benefit under the Indo-Swiss DTAA and the professional income derived by it was not taxable in India under Article 14. The Revenue however argued that the partnership was not entitled to DTAA benefit as it was not a 'resident' of Switzerland.

The Authority observed that the receiver of the income (partnership firm) and the person taxed on such income (the partners), were not the same. It further observed that under Article 1, the Indo-Swiss DTAA would apply only to the residents of India or Switzerland. Article 4 provides that 'resident' means any person who under the laws of that State is liable to taxation in that State by reason of his domicile, i.e. residence, place of incorporation, place of management, or any other criteria of similar nature. While the partnership could be said to be domiciled in Switzerland, Authority held that it was not a 'person' within the meaning of the DTAA. Consequently, the AAR held that as Swiss partnership firm isn't a person liable to be taxed in Switzerland, no treaty benefit would be available to it and legal fees would be taxable in India.

Schellenberg Wittmer & Ors. In Re (2012) 76 DTR 293 / 253 CTR 178 / 210 Taxman 319 (AAR)

S. 92B : Avoidance of tax - Transfer pricing - Corporate guarantee - Matter set aside

Issue as to whether corporate guarantee given by assessee to its subsidiaries comes within ambit of international transaction or not was ordered to be decided in view of order of Tribunal of Hyderabad,

wherein it was held that such corporate guarantee does not fall within ambit of international transaction; but with a rider that, if amended provisions of Income-tax Act proposed in Finance Bill, 2012 was to be passed by the Parliament amending provisions of section 92B with retrospective effect whereby it was proposed to insert an Explanation covering guarantee transaction, then above noted order of the Tribunal was to be ignored. (A.Y. 2006-07)

Mahindra & Mahindra Ltd. v. Dy. CIT (2012) 54 SOT 146 (URO)(Mum.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - Business expenditure - TPO has no authority to disallow the payment for the purpose of business, on the ground that the assessee has suffered continuous losses [S. 37(1)]

The assessee entered into an agreement pursuant to which it paid brand fee / royalty to an associated enterprise. The TPO disallowed the payment on the ground that as the assessee was regularly incurring huge losses, the know-how/ brand had not benefited the assessee and so the payment was not justified. This was reversed by the CIT(A) & Tribunal on the ground that as the payment was genuine, the TPO could not question commercial expediency. On appeal by the department, Held dismissing the appeal:

The "transfer pricing guidelines" laid down by the OECD make it clear that barring exceptional cases, the tax administration cannot disregard the actual transaction or substitute other transactions for them and the examination of a controlled transaction should ordinarily be based on the transaction as it has been actually undertaken and structured by the associated enterprises. The guidelines discourage re-structuring of legitimate business transactions except where (i) the economic substance of a transaction differs from its form and (ii) the form and substance of the transaction are the same but arrangements made in relation to the transaction, viewed in their totality, differ from those which would have been adopted by independent enterprises behaving in a commercially rational manner. The OECD guidelines should be taken as a valid input in judging the action of the TPO because, in a different form, they have been recognized in India's tax jurisprudence. It is well settled that the revenue cannot dictate to the assessee as to how he should conduct his business and it is not for them to tell the assessee as to what expenditure the assessee can incur [Eastern Investments Ltd. v. CIT (1951) 20 ITR 1 (SC), Walchand & Co. Pvt. Ltd. (1967) 65 ITR 381 (SC) followed]. Even Rule 10B(1)(a) does not authorise disallowance of expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same. (A.Y. 2002-03, 2003-04)

CIT v. EKL Applicances Ltd. (2012) 345 ITR 241 / 71 DTR 345 / 250 CTR 264 / 209 Taxman 200 (Delhi)(HC)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price - Royalty - Royalty allowable even in respect of unpaid sales - No reduction to be made because of failure of customers to pay for product

The assessee entered into a Software Distribution Agreement with CA Management Inc. ("CAMI") pursuant to which it was appointed as a distributor of CAMI's products in India. The assessee was required to pay an annual royalty of 30% on sales. The TPO accepted that the rate of royalty was at arms' length price but held that royalty ought not to have been paid on sales where there was complaints on quality or which had turned into bad debts. The CIT(A) upheld the TPO's stand though the Tribunal reversed it. On appeal by the department to the High Court, Held dismissing the appeal:

Section 92C provides the basis for determining the ALP in relation to international transactions. It does not either expressly or impliedly consider failure of the assessee's customers to pay for the products sold to them by the assessee to be a relevant factor in determining the ALP. In the absence of any statutory provision or the transactions being colourable bad debts on account of purchasers refusing to pay for the goods purchased by them from the assessee can never be a relevant factor while determining the ALP of the transaction between the assessee and its principal. Once it is accepted that the ALP of the royalty is justified, there can be no reduction in the value thereof on

account of the assessee's customers failing to pay the assessee for the product purchased by them from the assessee. Absent a contract to the contrary, the vendor or licensor is not concerned with whether its purchaser / licensee recovers its price from its clients to which it has in turn sold/licensed such products. The two are distinct & unconnected transactions. The purchaser's/licensee's obligation to pay the consideration under its transaction with its vendor/licensor is not dependent upon its recovering the price of the products from its clients. (A.Y. 2002-03)

CIT v. CA Computer Associates India Pvt. Ltd. (2012) 75 DTR 293 / 209 Taxman 382 / 252 CTR 164 / (2012) Vol. 114 (4) Bom.L.R. 2431 / (2013) 351 ITR 69 (Bom.)(HC)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price - Computation -Necessary or expedient - Appeal to High Court - Approval of commissioner - CBDT instruction No. 3 of 2003 dt. 20-5-2003 - TPOs order binding on Assessing Officer - Burden of proof - Various methods - High Court affirmed the view of 5 Member Special Bench of Tribunal on Transfer Pricing verdict without examining merits [S. 92CA, 260A]

In Aztec Software and Technology Services Ltd. v. ACIT (2007) 294 ITR 32 (AT) / 107 ITD 141 (SB)(Bang.)(Trib.) a 5 member Special Bench judgement of the Tribunal answered several questions such as (a) Whether it is a legal requirement under the provisions contained in Chapter X of the Income-tax Act, 1961 that the Assessing Officer should prima facie demonstrate that there is tax avoidance before invoking the relevant provisions?, (b) Whether it is a legal requirement under the provisions contained in Chapter X of the Income-tax Act, 1961 that the Assessing Officer should prima facie demonstrate that any one or more of the circumstances set out in clauses (a), (b), (c) and/or (d) of sub-section (3) of section 92C of the said Act are satisfied in the case of any assessee, before his case is referred to the Transfer Pricing Officer under sub-section (1) of section 92CA for computation of the arm's length price?, (c) Whether the Assessing Officer is required to record his opinion/reason before seeking the previous approval of the Commissioner under section 92CA(1) of the Income-tax Act, 1961?, (d) Whether before making a reference to the Transfer Pricing Officer under section 92CA(1) read with section 92C(3) of the Income-tax Act, 1961, is it is a condition precedent that the Assessing Officer shall provide to the assessee an opportunity of being heard?, (e) Is the approval granted by the Commissioner under section 92CA(1) justiciable ? If so, can it be called in question in appeal on the ground that it was accorded without due diligence or proper application of mind?, (f) What is the legal effect of Instruction No. 3 of 2003 dated 20-5-2003 issued by the Central Board of Direct Taxes on Transfer Pricing matters?, (g) What is the role of the Assessing Officer after receipt by him of the order passed by the Transfer Pricing Officer under section 92CA(3) of the Income-tax Act, 1961, etc. After laying down the principles of law, the matter was remanded to the Assessing Officer. On appeal by the assessee against the principles of law laid down by the Special Bench, Held by the High Court dismissing the appeal:

We notice that in this appeal, the assessee has raised as many as 30 substantial questions of law. In our considered opinion, it is not really necessary to consider any of these questions, as in the first instance, the order of the Tribunal is not at all adverse to the interest of the appellant but is one to set aside the order passed by the Lower Appellate Authority and remanding the matter. We notice that all questions are left open, for redetermination by the Lower Appellate Authority.

In a matter which is remanded for a reexamination, no question of law arises for examination by the High Court in an appeal under Section 260A of the Act, unless any part of the remand order suffers from a patent illegality or is an order perverse in nature, and is left to the Lower Appellate Authority to redetermine.

In this view of the matter, we do not propose to examine this appeal on merits any further but dismiss the appeal without expressing any opinion on any of the aspects and leaving it open to the assessee to urge all such contentions as are available to the assessee before the authority to which the matter is remanded. (A.Y. 2002-03)

Aztec Software & Technology Services Ltd. v. ACIT (2012) 209 Taxman 187 (Karn.)(HC)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price - Selection of comparables - Matter set aside to the Tribunal

TPO and the Assessing Officer ignored certain comparables on the ground that they pertain to loss making / continuously loss making organizations. Assessee however contended that it was necessary to consider a variety of entities, both loss making and otherwise. Assessee disputed the approach on the one hand excluding the loss making entities but considering the entities that had abnormally high profits. Remand of matter by Tribunal with a direction to give sufficient opportunity to the assessee to file fresh comparables and to decide proper ALP. Tribunal does not state that the material, including the comparables, furnished by the assessee were inadequate. In view of statement of assessee that it does not wish to furnish any further material and wants the matter to be decided on the basis of material already on record, order of remand passed by Tribunal set aside with direction to Tribunal to decide the matter. (A.Y. 2003-04)

Mitsui O.S.K. Lines Maritime (India) P. Ltd. v. Dy. CIT (2012) 79 DTR 261 / 209 Taxman 151 (Bom.)(HC)

S. 92C : Avoidance of tax - Transfer pricing - Arm's length price - Subsidiary - International transaction - Not in excess of 5% variation

Assessee was a wholly owned subsidiary of U.S. based company MTC. It entered into a support agreement with assessee for research services and corporate support services which was an international transaction. For bench marking assessee's international transactions TPO took various companies and made additions. Before Commissioner(Appeals) the assessee submitted that comparable cases identified by TPO were not engaged in similar activities as that of assessee. It was also contended that the TPO has ignored the comparable of another subsidiary where in the business is identical. The Commissioner(Appeals) held that the TPO arbitrarily selected 'S' Ltd. as comparable and ignored 'C' Ltd as comparable. Commissioner(Appeals) further held that had 'C' had been considered as comparable then arithmetic mean all comparable selected by TPO and assessee would be only 11.71 percentage and applying safe harbor rules in terms of second proviso below section 92C(2), difference in price between one adopted by TPO and ALP determined by including 'C' Ltd. would be within + or -5 percent range calling for no adjustment to price adopted by assessee in respect of international transaction, accordingly the Commissioner(Appeals) deleted the addition made by the TPO. Tribunal confirmed the view of Commissioner(Appeals). (A.Y. 2003-04, 2004-05)

Dy. CIT v. Monsanto Holdings (P) Ltd. (2012) 134 ITD 189 / 13 ITR 90 (Mum.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - Data - TPO can rely on "contemporaneous" data even if not available at specified date

In a transfer pricing appeal, the Tribunal had to consider two issues: (a) what is the data to be considered by the TPO at the time of determining ALP? & (b) whether the assessee should be given an opportunity to refute the material sought to be utilized by the TPO? Held by the Tribunal:

(i) Under Rule 10D(4) the information and documents should as far as possible be contemporaneous and should exists latest by the 'specified date' specified in section 92F(4) i.e. the due date for filing the ROI. There is no cut-off date upto which only the information available in public domain can be taken into consideration by the TPO while making the transfer pricing adjustments and arriving at the ALP. The assessee's argument that section 92D and Rule 10D is defeated if the TPO takes the data which is available in the public domain after the specified date is not acceptable.

(ii) While the TPO is empowered by section 131(1) & 133(6) to call for information without informing the assessee about the process, he cannot use such information against the assessee without giving the assessee a reasonable opportunity of hearing. If the assessee seeks an opportunity to cross-examine third parties, it has to be given the opportunity (Genisys Integrating Systems followed). (A.Y. 2006-07)

Kodiak Networks (India) Pvt. Ltd. v. ACIT (2012) 71 DTR 114 / 15 ITR 610 / 51 SOT 191/(2013) 152 TTJ 98 (Bang.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - Data - TPO is duty bound to eliminate differences in comparables' data

In a Transfer Pricing matter, the Tribunal had to consider whether for purposes of making adjustment under Rule 10B(1)(e)(iii) 'working capital' constituted a 'difference between the international transactions and the comparable uncontrolled transactions of between the enterprises entering into such transactions' and if so whether the said difference 'could materially affect' the amount of net profit margin of relevant transactions in the open market. Held by the Tribunal:

Rule 10B(1)(e)(iii) provides that "the profit margin arising in comparable uncontrolled transactions has to be adjusted to take into account the differences, if any between the international transaction and the comparable uncontrolled transactions, or between the enterprises entering into such transactions, which could materially affect the amount of net profit margin in the open market. While the "differences" are not specified, it covers "any differences" which could materially affect the amount of net profit margin. The litmus test to be applied is if the 'difference, if any, is capable of affecting the NPM in open market? If yes, then the TPO is under statutory obligation to eliminate such differences. The revenue cannot say that difference is likely to exist in all accounts and so the demands of the assessee should be ignored. The revenue's stand that the assessee is ineligible for any adjustments if he provides the set of comparable is not correct because under Rule 10(3) it is the duty of the Assessing Officer/TPO/DRP to minimize/eliminate the difference which is likely to materially affect the price. It is the settled proposition that 'working capital' adjustment is an adjustment that is required to be made in TNMM. The revenue's contention that the 'differences' specified should refer to only (i) the factor of demand and supply; (ii) existence of marketable intangibles i.e. brand name etc; (iii) geographical location and the like is not acceptable. Further, as the difference in the Arm's length Operating Margin of the Comparables before and after making the adjustment for working capital was up to 3.77%, it was "material" and had to be eliminated [Mentor Graphics (2007) 109 ITD 101 (Delhi), E-gain Communication (2008) 118 ITD 243 (Pune) Sony India (2008) 114 ITD 448 (Delhi) & TNT India followed] (A.Y. 2006-07)

Demag Cranes & Components (India) (P) Ltd. v. Dy. CIT (2012) 66 DTR 217 / 49 SOT 610 / 144 TTJ 320 (Pune)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - Computation - Arm's length price - Royalty - Cup method

Assessee has paid 3% of the net sales price, which was approved by RBI. The Tribunal has found that the assessee had sold only part of goods manufactured to its Associated enterprise and bulk sales were made to uncontrolled parties, and the Assessing Officer had failed to bring any material on record to show that payment of royalty @ 3% was not at arm's length, hence disallowance of royalty was not justified. (A.Y. 2006-07)

Sona Okegawa Precision Forgings Ltd. v. Addl. CIT (2012) 65 DTR 317 / 49 SOT 410 / 143 TTJ 516 (Delhi)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - Computation - Arm's length price - Reimbursement of cost - Jurisdiction of Assessing Officer

Assessee has reimbursed only cost of one employee who is sitting in Singapore. Assessee has produced evidence in the form of e-mails to substantiate its case that it has actually obtained services from its group companies and justified the commercial expediency of reimbursement of cost to said concerns by relating the payment to revenue earned by it from such services, the Tribunal held that there is no justification for adjustment to the ALP in respect of the payments made by the assessee to its group concerns. The Tribunal also held that once an international transaction has been made

subject of determination of ALP by the TPO, and he has found that transaction is at arm's length, then it is not permissible for the Assessing Officer to re-examine that transaction and make disallowance under the normal provisions of the Act. (A.Y. 2006-07)

Cushman & Wakefield India (P) Ltd. v. ACIT (2012) 135 ITD 242 / 66 DTR 28 / 143 TTJ 692 / 17 ITR 48 (Delhi)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - Computation - Arm's length price - Functional method - Combining all international transaction is not proper

Assessee-company which is in the business of providing buying services to associated enterprises for sourcing of garments, handicrafts, leather products etc. in India. Assessee determined ALP on 'transaction by transaction' basis using most appropriate method having regard to functional analysis and availability of comparable uncontrolled bench mark. TPO determined ALP by combining all transactions undertaken by assessee. Tribunal held that in assessee's case, there were different segmental activities, which were independent of each other, they are required to be analyzed on transaction to transaction basis and not by combining all activities, hence the method adopted by the assessee is correct and up held the computation of assessee. (A.Y. 2006-07)

Benetton India (P) Ltd. v. ITO (2012) 134 ITD 229 / 67 DTR 190 / 144 TTJ 449 / 15 ITR 518 (Delhi)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - Computation - If FAR analysis indicated diversion in two activities bench mark should be done on separate basis - In the absence of comparable cases submitted by assessee TPO can select the comparable from the details submitted by the assessee - Working of adjustment by the TPO was confirmed by the Tribunal

Assessee entered into international transactions with its Associated Enterprises. Apart from manufacturing the assessee also had business of trading and indenting. There was no disputes as regards the arm's length price declared by assessee in respect of manufacturing activity. Assessee consolidated the results of trading and indenting activities. The TPO requested the assessee to segregate the results in respect of trading and indenting activities. Initially the assessee was reluctant to furnish the details however furnished the details thereafter. The TPO computed the arms' length price by taking FAR analysis separately. The issue before the Tribunal was whether the action of the TPO determination of bench mark taking separate basis is justified or not. The Tribunal held that the action of the TPO is justified. The Tribunal also held that when the assessee has not submitted the comparables, the TPO was justified in selecting the comparable from the details furnished by the assessee and making an up word adjustment to ALP of Rs. 25.56 crores. The Tribunal confirmed the adjustment made by the TPO. (A.Y. 2006-07)

Bayer Material Science (P) Ltd. v. Addl. CIT (2012) 134 ITD 582 / 17 ITR 275 / 75 DTR 119 / 148 TTJ 581 (Mum.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - Computation - Interest free loan to subsidiary, matter is restored to the file of Assessing Officer to apply CUP method

The Assessee in its TP study observed that as no external CUP was available for bench marking the transaction applied the TNMM and concluded that transaction was at arms's length. The TPO rejected the assessee's method considered a risk free return from the subsidiary, a notional interest at 10 percent on loan as ALP amounting to Rs. 31,51,259/-. On appeal, Commissioner(Appeals) also confirmed the addition. On appeal to the Tribunal, the Tribunal held that neither the assessee nor TPO having examined applicability of CUP method in order to determine the ALP of the international transaction of interest-free currency loan to its subsidiary by assessee, the Tribunal restored the matter to Assessing Officer for fresh adjudication following CUP method. (A.Y. 2002-03)

Aithent Technologies (P) Ltd. v. ITO (2012) 134 ITD 521 / 144 TTJ 731 / 68 DTR 68 (Delhi)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - Computation - TPO flawed on five issues including the selection of comparable only with substantial related transaction held to be not proper and the matter is set aside

The assessee had international transactions with related and unrelated parties. The TPO has selected only four comparables and also denied the benefit of + 5 percent sought by assessee. The adjustment made by the TPO was confirmed by the DRP. On appeal to the Tribunal, it was contended that the (1) Party having substantial related party transactions should be excluded as comparable. (2) Allocation of advertisement and sale promotion expenses based on turn over of manufacturing and trading is held to be not proper. (3) The benefit of standard deduction of plus or minus 5 percent is not taken in to consideration. (4) The adjustment can be made only in respect of transaction with Associated Enterprises instead of entire turn over, (5) While working out the operating profit to sales margin, accurate figures as per the annual accounts of the concerned comparables should be taken. The Tribunal held that the TPO having flawed on five issues as contended by the assessee matter remanded to the Assessing Officer for deciding the matter afresh after taking in to consideration the propositions put forth by the assessee. (A. Y. 2006-07)

Huntsman Adavnced Materials (India) (P) Ltd. v. Dy. CIT (2012) 68 DTR 162 / 49 SOT 83 (Mum.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - Computation - Additions made on the basis of operating cost/operating profit of Vega US was deleted

The assessee is engaged in the business of manufacturing of several products. It had three overseas subsidiaries, namely Vega UK, Vega US and Vega UAE. The assessee sold its products to domestic market where as marketing and distribution of its products in international markets was undertaken by Vega entities of in their specified jurisdiction. The TPO made adjustment in respect of sales made to Vega UAE on ground that Vega UAE was neither bearing any inventory risk nor credit risk and therefore it was not a distributor but only market service provider .The TPO adopted the transfer pricing on basis of operating cost / operating profit percentage of Vega UAE, Vega UK and Vega US as base. The Tribunal held that operating cost / operating profit margin depend on level of operating expenses incurred by respective Vega entities and also making business earning by respective Vega entities, if operating cost is higher in US it could not be said that profit margin of other Vega entities in different countries should be at par with profit margin of Vega US. Accordingly once it was accepted that Vega UAE as distributor and carrying on both inventory or credit risk, TP adjustment made of the TP officer was deleted. (A.Y. 2006-07)

AIA Engineeing Ltd v. Addl. CIT (2012) 50 SOT 134 / 78 DTR 473 / 150 TTJ 170 (Ahd.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - Computation - Result of Loss making companies were held to be not comparable

The assessee is 100% subsidiary of a foreign company and is engaged in the business of BPO / ITES. The assessee has adopted TNMM method as the most appropriate method and computed the PLI (OP/TC) at the rate of 15.76 percent on the operating cost. The TPO has determined PLI at 25.78 percent on the basis of eight comparable. Before Commissioner(Appeals) the assessee has furnished eight additional comparables. On the basis of 16 comparables the average PLI was computed at 11.01 percentage which was less than PLI shown by assessee. The Commissioner(Appeals) had excluded the results of loss making companies for the purpose of determining the average profit margin. On appeal to Tribunal, by assessee the Tribunal held that order of Commissioner(Appeals), held to be justified. (A.Y. 2004-05)

Knoah Solutions (P) Ltd. v. ITO (2012) 50 SOT 189 (Hyd.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - Computation - Price paid by assessee to its associated enterprise was higher than price paid by unrelated parties for purchase of similar goods hence adjustment made by TPO held to be justified

During relevant assessment year the assessee has undertaken international transactions with its associated enterprises Sri Chirag Private Ltd., Sri Lanka. The TPO has found that the price paid by assessee to its associated enterprises was higher than the price paid by unrelated parties for purchase of similar goods from Associated enterprises accordingly the adjustments were made. On appeal the Commissioner(Appeals) held that the due to increase in price in international market assessee had paid higher price, hence the adjustment made by TPO was deleted. On appeal by revenue, the Tribunal held that as the assessee has not proved that quoted goods were different than the goods dealt with associated enterprise, adjustment made by the TPO was justified. As regards the adjustment, of 5% where there is only on price, the adjustment is neither provided in statute nor justified on general consideration. Accordingly the addition made by the Assessing Officer is held to be justified. (A.Y. 2005-06)

Vipin Enterprises v. Addl. CIT (2012) 135 ITD 130 / 72 DTR 302 / 147 TTJ 470 (Delhi)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - Computation - Benefit of proviso to section 96C(2) would be given - Comparable has to meet the criteria

The assessee company is engaged in the business of processing and support and is operating 100 percent export oriented unit. During the year the assessee had entered into international transaction, with its associated enterprises. The assessee compared its international transaction with unrelated parties based on cost plus 5 percent pricing model which the assessee adopted. The analysis was done on the basis of TNMM using external comparables. The TPO held that the Turnover of the assessee with the party to which the comparison was made too insignificant to qualify as a meaningful comparable in comparison entered by assessee with its Associated Enterprises. The TPO also rejected the secondary analysis of the assessee on the ground that the financial data for 1999-2000 and 2000-01 was applied. The TPO has made fresh search by applying filters (i) Turnover (ii) Net fixed assets (iii) depreciation. By using said filters searched out 9 comparables out of which further three rejected and identifying six comparable made additions of 18% by applying the operative margin to assessee's cost, arms length price of international Transaction. On appeal the Commissioner(Appeals) held that during the F.Y. 2001-02 the turnover of comparable of related party transaction was less than 1 percent of total turnover which cannot influence the profit margin and he also found that related party transaction in the financial data related to some advances / deposits and those receipts and payments did not form part of the sale / expenditure of the company. The Commissioner(Appeals) declined to exclude that party. As regards benefit of plus minus 5 percent the Commissioner(Appeals) has held that difference of plus minus 5 percent is not in the nature of standard deduction. After discussing, the Commissioner(Appeals) held that (i) current year data was to be used for comparable analysis (ii) the filters used by TPO were correct and (ii) One of the comparable has to be rejected as the comparable turnover of medical transaction significant less than 5 crores and thus did not meet the criteria laid down by the TPO and remaining 5 comparables was computed by the Commissioner(Appeals). On appeal by revenue the Tribunal confirmed the view of Commissioner(Appeals) and gave direction to Assessing Officer to verify the figure and if difference as computed as per direction between two remained less than 5 percent, benefit of proviso to section 92C(2) would be given to assessee and no addition would be called for. (A.Y. 2002-03)

Dy. CIT v. American Express (India) (P) Ltd. (2012) 135 ITD 211 / 70 DTR 330 / 146 TTJ 442 (Delhi)(Trib.)

S. 92C : Avoidance of tax – Arm's length price - International transaction - Transfer pricing - Computation of ALP - Depreciation - Assessee provides for depreciation on more real time

basis and not as per Income-tax Rules - No adjustment called for in the quantum of depreciation for the purpose of determining the Arm's Length Price

The assessee has followed a scientific system of providing for depreciation on a more real time basis. The assessee is not providing technical depreciation influenced by Income-tax Rules. The assessee provides for more or less actual depreciation. This actual depreciation is more relevant in working out the operating profit of the assessee. Thus, no adjustment is called for in the quantum of depreciation provided by the assessee in its operating account so as to work out its operating profit for the purpose of determining the Arm's Length Price. (A.Y. 2007-08)

Lason India (P.) Ltd. v. ACIT (2012) 50 SOT 583 / 73 DTR 273 / 147 TTJ 481 / 17 ITR 203 (Chennai)(Trib.)

S. 92C : Avoidance of tax – Arm's length price - International transaction - Transfer pricing - TPO rejected the filters adopted by the assessee and adopted untenable filters for arriving at the comparables - Tribunal set aside the matter back to Assessing Officer

Where TPO rejected the filters adopted by the assessee and adopted untenable filters for arriving at the comparables. The assessee in his detailed submissions before the TPO as well as the Tribunal, brought out various factors that would justify adopting of comparables by the assessee. On appeal, the Tribunal following the decision of Genesis Integrating System India P. Ltd. (Bangalore) set- aside the matter back to the file of Assessing Officer directing the TPO to allow assessee to cross examine the comparables whose replies were sought to be used against the assessee if the assessee so desires. (A.Y. 2006-07)

Genesis Microchip (I) (P.) Ltd. v. Dy. CIT (2012) 135 ITD 533 (Bang.)(Trib.)

S. 92C : Avoidance of tax – Arm's length price - International transaction - Transfer pricing - Extension of credit to the AE beyond a stipulated credit period - Held not to be construed as International Transaction

The extension of credit to the AE beyond a stipulated credit period cannot be construed as an 'international transaction' for the purpose of section 92B(1) so as to require adjustment for ascertaining the ALP. Therefore, the consequential addition is untenable and liable to be deleted. (A.Y. 2002 -03, 2003 - 04)

Patni Computer Systems Ltd. v. Dy. CIT (2012) 135 ITD 398 / 16 ITR 533 / (2011) 60 DTR 113 / 141 TTJ 190 (Pune)(Trib.)

S. 92C : Avoidance of tax – Arm's length price - International transaction - Transfer pricing - TPO has no power to question business purpose of transaction - Rule 10B(1)(a), does not authorize disallowance of any expenditure on the ground that it was not necessary [S. 37]

The assessee made payment of Rs. 31.34 crores to its associated enterprise for "Second Line Support" services. The TPO & DRP held that the assessee had not benefited from the expenditure and that it was not "necessary to be incurred" and that its ALP was Nil. On appeal by the assessee Held:

There is no force in the Revenue's claim that the assessee was not required to make any payment to its AE for resolving warranty claims. The assessee has the right to enter into an arrangement according to which its business interests are protected. It is the prerogative of the assessee to decide the business expediency. Rule 10B(1)(a) does not authorize disallowance of any expenditure on the ground that it was not necessary or prudent for the assessee to have incurred the same or that in view of the expenditure was un remunerative or that in view of the continued losses suffered by the assessee in his business, he could have fared better had he not incurred such expenditure. However, the reasonableness of an expenditure has not been excluded from determination and the TPO has to determine the ALP of the transaction (CIT v. EKL Appliances Ltd. & Dresser Rand followed) (A.Y. 2007-08)

Ericsson India Pvt. Ltd. v. Dy. CIT (2012) 71 DTR 337 / 146 TTJ 708 / 17 ITR 79 (Delhi)(Trib.)

S. 92C : Avoidance of tax – Arm's length price - International transaction - Transfer pricing - Computation of ALP - Loan is granted to foreign subsidiary in foreign currency - International LIBOR rate apply and not the domestic prime lending rate - No addition to be made where assessee charging interest at a rate higher than the LIBOR rate

In case of grant of loan by the assessee to its foreign subsidiary in foreign currency out of its own funds, for determining ALP, it is the international LIBOR rate that would apply and not the domestic prime lending rate, and assessee charging interest at a rate higher than the LIBOR rate, no addition can be made on this account. (A.Y. 2006-07)

Siva Industries & Holdings Ltd. v. ACIT (2013) 54 SOT 49 / (2012) 145 TTJ 497 / (2011) 59 DTR 182 (Chennai)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price - Expression "shall" used in Rule 10B(4), makes it clear that only current year's data is to be used

The expression "shall" used in the Rule 10B(4) makes it clear that it is mandatory to use the current year's data first and if any circumstances reveal an influence on the determination of arm's length price in relation to the transaction being compared than other data of the period not more than two years prior to such financial year may be used. The assessee did not raise any objection before the first appellate authority or before TPO during the proceedings, that the TPO failed to take cognizance of the difference in the accounting policies followed by the assessee company and alleged comparable companies selected by them by not allowing the depreciation adjustment made by the assessee. Therefore, ground could not be entertained by the government. (A.Y. 2004-05)

Dy. CIT v. Deloitte Consulting India P. Ltd. (2012) 15 ITR 573 / (2011) 61 DTR 101 (Hyd)(Trib.)

S. 92C : Avoidance of tax - Transfer Pricing - Computation of ALP - Information - Information cannot be used against the assessee without giving an opportunity

ALP has to be determined by the TPO by taking into consideration contemporaneous data relevant to the previous year in which the transaction has taken place and he is not from using the information available in public domain beyond any cut-off date; though the TPO is not under any obligation to furnish the entire information to the assessee, when any information is sought to be used against the assessee, it has to be given a reasonable opportunity of hearing on that material; TPO having not considered various defects pointed out by assessee in the selection of additional comparables by TPO and other infirmities in the computation of ALP. (A.Y. 2006-07)

Kodiak Networks (India) Pvt. Ltd. v. ACIT (2012) 71 DTR 114 / 15 ITR 610 / 51 SOT 191(2013) 152 TTJ 98 (Bang.)(Trib.)

S. 92C : Avoidance of tax - Transfer Pricing - Computation of ALP - Assessing Officer has made a reference to the TPO for determination of ALP, Adoption of ALP suggested is sufficient compliance

Once the Assessing Officer has made a reference to the TPO for determination of ALP and he has adopted the ALP as suggested by the TPO that would be sufficient compliance with the requirements of Section 92C(3) even if there is no specific finding in this regards in the order of Assessing Officer. (A.Y. 2007-08)

Tevapharm Pvt. Ltd. v. Addl. CIT (2012) 71 DTR 209 / 147 TTJ 35 (Mum.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price - While computing of Arm's Length Price the data is to be restricted to AEP

The assessee, part of a group company, exported its services to its associated enterprises and other clients. The assessee received payments from its clients for providing the software development

services and information technology enabled services. The assessee filed a transfer pricing study based on transactional net margin method, and using filters arrived at comparables and as the margin earned by it was more than the adjusted mean margin, submitted that price charged by its international transactions was at arm's length. The Hon'ble Tribunal held that the Assessing Officer was to make transfer pricing adjustment restricting the adjustments to the transactions of the associated enterprise. It was further held that as the TPO had furnished the information gathered from the selected comparables and the assessee had submitted a detail submission along with its objections to their selection and thus, there was no violation of natural justice. (A.Y. 2006-07)

Genisys Intergrating Systems (I) Pvt. Ltd. v. Dy. CIT (2013) 152 TTJ 215 / (2012) 15 ITR 475 / 53 SOT 159 / (2011) 64 DTR 225 (URO)(Bang.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - Arm's length price - Arm's length price is to be done in accordance with Rule 10B

In the transfer pricing analysis done by both assessee in its TP report and by TPO in its TP order it was found that neither of them spelt out functions performed, risks borne and assets used by assessee as well as its associated enterprises; it was found that FAR analysis had not been performed between assessee and comparable companies as mandated by Rule 10B. Therefore, held that determination of ALP by assessee or revenue authorities was not in accordance with law. (A.Y. 2006-07)

Trigent Software Ltd. v. ACIT (2012) 51 SOT 113 / 15 ITR 452 (Mum.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price - Rule of consistency - Matter was remitted to ascertain whether similar transactions of the assessee with Associated enterprise have been accepted as ALP by the TPO in subsequent years - If yes the Assessing Officer is directed to follow the same

The Assessee has followed the internal CUP method for arriving at ALP for the import of raw material, where as the TPO in his order mentioned that the assessees has adopted the external CUP method. Similarly, for the royalty payment, the assessee has adopted the external CUP method as it was a single payment, where as the TPO observed that it is recurring payment, there were many flaws in the TPO's order which demonstrated that the facts have not been properly appreciated by the TPO while making the TP study analysis. Where as similar transactions have been accepted to be at ALP for the subsequent years even though the same method is followed by the assessee. Considering the facts the Tribunal remitted the matter to the Assessing authority with the direction to ascertain as to whether similar transactions of the assessee with AEs have been accepted to be ALP by the TPO in subsequent years, and if it is so, then the Assessing Officer to adopt the TP analysis conducted by the assessee for the relevant assessment year and make the assessment accordingly. (A.Y. 2006-07)

Lenovo (India) (P) Ltd. v. ACIT (2012) 71 DTR 90 / 140 ITD 127 / 147 TTJ 102 (Bang.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price - Loss - Turnkey contracts - Law on taxability of "turnkey contracts" for offshore & onshore supply explained and matter set aside for redetermination [S. 5, 9(1)(i), 92CA]

The assessee, a Chinese company, entered into two contracts with WBPDCL, one for the offshore supply of equipment and the other for onshore supplies, design, engineering and construction etc. Separate consideration was specified for each activity. The assessee claimed, relying on Ishikawjima-Harima Heavy Industries Ltd. v. DIT (2007) 288 ITR 408 (SC), that the profits from offshore supply was not taxable in India. The Assessing Officer rejected the claim on the ground that the project was a "turnkey" one with "cross-fall breach clause" and "single point responsibility" and that the split contracts were entered into only for convenience. It was held that the project office PE played a role in the offshore supplies. He referred the matter for determination of ALP of the onshore supplies to the TPO who determined a profit of Rs. 24 crores as against the loss of Rs. 67 crores offered by the assessee. This was upheld by the DRP. On appeal by the assessee to the Tribunal, held;

(i) As regards the assessee's claim, relying on Ishikawajima-Harima, that offshore supply contracts cannot be taxed, there is a school of thought as advocated in Alstom Transport SA (AAR) that in view of the later & larger bench judgement in Vodafone International Holdings B.V. v. UOI (2012) 341 ITR 1, the Ishikawajima-Harima principle is not good law and a "dissecting approach" cannot be adopted. While it is arguable that the observations in Vodafone regarding "looking at the transactions as a whole and not adopting dissecting approach" cannot be applied in all cases where separate contracts are entered into for offshore supplies and onshore services, the observations are applicable in cases where the values assigned to the onshore services are prima facie unreasonable vis-à-vis values assigned to the offshore supplies, which make no economic sense when viewed in isolation with offshore supplies contract. The transactions have to be looked at as a whole, and not on standalone basis, when the overall transaction is split in an unfair and unreasonable manner with a view to evade taxes. In order that such a situation can arise, it is sine qua non that while the assessee submits the bids for different segments (e.g. offshore and onshore) separately, these bids are considered together, as a single cohesive unit, by the other party, and this fact must be apparent from material on record. The fact that there is a "cross fall breach clause" which provides that a breach in one contract will automatically be classified as breach of the other contract give an indication that the "offshore supplies" contract and "onshore supplies" contract have to be viewed as an integrated contract, this fact by itself does not indicate that the onshore services and supplies contract is understated so as to avoid tax in the source country. That would be the situation in which while offshore supplies show unreasonable profits while onshore supplies and services result in unreasonable losses;

(ii) The fact that the assessee claims to have made a loss on its entire project, including the onshore activities, is not reason enough to show that the value of the onshore activities was deliberately kept at a lower amount to avoid taxability in India because it may make commercial sense that the offshore supplies are made at loss, as long as these supplies are at less than incremental costs i.e. marginal costs of offshore supplies, and thus overall losses of the assessee are minimized (matter remanded for the Assessing Officer to examine the assessee's claim regarding overall loss on the project) (A.Y. 2007-08)

Dongfang Electric Corporation v. Dy. DIT (2012) 74 DTR 25 / 147 TTJ 579 / 52 SOT 496 (Kol.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - Arm's length price - Comparables -Operating margin being within the range of 5% of the arithmetic mean of the operating margin of such comparable companies, same has to be accepted as ALP

Assessee provides investment advisory related support services. It was held that while some of the comparables chosen by the TPO are not engaged in rendering investment advisory services and there is no segmental data relating to investment advisory services provided by the other companies, the aforesaid comparables cannot be treated as functionally comparable with the assessee; TPO having given no reason whatsoever for rejecting the comparables chosen by the assessee and the assessee's operating margin being within the range of 5% of the arithmetic mean of the operating margin of such comparable companies, same has to be accepted as ALP. (A.Y. 2007-08)

Caryle India Advisors (P) Ltd. v. ACIT (2012) 146 TTJ 521 / 71 ITR 273 / 53 SOT 267 (Mum.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - Arm's length price - Comparables - If comparison is not valid the adjustment is liable to be deleted - Remaining margin less than 5% hence adjustment is deleted

The assessee is engaged in the business of breeding, development and marketing hybrid seeds and is providing research and product development services to Associate Enterprises abroad. The assessee adopted the 15% margin. The DRP rejected the comparable made by the assessee and confirmed the

addition. On appeal to the Tribunal it was found that the Engineering India Ltd., a PSU dealing in Engineering consultancy, is not at all engaged in low risk contract research work and it cannot be a valid comparable for this purpose, once Engineering India Ltd. is excluded from the list of comparables, the arithmetic mean of remaining comparables will be within 5% range of ALP margin adopted by assessee, therefore the impugned ALP adjustment was deleted. (A.Y. 2007-08)

Bayer Bio Science (P) Ltd. v. Addl. CIT (2012) 72 DTR 371 / 148 TTJ 73 / 51 SOT 16 (URO)(Mum.)(Trib.)

S. 92C : Avoidance of tax - Transfer Pricing - Arm's Length Price - Comparable selected were in different geographical regions - Geographical difference is not material so far as it applies to logistics industry

The assessee company is engaged in the business of International Freight forward as agent of air lines and sea lines. It entered into an international transaction with its AEs and profits were shared equally. Assessee employed CUP method in determining the ALP. Assessee selected six public companies as comparables whose average PLI tallied with that of assessee. The TPO rejected it on the ground that all the companies were operating in different geographical regions. It was held by the Tribunal that geographical difference is not material so far as it applies to logistics industry and in view of splitting of gross profit equally at 50:50 in geographical region, CUP method adopted was upheld. (A.Y. 2004-05 to 2006-07)

ACIT v. Agility Logistics P. Ltd. (2012) 136 ITD 46 / 76 DTR 212 (Mum.)(Trib.)
Agility Logistics P. Ltd v. ACIT (2012) 136 ITD 46 / 76 DTR 212 (Mum.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price - Interest free loan to overseas associated concern - Interest free loan to overseas concern falls within the ambit of international transaction

The assessee made advances to its wholly owned subsidiary. The assessee contended that lending of interest free funds to subsidiaries is a normal and acceptable business practice and thus, the existence of such interest free loans does not fall within the ambit of international transaction. The Tribunal held that grant of interest free loan to overseas associated concerns comes within the ambit of international transaction, therefore assessee having made interest free advances to its wholly owned subsidiary, a German company, EURIBOR rate is be applied for arriving at the ALP of the interest free loan. (A.Y. 2007-08)

Tata Autocomp Systems Ltd. v. ACIT (2012) 73 DTR 220 / 149 TTJ 233 / 52 SOT 48 (Mum.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - Arm's length price - International transaction - Average of percentage of expenditure incurred by 17 pharmaceutical companies on advertisement and marketing - No analysis as to type of drug, nature of market, period of advertisement - Held not to be TNMM as per provisions of the Act

The assessee-company was engaged in the business of manufacture and export of pharmaceutical products. The assessee ultimartely sold products in Ukraine but routed the same through its Associated Enterprise located in Cyprus as Ukraine was politically and economically very unstable in that period. The assessee adopted CUP method for determining arm's length price for reimbursement of business promotion expenses to the associated enterprise. The TPO rejecting the CUP method without any cogent reason and applied the mean of percentage of expenditure incurred by 17 pharmaceutical companies on advertisement and marketing and termed the same as ALP arrived by using TNMM. It was held that the said method applied by TPO was not TNMM and what was sought to be compared was only average of expenditure incurred by 17 pharma companies, without any analysis as to type of drug, nature of market, period of advertisement, etc. Thus, as TPO had not applied the TNMM in accordance with the provisions of the act and had adopted ad-hoc method to

disallow capital expenditure under guise of transfer pricing provision, impugned adjustment was held to be set aside. (A.Y. 2004-05)

ACIT v. Genom Biotech (P.) Ltd. (2012) 52 SOT 147 / 17 ITR 260 (Mum.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price - Reference to TPO does not give presumption that the payment is allowable under section 37(1) [S. 37(1)]

Assessee was a joint venture company between Deloitte and Mastek, formed for establishment and operation of an offshore development centre for provision of both offshore and on site information technology and other related services. As per joint venture agreement Deloitte assisted assessee in generation of sales, management and delivery of projects, and in managing and maintaining customer relationships. For that purpose, three senior managers had been assigned by Deloitte to undertake full-time marketing only for assessee. Cost incurred on assignment of said managers consisting of their salary and related expenditure, was charged by Deloitte on actual basis. TPO held that marketing costs incurred and allocated by Deloitte to assessee did not result in rendering of any service to assessee and, therefore, determined arm's length price for same, at nil. It was very imperative on part of assessee, to establish before TPO, that payments made were commensurate to volume and quality of services and such costs were comparable. When assessee had not furnished evidence to prove that those three personnel had rendered marketing services to it and, in fact, assessee-company had no revenue which had been derived as a result of those marketing expenses, TPO was justified in determining ALP of marketing expenses at nil. 'ALP' has to be determined irrespective of any contractual obligation undertaken by parties. If transactions are, in opinion of TPO, not at arm's length, required adjustment has to be made, as provided in Act, irrespective of fact that expenditure is allowable under other provisions of Act. In view of CBDT instructions dated 20-5-2003, Assessing Officer is bound to refer all transactions beyond specified limit to IPO for determining ALP and mere reference to TPO by Assessing Officer does not raise presumption that amount in question has been allowed under section 37(1). (A.Y. 2002-03 to 2006-07)

Deloitte Consulting India (P.) Ltd. v. Dy. CIT (2012) 137 ITD 21 / 19 ITR 378 / 80 DTR 283 / 150 TTJ 824 (Mum.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price - Comparables - Matter remanded to decide fresh

Assessee-company was mainly engaged in providing various kinds of software and services for Internet Protocol, wire line, mobility and cable networks, helping various communications companies. For providing said services, assessee earned a compensation which equalled to its total operating cost of providing services plus a mark-up of 15 per cent. For establishing arm's length price relating to software development and related services, assessee adopted "Transaction Net Margin Method" (TNMM) as most appropriate method. As per assessee's TP report it had identified 18 comparable companies engaged in software development services. During transfer pricing proceedings, TPO rejected most of comparables selected by assessee and adopted some fresh comparables. Based on comparables selected by TPO, certain adjustment was made to ALP determined by assessee. DRP rejected various objections raised by assessee. On appeal, it was noted that some of comparables were rightly selected by TPO whereas objections were rightly raised by assessee in respect of some of comparables. On facts, matter was to be remanded back to Assessing Officer for determining arm's length price afresh after taking into consideration arithmetic mean of profit ratio of all finally tested comparables. (A.Y. 2007-08)

Telcordia Technologies India (P.) Ltd. v. ACIT (2012) 137 ITD 1 / 80 DTR 351/ (2013) 151 TTJ 445 /23 ITR 364/ (Mum.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price - Controlled transaction - A "controlled transaction" can never be regarded as "comparable" even if at ALP

In determining the comparable parties for purposes of TNMM, the TPO selected a wholly owned subsidiary of the assessee called ICB Contractors India Pvt. Ltd. ("ICB") even though there were related party transactions between ICB and another AE called JTS Contracting Co. Malta. The TPO justified the selection on the ground that the transactions between ICB and the AE were at arms' length and so the distinction between controlled and uncontrolled transactions stood obliterated. In appeal before the Tribunal, the AM held that as there were controlled transactions between ICB and the AE, ICB could not be taken as a comparable party. However, the JM took the view as the transactions entered into by ICB was found to be at arms' length, it was an internal comparable which could not be ignored. The Third Member had to consider whether "the net margin realized from a transaction with an AE found and accepted at ALP could be taken as a comparable being an internal comparable for computation of ALP an international transaction with another AE?" Held by the Third Member:

The entire scheme in the Act & Rules for determining the ALP of an international transaction is based on making comparison with certain comparable uncontrolled transactions. The various methods prescribed for determining ALP clearly divulge that the comparison is always sought to be made of the assessee's international transactions with comparable 'uncontrolled transactions'. An 'uncontrolled transaction'is defined under Rule 10A(a) to mean 'a transaction between enterprises other than associated enterprises whether resident or non-resident'. A transaction between two associated enterprises goes out of the ambit of 'uncontrolled transaction' under Rule l0A. There is no statutory sanction for roping in a comparable controlled transaction for the purposes of benchmarking. If the view that a controlled transaction should not be shunted out for the purposes of benchmarking, is accepted, then all the relevant provisions contained in Chapter X in this regard, will become otiose. The argument that once controlled transactions are verified by the TPO and found at ALP, then the difference between controlled and uncontrolled transactions is obliterated cannot be accepted because it is possible that higher/lower prices for India may have been charged to reduce the overall incidence of tax. The TPO may accept that the transaction does not require adjustment if it benefits India even though the transaction may not be at ALP and cannot be used as a benchmark for purposes of making comparison in other cases. That is why the legislature has ignored controlled transactions, even though at ALP, and restricted the ambit only to uncontrolled transactions for computing ALP in respect of international transactions between two AEs. (A.Y. 2005-06)

Technimont ICB India (P) Ltd. v. Addl. CIT (2012) 138 ITD 23 / 75 DTR 259 / 148 TTJ 547 / (2013) 21 ITR 267 (TM)(Mum.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - Cup method - TNM method - Depreciation - While computing Arms length price profit should be considered without deduction of depreciation

The Assessee company which is engaged in software development. The assessee has adopted the CUP method. The TPO has rejected the CUP method applied by the assessee and adopted TNMM method for computing ALP. The method adopted by the assessee was rejected by the Commissioner(Appeals). On appeal the Tribunal held that for application of CUP method there should be similarity of transactions to be compared. If there are material product differences CUP method may not be applicable. On the facts the Tribunal held that services rendered by assessee to third parties were different from services rendered by it to Associated Enterprises hence third parties could not be considered for comparability analysis for benchmarking of international transactions made by assessee with its AE and therefore, CUP method could not be adopted for determining ALP, therefore order of TPO was justified. Assessees appeal was dismissed. As regards depreciation which can have varied basis and is allowed on different rates, which has no direct connection or bearing on price, cost or profit margin of international transactions profit should be taken without deduction of depreciation. The issue decided in favour of assessee. (A.Y. 2005-06)

Qual Core Logic Ltd. v. Dy. CIT (2012) 52 SOT 574 (Hyd.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - Arm's length price - Comparables - TNMM - Subsequent year TPO has accepted the operating margin method can be the sole basis to apply profit margin method for the relevant year [Rule 10B(1)(e)]

The Assessee in its transfer pricing report has accepted the TNMM as most appropriate method after intensive search of comparable companies. The contention of the assessee that operating profit shown should be accepted solely on the ground that in subsequent years the TPO has accepted the operating margin, cannot be accepted. The Tribunal directed TPO to work out the operating profit of comparable cases with certain specified adjustments and take their arithmetic mean for determining the ALP of the international transactions of the assessee company. TPO will restrict the adjustments to the transactions with the AEs only and not whole of the transactions/turnover. Further, while arriving at the aritmatic mean of the operating profit of the comparable companies, if the difference is less then +-5 percent as given in section 92C(2), then the benefit of the section 92C(2) should be given according to law. Revenues appeal was partly allowed. (A.Y. 2002-03)

Dy. CIT v. Firmenich Aromatics (I) Ltd. (2012) 75 DTR 33 / 150 TTJ 144 / 53 SOT 269 (URO)(Mum.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price - Cup - TNMM - Weighted average - Broking and trading in shares - For comparability analysis, the comparable uncontrolled method (CUP) is better than the TNMM, especially if internal CUP instances are available

Assessee is in the business of broking and trading in shares. It provided the stock broking services in respect clearing house trade to its Associated Enterprises. The TPO applied the CUP method for comparability analysis. The Assessee contended that the TNMM method is most appropriate. Without prejudice if CUP method is adopted certain adjustments have to be made as per Rule 10B(1)(a)(ii).

The Tribunal held that,

(i) For comparability analysis, the comparable uncontrolled method (CUP) is better than the TNMM, especially if internal CUP instances are available;

(ii) the assessee's argument that "weighted average arithmetic mean" of brokerage rates as compared to the "simple average arithmetic mean" of such rates should be adopted is not acceptable because the first proviso to section 92C refers only to "arithmetic mean" of more than one ALP and does not require the volume of the relevant transactions to be taken into consideration;

(iii) Under Rule 10B(1)(a)(ii) adjustments to account of difference, if any, between the international transaction and the comparable uncontrolled transaction which could materially, affect the price in the open market have to be made, However, the onus is on the assessee to make out a case for such adjustment (on account of differences in marketing function, research functions and difference in volumes) supported by relevant facts & figures & documentary evidences. The matter was set aside for verification of details and documentary evidence to be furnished in support. (A.Y. 2003-04 & 2005-06)

RBS Equities (India) Ltd. v. ACIT (2012) 79 DTR 51 / (2013) 151 TTJ 165 / 55 SOT 20 (URO)(Mum.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price - Choice of method and profit level indicator ('PLI') - Functional Asset Risk (FAR) - On the facts of the case the appropriate PLI will be the net profit / total cost and not the % of FOB value of goods sourced by AE [Rule 10B(1)(e)]

The assessee is a wholly owned subsidiary of GAP International Sourcing Inc, USA. The business activities of the assessee is to facilitate sourcing of apparel merchandise from India for the GAP group. Earlier years similar services were provided by a liasoning office, after incorporation as wholly owned subsidiary similar services are rendered by the assessee. Earlier Liasoning office was

remunerated at cost +15% for these services. The assessee filed its TP report claiming Transactional Net Margin Method (TNMM) with cost plus 15% remuneration to be most appropriate method for determination of arms length price ("ALP"). The TPO looking at the FAR and other factors rejected the assessee' s claim cost plus 15% ALP and held that commission at 5% of the FOB value of goods by the foreign enterprise through Indian Venders was the most appropriate PLI for determining ALP. Before the DRP it was submitted that assesses, primary business activity comprised identification of vendors, provision of assistance to vendors in procurement of law material, inspection and quality control and co-ordination with vendors to ensure delivery of goods to GAP Group as per schedule supplied by GAP. However DRP has accepted the report of TPO. The main issue before the Tribunal was whether PLI based on cost plus mark up or 5% of commission on FOB value of goods facilitated by the assessee for out sourcing is the most appropriate in given circumstances. After considering the submissions the Tribunal held that,

(i) The FAR, analysis gives the basis of broad characterization for e.g. Manufacture, service provider, distributor, etc. with a further sub-characterization including low risk service provider; fullfledged manufacturer, contract manufacturer, etc. These characterization are vitally important to determine the arm's length price of international transactions;

(ii) The department has to proceeded on the erroneous premises is a risk bearing AE and its functions are not in the nature of a service provider only. The FAR attributable to assessee are far greater than what are claimed. It is also assumed that the assessee has developed substantial intangibles in the form of human resources and supply chain and enjoys location advantages. The fact is that the assessee is only a low risk procurement support service provider;

(iii) The arms' length pricing (method and profit level indicator (PLI) should be the one which reflects commercial and economic realities of the industry and does not lead to absurd and distorted results. The appropriate PLI is the net profit/ total cost as adopted by the assessee.

(iv) On the question of percentage mark up to be applied to the assessee's cost, in comparable instances of Li& Fung India Pvt. Ltd. v. Dy. CIT (2010) 12 ITR 748 (Delhi)(Trib.), the rate of 32% was applied as opposed to the rate of 15% applied by the assessee.

The Tribunal accordingly held that non risk bearing procurement facilitating functions which are preordained by contract and hand book, the appropriate PLI will be the net profit / total cost and not the % of FOB value of goods sourced by AE. Accordingly the Tribunal up held the net profit / total remuneration model adopted by the assessee. For determination of cost plus remuneration method the Tribunal on the facts of the case held as under "In view of the foregoing we have no hesitation to accept candid proposal given by the assessee and hold that assessee TP adjustments be made by adopting the 32% cost plus mark up of the assessee for the A.Y. 2006-07 & 2007-08. The mark up proposal of assessee is higher than mark up proposal over total cost earned by all comparables placed on record. The assessments should be framed accordingly. We may hasten to add that this mark we will be subjected to variation in subsequent years if the facts and circumstances of the case so warrant". The appeal of assessee was partly allowed. (A.Y. 2006-07, 2007-08)

GAP International Sourcing (India) Pvt. Ltd. v. ACIT (2012) 149 TTJ 437 / 77 DTR 185 / 20 ITR 779 / (2013) 55 SOT 25 (URO)(Delhi)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price - Discount to both domestic company and AEs - No adjustment in ALP as in independent business situation granting of discount is a normal occurrence

In the instant case, assessee rendered similar service to both domestic customers and AEs abroad, but granted discount of 10% only to AE abroad. According to TPO price of services rendered was not at ALP and thus, he made upward adjustment in ALP to the extent of discount allowed. It was held that in independent business situation granting of discount is a normal occurrence and unless Assessing Officer demonstrates that discount so allowed would not have been allowed in an arm's length situation, ALP adjustment could not be made in respect of the same. It was therefore held that since

there was nothing on record to show to even suggest that discount in question was not arm's length discount, or that discount had not been allowed under any other situations, adjustment made by revenue was set aside. (A.Y. 2006-07)

Dresser-Rand India (P.) Ltd. v. Addl. CIT (2012) 53 SOT 173 / 13 ITR 422 / (2011) 141 TTJ 385 / 61 DTR 265 (Mum.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price - Reasoned order

Specific issues raised by the assessee before DRP have not been addressed and decided by way of a speaking order. It has been pleaded that CMC Ltd. should be excluded on the basis of the fact that it has significant related party transactions. Leaving aside CMC Ltd. which is should to be excluded on account of significant related parties transactions, the other comparables, ICC Ltd. and TSR Ltd. are required to be excluded on account of significantly higher operating margins. Matter restored back to the file of the DRP with a direction to pass a speaking order. (A.Y. 2007-08)

Symantec Software Solution (P) Ltd. v. ACIT (2012) 77 DTR 161 / 149 TTJ 554 (Mum.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price

Perusal of the provisions of S. 92C shows that the words used are "in relation to an international transaction, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons". The terms 'class of transaction' and 'nature of transaction' come to the forefront in the present case. In the assessee's case, the transaction with the AE is not one of simple purchase or simple sale. The assessee purchases from one and sells to another. The assessee has purchased from its AEs in Hong Kong, Sri Lanka, Malaysia, Pakistan and Randy Asia and has sold to its AEs in Sri Lanka, Korea, Hong Kong, Fulf, Egypt, Bangladesh, Malaysia, Taiwan, UK and Pakistan. What is noticed is t hat on the purchase the assessee has a positive differential i.e. the assessee purchases at a lower price from its AE than the non AE and when it sells to the AE, its selling price is lower than the selling price as compared with the non AE. There is no question that the assessee is generating profits from the transaction. There is no dispute that the assessee is also paying taxes on the profits that it has generated from its transaction of purchase and sale with its AE. The assessee, thus it is noticed, is doing the business of trading when it purchased from its AE from one country and sells to another AE in another country. This marging could be on account of both foreign exchange fluctuations as also the mark up done by the assessee. These transactions clearly show that what is done by the assessee is one of purchase and sale. With this in mind reading of the provisions of section 92C shows that the words used are "nature of transaction". "Nature of transaction" would be a particular set of transactions, which are to be seen together. When the assessee is buying from one place and selling at another that would be a "class of transaction". When the assessee is doing the business of trading, it would not be right to hold that the purchase is one "class of transaction" and the sales are another "class of transaction". The assessee dealing with the AEs is in a better position to negotiate better prices and consequently would be able to get a better bargain. Here, what is to be seen is whether the transaction of purchase and sale being the nature of transaction, when seen in consolidated form, generates profits which normally would be generated. For this both the purchase and sale transactions would have to be considered. The profitability if considered without considering the positive deviations would lead to impossible profitability positions, which is not what is contemplated under the provisions of section 92C. In the circumstances, the Assessing Officer is directed to recomputed the ALP by taking into consideration both the net difference on the sale to the AE and purchase from the AE. The Assessing Officer may look into the fact as to the margins of the profits in regard to the transactions done by the assessee with its AE, as also the non AE transactions and then compute the adjustment of ALP, if any. (A.Y. 2007-08)

Mainetti India (P) Ltd. v. ACIT (2012) 77 DTR 60 / 149 TTJ 767 (Chennai)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - Arm's length price - Aggregation - Application of "Aggregation" / "Portfolio Approach" - The assessee cannot take advantage of its own mistake - Even if the TPO's report on that issue is illegal, the Assessing Officer is now aware of the fact that there is such an international transaction and he is empowered under section 92C(3) to determine the ALP thereof

The Tribunal had to consider the following transfer pricing issues: (i) whether the principle of "aggregation" or "portfolio approach" could be adopted so as to adjust the under-charge of one international transaction against the over-charge for another; (ii) whether an adjustment for the "difference in application" of the product by the customer could be made; (iii) whether an adjustment towards "quantity discount" could be made; (iv) whether the "tax avoidance motive" is relevant in invoking transfer pricing provisions; (v) whether (pre sub-section (2A) of section 92(CA) if the TPO determines the ALP of a transaction which is not referred to him, can the Assessing Officer use the material to himself determine the ALP? Held by the Tribunal:

(i) Rule 10A(d) defines the term "transaction" to include a number of closely linked transactions. The "closely linked transactions" are those which cannot be segregated and if segregated, cannot be evaluated adequately on a separate basis and it is impractical to determine the price of each individual product or transaction. This is also the purport of the OECD Guidelines. On facts, as the transactions are neither of same 'product-line' nor 'routed-in-parts', the 'portfolio-approach' is not called for (CIT v. Tara Ultimo & UE Trade Corporation (2011) 45 SOT 197 (Delhi) referred);

(ii) An adjustment towards 'difference in application' i.e. that the ALP should be determined depending on what the end user uses the product for is not acceptable because the purpose for which the buyer uses the product has no relevance in fixation of sale price;

(iii) However, an adjustment towards 'quantity discount' is permissible because it is a common market practice that bulk purchasers are generally given some discount. The assessee has to show that such discount have been given to non AEs as well;

(iv) The argument that the department has to show "tax avoidance motive" before invoking transfer pricing provisions is not acceptable because the language used by the legislature is clear [Azetc Software & Technology Service Ltd. v. ACIT (2007) 107 ITD 141 (Bang.)(SB) followed];

(v) While it is true, as held in CIT v. Amadeus India (P) Ltd. (2012) 246 CTR 338 (Delhi), that pre sub-section (2A) of section 92CA, the TPO could not inquire into matters that were not referred to him by the Assessing Officer, it is a fact that he could not make a reference to the TPO because the information about the transaction was not reported in Form 3CEB. The assessee cannot take advantage of its own mistake. Even if the TPO's report on that issue is illegal, the Assessing Officer is now aware of the fact that there is such an international transaction and he is empowered under section 92C(3) to determine the ALP thereof. (A.Y. 2006-07)

Atul Limited v. ACIT (2012) 80 DTR 210 / (2013) 151 TTJ 346 /140 ITD 374 (Ahd.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price

Assessee purchased six items at a higher price from its AE than the cost at which it purchased similar items from non AEs. DRP has specifically mentioned that the rates of purchase from the AE have crossed the tolerance limit only in respect of 6 of the 35 items purchased by the assessee from the same AE. Other 29 items have been found to be appropriately priced since no ALP revision has been recommended for such items. Assessee had substantial volume of international transactions with its AEs. Aes of the assessee were supplying designs, placing orders, supplying raw materials and finally purchasing its products. In such a scenario, if the assessee had an intention to price its products and purchases so as to give undue benefits to the AEs outside India, it could have done so in other volunminous transactions with the AEs. Out of Rs. 227.244 crores worth of transactions with AE, TPO found nothing warranting a revision of ALP other than purchase of six items. Thus, it cannot be accepted that the assessee has indulged in a pricing methodology to benefit its AEs in respect of purchase of six item codes. Hence, the explanation of the assessee that it was forced to pay more

amount for the items under six codes to its AE than the comparable prices of supplies from non AEs due to mainimum order quantity restrictions imposed by the said entities cannot be brushed aside. Even otherwise, if the other materials falling under 29 items codes purchased from the very same AEs are also considered, it would wipe out the advantage that the assessee derived from any possible over payment of the materials falling under 6 item codes purchased by it. Consideration of only these six items from a pack of 35 items for making a revision of ALP will not give a fair result at all. Lower authorities went off tangent in reaching an adverse finding without considering the total volume of transactions made by the assessee with its AEs- Therefore, the impugned addition on account of revision in ALP was not called for. (A.Y. 2006-07, 2007-08)

Intimate Fashions (India) (P) Ltd. v. ACIT (2012) 77 DTR 68 / 149 TTJ 775 / 53 SOT 287 (URO)(Chennai)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price

Selection of PLI depends on number of economic factors which may vary on year to year basis and thus, the principle of consistency or the principle of res judicata is not applicable to the selection of PLI; it is open to the taxing authorities to consider the position on year to year basis for working out the appropriate PLI.

Cost of precious metal (raw material) imported by assessee as per the specifications of its customer MU Ltd. for manufacture of automobile catalysts which are not sold / supplied directly to MU Ltd. but are sold / supplied to the vendors of MU Ltd. cannot be said to be a pass through cost and, therefore, PLI is to be arrived at by taking operating profit as a percentage of total cost inclusive of purchase cost of the precious metal.

Tolerance band provided in the proviso is not to be construed as a standard deduction. In this case, the TPO has adopted the arithmetic mean of several comparables for taking out a PLI which would be tested with the PLI of the assessee. If that arithmetic mean falls within the range of tolerance band then there may not be any adjustment but if it exceeds then ultimate adjustment is not required to be computed after reducing the arithmetic mean by 5 per cent. Actual working is to be taken into consideration. (A.Y. 2003-04)

Johnson Matthey India (P) Ltd. v. Dy. CIT (2012) 78 DTR 12 (Delhi)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - TNMM - TPO is entitled to collect information under section 133(6), however if it is used against the assessee, assessee should be given an opportunity - Comparables cannot be ignored on ground of abnormal profits / losses if they are functionally comparable - Matter remanded [S. 133(6)]

The assessee provided software research & development services to its' USA based AE and was remunerated on a 'cost plus' basis. The assessee claimed that applying the TNMM and using operating profits to cost as the Profit Level Indicator ("PLI"), its PLI of 9.98% was at arms length. The TPO & DRP rejected the assessee's claim and computed the ALP at 24.35% and made an adjustment of Rs. 6.20 crores. The Tribunal had to consider the following issues: (i) whether in selecting a comparable, a turnover filter has to be adopted, (ii) whether companies with abnormal margins can be regarded as comparable, (iii) whether a filter can be applied to distinguish between companies earning revenue from rendering "onsite services" as compared to those rendering "offshore services" even though there is no functional difference between the two activities & (iv) whether the TPO is confined to information in public domain or he can collect information under section 133(6). Held by the Tribunal:

(i) Section 92C & Rule 10B(2) clearly lay down the principle that the turnover filter is an important criteria in choosing the comparables because significant differences in size of the companies would impact comparability even there is no functional difference in their activities. Size matters in business because a big company would be in a position to bargain the price and also attract more customers. It would also have a broad base of skilled employees who are able to give better

output. A small company may not have these benefits and therefore, the turnover also would come down reducing profit margin. As the assessee's turnover is Rs. 47 crores, only companies with a turnover between Rs. 1 to Rs. 200 crore should be considered for comparability [Dy. CIT v. Quark Systems (P) Ltd. (2010) 38 SOT 307 (Chd.)(SB), Genesis Integrating Systems & OECD TP Guidelines, 2010, ICAI TP Guidelines followed];

(ii) Under section 92C & Rule 10B(2), there is no bar to considering companies with either abnormal profits or abnormal losses as comparable to the tested party, as long as they are functionally comparable. This issue does not arise in the OECD guidelines and the US TP regulations because they advocate the quartile method for determining ALP under which companies that fall in the extreme quartiles get excluded and only those that fall in the middle quartiles are reckoned for comparability. Cases of either abnormal profits or losses (referred to as outliners) get automatically excluded. However, Indian regulations specifically deviate from OECD guidelines and provide Arithmetic Mean method for determining ALP. In the arithmetic mean method, all companies that are in the sample are considered, without exception and the average of all the companies is considered as the ALP. Hence, while the general rule that companies with abnormal profits should be excluded may be in tune with the OECD guidelines, it is not in tune with Indian TP regulations. However, if there are specific reasons for abnormal profits or losses or other general reasons as to why they should not be regarded as comparables, then they can be excluded for comparability. It is for the Assessee to demonstrate existence of abnormal factors. On facts, as the assessee has not shown any factors for abnormal profits, no comparable can be excluded for that reason (contra view in Quark Systems & Sap Labs noted);

(iii) Though the functions performed by offshore service providers and onsite service providers is the same, i.e. development of computer software, under Rule 10B(2)(b) one has to have regard to the functions performed, taking into account assets employed or to be employed and the risks assumed by the respective parties to the transactions. The "market conditions" are different for on-site and offshore work because in onsite development of computer software, the assessee does not employ assets or assume many risks. Even the per hour rate is different. The fact that in TNMM it is only the margins in an uncontrolled transaction that is tested does not mean that the fact that pricing will have an effect on the margins obtained in a transaction can be ignored. Companies which generate more than 75% of the export revenues from onsite operations outside India are effectively companies working outside India having their own geographical markets, cost of labour etc., and also return commensurate with the economic conditions in those countries. Thus assets and risk profile, pricing as well as prevailing market conditions are different in predominantly onsite companies from predominantly offshore companies like the assessee. Since, the entire operations of the assessee took place offshore i.e. in India; it should be compared with companies with major operations offshore, due to the reason that the economics and profitability of onsite operations are different from that of offshore business model;

(iv) The TPO is entitled to collect information under section 133(6) though if it is sought to be used against the assessee, it must be furnished to the assessee and his objections taken into account. If the assessee seeks an opportunity to cross examine the party that opportunity should be provided so that he can rebut the stand of that particular company. On facts, the assessee had not been able to show that the TPO had used information under section 133(6). (A.Y. 2007-08)

Trilogy E-Business Software India (P.) Ltd. v. Dy. CIT (2013) 140 ITD 540/23 ITR 464 (Bang.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price - Application of cost plus method - Charter hire charges - No adjustment is called for

Difference arose in calculation of cost due to the fact that TPO took the cost relating to charter hire activity as 50 percent of total cost whereas the assessee took the actual cost relating to the charter hire activity. Cost plus method can be applied only by taking the actual cost of the activity. Once the

figures used in the calculation made by the TPO are replaced by actual figures, the payment made by the assessee is at ALP and, therefore, no adjustment is called for. (A.Y. 2002-03)

Reliance Industries Ltd. v. Addl. CIT (2012) 79 DTR 315 / (2013) 55 SOT 8 (URO)(Mum.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price - Most appropriate method - C&F agent - Directed to adopt proper comparable

Assessee purchases the spare parts to be sold to its AE only and for doing so, it earned 1 per cent of mark up on the value of the produces and the cost of importing the goods. Though the assessee is becoming the owner of the goods imported, but by virtue of the product replacement services agreement, he has no right to fix the resale price or to choose the customer to whom the products are to be sold. When the assessee cannot be held to be a trader or distributor of the spare parts, it is clear that the resale price method is not applicable for arriving at the ALP of the international transactions. TNMM method is the most appropriate method for computing the ALP relating to the international transactions of the assessee with its AE-Comparables chosen by TPO were not appropriate. Only comparable which can be accepted is IC and is to be accepted and the gross profit as pointed out by the counsel for the assessee should also be reconsidered by the TPO. Hence, issue is remitted back to the TPO/Assessing Officer with a direction to recomputed the ALP by adopting the proper comparables. (A.Y. 2006-07)

CISCO Systems (India) (P) Ltd. v. Dy. CIT (2012) 78 DTR 498 / 49 SOT 108 / 150 TTJ 370 (Bang.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price - Selection of comparables

Receipt of the assessee from its AE in the relevant year being Rs. 213 crores, turnover filter of Rs. 5 crores applied by the CIT(A) for selection of comparables is fair and justified as against the turnover filter of Rs. 1 crore applied by the TPO, more so when the TPO himself has applied the turnover filter of Rs. 5 crores in the earlier year.

The TPO himself has noted that GIC Ltd cannot be considered as a comparable because of substantial related party transactions. To nullify the effect of related party transactions, he considered the consolidated accounts of GIC Ltd. However, in the case of ITES which is the main business of the assessee, 95 per cent of the GIC Ltd's consolidated account is received from subsidiaries and only 5 per cent from GI India operations. The subsidiary of GIC Ltd. is in United States. Similarly, even in respect of Global Information Services segment, 60 per cent of the consolidated revenue is from subsidiaries and only 40 per cent from GIC Ltd in view of the above, the CIT(A) rightly held that GIC Ltd. cannot be considered as a comparable company for the purpose of determining ALP of ITES rendered by the assessee. (A.Y. 2003-04)

American Express (India) (P) Ltd. v. JCIT (2012) 79 DTR 127 / 150 TTJ 316 (Delhi)(Trib.)

S. 92C : Avoidance of tax - Transfer Pricing - Discounted value - Difficulties in ascertaining fair market value is not reason for not adopting methods prescribed - Discounted cash method - Proper value of enterprise fixed based on present value of future earnings - Law on valuation of shares of a closely held company explained - Matter remanded

The assessee held 50% of the shares in L&T Infocity Asendas Ltd. ("LTIAL") while the rest were held by L&T Infocity Ltd. The assessee and L&T Infocity agreed to sell their entire holding in LTIAL to Ascendas Property Fund India ("APFI"), an AE of the assessee for a consolidated price of Rs. 79 crores. The assessee also held shares in Ascendas (India) IT Park Ltd. ("AITPL") which was also separately sold to APFI. The assessee claimed that the shares were sold at arms' length price on the basis that (a) with regard to LTIAL, a third party (L&T Infocity) had sold its holding at the same price as that of the assessee and so the price was supported by "internal CUP" and (b) with regard to AITPL, the valuation was determined by a CA in accordance with the Controller of Capital Issues

(CCI) Valuation guidelines. The TPO / Assessing Officer & DRP held that the transfer of shares in LTIAL by L&T Infocity to APFI was not an "uncontrolled comparable transaction" and so the argument of "internal CUP" was not available. With regard to the transfer of shares in AITPL, it was held that the valuation based on CCI guidelines was not acceptable. Instead, the valuation of both sets of shareholdings was determined on the basis of the "Discounted Cash Flow (DCF)" method for valuation of an enterprise and an addition of Rs. 239 crores was made. On appeal by the assessee to the Tribunal, held:

(i) Though section 92C(1) provides that the arm's length price in relation to an international transaction "shall" be determined by any of the methods set out therein, the selection of the method cannot be done with a water-tight attitude as such an interpretation will defeat the very purpose of enactment of transfer pricing rules and regulations and also detrimentally affect the effective and fair administration of an international tax regime. There may be difficulties in ascertaining the fair market value, but such difficulties should not be a reason for not adapting the prescribed methods. Some subtle adjustments in the methodology prescribed for evaluation of an international transaction are required to be done;

(ii) To a transaction of sale of shares in a closely held company, none of the six methods prescribed in section 92C & Rule 10B apply. Accordingly, while determining the most appropriate method, the modern valuation methods fitting the type of underlying service or commodities cannot be ignored. Fixing enterprise value based on discounted value of future profits or cash flow is a method used worldwide. The endeavor is only to arrive at a value which would give a comparable uncontrolled price for the shares sold. Viewed from this angle, the discounted cash flow method adopted by the TPO is in accordance with section 92C(1);

(iii) The assessee's argument, with regard to the sale of shares in LTIAL, that the price is at ALP as per the CUP method as a third party (L&T Infocity) sold the same shares at the same price to the same buyer is not acceptable because the sale of shares by L&T Infocity to APFI cannot be said to be uncontrolled. The fact that a common agreement for sale of the shares for a consolidated sum was entered into by the assessee with L&T Infocity shows that the transaction was not independent but was a joint effort;

(iv) The assessee's argument, with regard to the sale of shares in AITPL, that the TPO was bound by the CCI guidelines on valuation of shares is also not acceptable because the CCI guidelines were issued for a totally different purpose and cannot be transported into a pricing methodology prescribed for fixing ALP. Instead, the Discounted Cash Flow method for valuation is an accepted international methodology for valuing enterprises and for determining the value of the holding of an investor. Investors are interested in ascertaining the present value of their investments, considering the future earning potential of the underlying asset. Ascertaining the net present value of future earnings is more appropriate where market value of an investment is not readily ascertainable by conventional methods;

(v) The value of equity can be obtained in two methods under the Discounted Cash Flow method. The first method is to discount the cash flow expected from the equity investment and the second method is to ascertain the value of the enterprise by applying DCF on its future earnings and then dividing it with the number of shares. The most important aspect in the application of DCF is the discounting factor used for working out the net present value (NPV). The factor generally used is the Weighted Average Cost of capital. The difficult parts are (i) determining the future cash flows, (ii) determining the cost of equity, (iii) determining the cost of debt and (iv) determining the period of discounting. For a valuation to have some amount of objectivity the variables must be considered within a reasonable limit so that acceptable values can be arrived at. Even a slight change in the discounting ratio will result in substantial change in the valuation of the company. If the ALP of the shares are worked out without considering a reasonable value for the enterprise, it will result in injustice. (Matter remanded to the TPO for a reworking). (A.Y. 2007-08)

Ascendas (India) Pvt. Ltd. v. Dy. CIT (2013) 21 ITR 665 / 152 TTJ 57 (Chennai)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing – Arm's lenght price - CUP method - Wholly owned subsidiary - Medical transcription services to its parent company - CUP method is appropriate

Assessee is whilly owned subsididary of 'C' Ltd. USA. It has provided medical transacription services to its parent company. It its TP study report assessee adopted Comparable Uncontrolled Price (CUP) method as most appropriate method for computing Arm's Length Price of international transactions made with its AE. TPO held that CUP method could not be applied due due to lack of information and comparables. He applied the TNM method and proposed certain additions to ALP determined by the Assessing Officer. The Assessing Officer made the addition based on the TPO's report. In appeal Commissioner(Appeals) deleted the addition and held that the CUP method is most appropriate method.On appeal by the revenue the Tribunal held that the comparable considered by the assessee were in no way connected with the assessee or with its holding company and all information / data relating to their transactions were available hence the TPO was not justified in rejecting computation of ALP made by assessee by applying the CUP method. Appeal of department was dismiised. (A.Y. 2005-06)

ACIT v. Ckar Systems (P) Ltd. (2012) 20 ITR 817 / (2013) 55 SOT 553 (Hyd.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price - Variation less than 5 percent

As per the proviso to section 92C(2) if the variation between the ALP and the actual transaction price does not exceed 5 per cent, the transaction price is to be accepted and no adjustment is required to be made. Since the difference in the arm's length margin as determined by the TPO and the actual transaction price in the instant case does not exceed five per cent, no adjustment is required to be made.

Assessee charged higher rate from its AEs than what it charged from third party. Department has not brought any evidence on record to controvert the submissions of the assessee that the services rendered to the AEs and third parties are of similar type and operate in the same geographical region. Geographical considerations have to be kept in mind while considering the rates and applying CUP method. CUP method as adopted by the assessee is sustainable. Therefore, CIT(A) has rightly held that TPO has not brought out a case for making any adjustment on account of ALP. (A.Y. 2004-05 & 2005-06)

ACIT v. Genesys International Corporation Ltd. (2012) 80 DTR 4 / 53 SOT 245 / (2013) 151 TTJ 588 (Mum.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - Arm's length price - Computation -Exchange difference - Difference less than 5% adjustment is not justified

Exchange difference wrongly included by TPO in operating cost of assessee's sales for year under consideration was rectified by TPO accepting that exchange difference loss was required to be accounted for under head 'non-operating expenses' and TP adjustment to that extent was required to be reduced. As a result of rectification operating cost of sales of assessee was reduced and ALP of sales of assessee applying OP / cost margin as worked out by TPO against sales price showed a difference of less than 5 per cent between them, therefore, addition made by way of TP adjustment in case of assessee was unsustainable. (A.Y. 2004-05)

ACIT v. D. A. Jhaveri (2012) 54 SOT 219 (URO)(Mum.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing - Computation - Arm's length price - Reimbursement of expenses which is not the responsibility of assessee held to be not allowable

Assessee manufactured tractors and exported them to USA. Tractors had to be recalled in view of some manufacturing defects. Defects were to be rectified in US on which distributor AE incurred

expenditure. Said expenditure was reimbursed to AEs. TPO noted that assessee had not provided any evidence of this practice, being adopted with unrelated parties inside or outside country. DRP found that expenditure incurred was not covered under warranty expenses or other expenses, as per the agreement between assessee and AE. Such expenses were required to be borne by AE which was in course of its normal business activity and assessee was responsible only for insurance in course of transit. DRP held that TPO was more than magnanimous in charging only reimbursement of repairing expenditure in question and not in charging any mark up on services rendered by assessee to AE. Adjustment made by the TPO/Assessing Officer was confirmed by DRP. Since under terms of agreement entered with distributor-AE, it was not responsibility of assessee to make payments to AE, expenditure as to reimbursement in question was not allowable. (A.Y. 2006-07)

Mahindra & Mahindra Ltd. v. Dy. CIT (2012) 54 SOT 146 (URO) (Mum.)(Trib.)

S. 92CA : Avoidance of tax - Transfer pricing - Reference to TPO - Petitioner participated in the proceedings before TPO and has remedy to move before the DRP as well as appeal before the Tribunal hence writ petition was held to be not maintainable [Art. 226]

The Assessing Officer relying upon the CBDT instruction selected for scrutiny and after seeking approval of CIT made reference to the TPO. The petitioner participated in the proceedings before TPO. The petitioner thereafter filed a writ petition questioning the validity of the approval granted by the Commissioner to the Assessing Officer and the order passed by the TPO. The Court dismissed the petition by observing that petitioner participated in the proceedings before TPO and has remedy to move before the DRP as well as appeal before the Tribunal hence writ petition was held to be not maintainable under Art. 226, of the Constitution of India.

Hindalco Industries Ltd. v. Addl. CIT (2012) 75 DTR 238 / 252 CTR 167 / 211 Taxman 315 (Bom.)(HC)

S. 92CA : Avoidance of tax - Transfer pricing - Alternative remedy - Writ is not maintainable as the petitioner is having alternative and efficacious remedy against the order [S. 144C, Art. 226]

The petitioner challenged the reference made under section 92CA(1) of the Act and the show cause issued by the Addl. CIT. It was contended on behalf of the revenue that there is a complete mechanism provided under the Act for raising objections in the matter of fixation of ALP hence the writ is not maintainable. The court held that petitioner is having alternative and efficacious remedy against the order passed under section 92CA(3) as a complete mechanism exists under section 144C the writ is not maintainable. (A.Y. 2007-08, 2008-09)

Bhatia International Ltd. v. Addl. CIT (2012) 75 DTR 247 / 252 CTR 176 / 210 Taxman 327 (MP)(HC)

S. 92CA : Avoidance of tax - Reference to Transfer Pricing Officer - Transaction based and not entity based

The reference by the Assessing Officer under section 92CA(1) is transaction based and not entity based. There may be several international transactions with the same entity, but reference made by the Assessing Officer is each transaction specific i.e. only the international transaction which have been referred to by the Assessing Officer after taking the approval of the Commissioner can be looked into by the TPO. (A.Y. 2006-07)

Glaxo Smithkline Consumer Health Care Ltd. v. Addl. CIT (2012) 149 TTJ 246 / 76 DTR 114 / 51 SOT 52 (Chd.)(Trib.)

S. 92C : Avoidance of tax - Transfer pricing – Arm's length price - Comparable - Assessee has not conducted a proper transfer pricing study and has wrongly chosen these four comparables. The four companies in question were engineering companies

The assessee, a wholly owned subsidiary of a Hongkong based private limited company providing internet data and international communication services, was established with the objective of rendering marketing support services to the parent company. The assessee carried out a transfer pricing analysis and close the transactional net margin method as the most appropriate method. Assessee has not conducted a proper transfer pricing study and has wrongly chosen these four comparables. The four companies in question were engineering companies providing end-to-end solutions whereas the assessee company provided marketing support services to the parent company, which was in the nature of support service and hence not functionally comparable. Concluded that the risk profile was vastly different and hence on this count also they were not comparable. (A.Y. 2004-05, 2005-06)

Dy. CIT v. MCI Com India P. Ltd. (2012) 19 ITR 42 / 53 SOT 290 (URO)(Delhi)(Trib.)
JCIT v. Verizon India P. Ltd. (2012) 19 ITR 42 / 53 SOT 290 (URO)(Delhi)(Trib.)

S. 92C : Avoidance of tax - Transfer Pricing – Arm's lengh price - Traveling expenses -Legal fees - Subsidiary - Interest on advances given to seconded employees

The purpose of travel of the secondaries from India to the respective locations were to render on site services. All the revenues relating to the on site activities were earned by AEs on their account, adjusdment towards the travelling cost of the seconded employees in determination of ALP was justified. Similarly legal fees incurred by the assessee company in connection with incorporation of overseas subsidiary company into be treated as costs recoverable from AE in accordance with the Arm's length principle. As the assessee has not given the details the Tribunal held that adjustment on account of unrecovered interest cost is justified on the basis that advances equilant to three months salary have been given to the seconded employees and that the same remained ourstanding for an average period of three months. Issuee were decided in favour of revenue. (A.Y. 2002-03 to 2004-05)

Mastek Ltd. v. Dy. CIT (2012) 74 DTR 318 / (2013) 151 TTJ 484 (Ahd.)(Trib.)

S. 92CA : Transfer pricing - Reference to TPO - Assessing Officer is not required to give opportunity of hearing

Assessing Officer is not required to provide opportunity of hearing to assessee before referring matter to TPO. (A.Y. 2005-06)

I. J. Tools & Castings (P.) Ltd. v. ACIT (2012) 139 ITD 414 (Amritsar)(Trib.)

S. 94 : Avoidance of tax - Transaction in securities - Units - Securities - Loss on account of capital gain [S. 23D, 115AB]

It was contended on behalf of the assessee, that loss on account of capital gain is not hit by the amendment in 2004 to section 94(7) of the Act. Units would be governed by the term secutities in section 94(7)(b)(i) and securities to be kept only for a period of three months after recorded date and not for period of nine months as required under section 94(7)(b)(ii). High Court held that units are governed by the provisions of section 94(7)(b)(ii) and not section 94(7)(b)(i); contention that "units" are included within the meaning of the word "securities" and therefore, section 94(7)(b)(i) is applicable and the period of holding has to be only three months is not sustainable. Appeal of assessee was dismissed. (A.Y. 2005-06)

Sista's (P) Ltd. v. CIT (2012) 78 DTR 81 / 211 Taxman 244 / (2013) 255 CTR 122 (Bom.)(HC)

S. 94 : Avoidance of tax - Transactions in securities - Colourable device - Loss on securities - Sale of securities next day Transactions cannot be considered as colourable hence loss can not be disallowed [S. 80M]

The assessee had purchased units of the Unit Trust of India from Bank of America on 31-5-1991. On the very next day, the assessee sold back the very same units to the same Bank and had incurred some loss. The assessee claimed set off of the said loss against the income under the head 'Capital gains'.

The Assessing Officer invoked section 94(4) and proceeded to compute the assessee's taxable income. The Assessing Officer further held that Bank of America being a foreign company and not a domestic company, the benefit of section 80M was not available to it. However, the Commissioner(Appeals) held that section 94 had no relevance. The Tribunal held that the transaction was only for the purpose of getting deduction under section 80M, and was a colourable device to avoid tax.On appeal to High Court held that by purchase of units, assessee became entitled to have benefit of deduction under section 80M and, sale on next day would not make transaction of purchase and resale a colourable one. Explanation to section 94, as it stood at material time, defined interest to include dividend and term 'securities' to include stocks and shares alone and not units of Unit Trust of India and, hence, when revenue had not questioned transaction as not legal, section 94 would not have come into play in considering merits of claim. Accordingly the appeal of assessee was allowed. (A.Y. 1992-93)

Sundaram Finance Ltd. v. Dy. CIT (2012) 211 Taxman 303 (Mad.)(HC)

S. 94 : Avoidance of tax - Transaction in securities - Purchase of units and the sale thereof at loss after earning dividend - Loss is allowable

The assessee had purchased units of mutual funds on 26-12-20003. On the very same date, the assessee received the dividend. On 29-03-2004, the assessee redeemed the units and claimed shorter capital loss. The Assessing Officer opined that the cheque for the purchase of units was actually realized on 30-12-2003 and therefore, the period of holding before the sale was only 88 days i.e. less than 3 months, therefore provision of section 94(7) of the Act held applicable. He denied the set off short term capital loss claimed by assessee. On appeal the claim of loss was allowed by Commissioner(Appeals) by observing that if date of tender of cheque for purchase of share is considered as the date of purchase, then the sale was not within three months of purchase and provision of section 94(7) held not applicable. On appeal by revenue the Tribunal confirmed the view of Commissioner(Appeals) and dismissed the appeal of revenue. (A.Y. 2004-05)(ITA No. 4285/Mum/2009 dated 6-6-2012 Bench 'F')

ITO v. Vasudeo Pandurang Ginde (2012) BCAJ July P. 57(Mum.)(Trib.)

S. 112 : Tax on long term capital gains - Exempt income - Transfer - Since shares were not sold to allottees in stock exchange, transaction would not be eligible for concessional rate of 10 percent for assessing the capital gains. [S. 2(47), 10(38), 45, 48, 112]

The Assessing Officer held that the since the shares were not listed securities at the time of transaction, the tax was payable at normal rate and not concessional rate. The view of Assessing Officer was confirmed by the Commissioner(Appeals) and Tribunal. The Court held that trading of these shares in the Stock exchange commenced only in the morning of 6-1-2006. The shares were transferred from the demat account of the assessee on 5-1-2006 the credit of sale consideration was credited on 6-1-2006 would not be relevant to determine the transfer. The court held that once shares were transferred from demat account of assessee to account of 'Registrar to issue' and then to demat accounts of allottees, transfer is complete in terms of section 2(47) by 5-1-2006. On the facts transfer for purchase being completed prior to listing of shares and commencement of trading in stock exchange being on 6-1-2006, transaction cannot be held to be in stock exchange hence the assessee would not be eligible for payment of capital gains tax at lower rate of 10 percent, normal rate is applicable. (A.Y. 2006-07)

Uday Punj v. CIT (2012) 348 ITR 98 / 209 Taxman 29 / 76 DTR 166 / 253 CTR 22 (Delhi)(HC)

S. 113 : Tax - Block assessment - Search cases - Surcharge [S. 158BC]

Amendment made by inserting proviso to section 113 by Finance Act, 2002 w.e.f. 1-6-2002, is merely clarificatory. Where search was conducted on 29-8-1996, Finance Act of 1996 would be

applicable and since Finance Act (No. 2) of 1996 authorised levy of surcharge of 15 per cent of tax such levy was justified.
CIT v. D. D. Gears Ltd. (2012) 211 Taxman 8 (Mag.) / (2013) 83 DTR 88 (Delhi)(HC)

S. 115A : Foreign companies - Tax - Dividends - Royalty - Technical services fees - DTAA - India-USA - Different agreement Different source of income [S. 90, Art. 12]
Royalty income receipts under different agreements are different sources of income, taxpayer can take benefit of lower tax rate by comparing the rate of tax under Income-tax Act and the DTAA separately for each agreement. (A.Y. 2007-08)
IBM World Trade Corporation v. Dy. DIT (2012) 148 TTJ 496 / 75 DTR 161 / (2012) BCAJ Pg. 34, Vol. 44-A, Part 3, June, 2012 / 54 SOT 39 (Bang.)(Trib.)

S. 115E : Non-residents - Capital gains - Not ordinary resident - Interest - Declaration - Interest on deposits in banks are entitled benefit not required to filing of declaration under section 115H [S. 6(6)(a), 115H]
The assessee had been a 'non-resident' for 12 years prior to return to India. He has been in India only for 323 days during the previous seven years preceeding in the A.Y. 1993-94. The Tribunal held that assessee falls within scope of section 6(6)(a), hence the status of the assessee is 'not ordinary resident' and non-resident upto A.Y. 1992-93. The Assessing Officer denied the exemption under section 115E on the ground that the assessee has not filed the declaration under section 115H. The Tribunal held that there is no requirement of filing of declaration under section 115H. On appeal to the High Court held that the Tribunal has correctly justified in holding that the exemption under section 115E of the Income-tax Act and there is no requirement of filing of declaration under section 115H. (A.Y. 1994-95 to 1996-97)
CIT v. N. Sundarraman (2012) 70 DTR 9 / 206 Taxman 364 / 250 CTR 212 (Mad.)(HC)

S. 115E : Non-residents - Capital gains - Bonus shares resulted out of original investments in shares made out of convertible foreign exchange, concessional rate in section 115E can be applied to LTGC on such bonus shares
There can be no differentiation whatsoever between definition of the 'foreign exchange asset' as applied to section 115E and 115F since both the sections fall under chapter XII-A. That being so, the assessee cannot be deprived of the concessional rate available under section 115E just because the sale of the shares were bonus shares. Coordinate Bench of the Tribunal rightly relied on the decision of Apex Court in the case of CIT v. Dalmia Investment Co. (1964) 52 ITR 567 for holding that such bonus shares were covered by sub-clause (b) of section 115C and was a foreign exchange asset. This being so, income by way of long term capital gains on transfer thereof was well eligible for application of concessional rate of tax specified under sub-clause (b) of section 115E. It is held that the authorities below fell in error when they applied higher rate of tax. Thus Assessing Officer was directed to give assessee benefit of concessional rate under Section 115(E). (A.Y. 2008-09)
Deivanayagam Maruthini (Smt.) v. Dy. DIT (IT) (2012) 51 SOT 163 (Chennai)(Trib.)

S. 115J : Company - Book profit - Bonus and Donation amounts - Assessee not entitled to deduction when profit and loss account of the assessee disclosed the net profit in accordance with Part II and Part III of Schedule VI of the Companies Act
The Assessing Officer while completing the assessment under Section 115J of the Act, disallowed the bonus and donation amounts on the ground that they did not relate to A.Y. 1989-90. The High Court held that when the profit and loss account of the assessee disclosed the net profit in accordance with Part II and Part III of Schedule VI of the Companies Act, the assessee was not entitled to have deduction of the amounts debited in profit and loss appropriation account in the computation of net profit. (A.Y. 1989-90)

CIT v. Swamiji Mills Ltd. (2012) 342 ITR 250 / 72 DTR 139 / 251 CTR 334 (Mad.)(HC)

S. 115J : Company - Book profit - Tonnage business - Interest expenditure is held to be allowable

The assessee is engaged in the business of shipping, property development and finance. The assessee filed its return declaring income and book profit under section 115J. In the return, interest expenditure was claimed by the assessee as deduction against income from non-tonnage activities. The Assessing Officer was of the opinion that out of the interest expenditure claimed by the assessee as deduction against the income from non-tonnage activities, a certain sum was attributable to tonnage activities. He disallowed the amount. The Commissioner(Appeals) deleted the disallowance. On appeal to the Tribunal the Tribunal held that the Assessing Officer himself had stated in the assessment order that the loans availed of by the assessee for shipping activities had been diverted to non-tonnage activities. Accordingly the order of Commissioner(Appeals) was upheld. (A.Y. 2006-07)

Great Eastern Shipping Co. Ltd. v. Addl. CIT (2012) 20 ITR 351/(2013) 57 SOT 172 (Mum.)(Trib.)

S. 115JA : Company - Book profit - Export - Deduction under section 80HHC is to be computed as per Book Profits and not normal provisions [S. 80HHC, 115JB]

In computing "book profits" under section 115JA & 115JB, the assessee claimed that the deduction admissible there under section 80HHC had to be computed on the basis of the "book profits" and not on the basis of the income computed under the normal provisions of the Act. This claim was upheld by the Tribunal by relying on the judgment of the Special Bench in Dy. CIT v. Syncome Formulations (I) Ltd. (2007) 106 ITD 193 (Mum.)(SB)(Trib.). On appeal by the Revenue, the High Court [CIT v. AI-Kabeer Exports Ltd. (2010) 233 CTR 443 (Bom.)] reversed the Tribunal. On appeal by the assessee, The Apex Court held reversing the High Court:

In view of this Court's Order in the case of CIT v. Bhari Information Technology Systems (2012) 340 ITR 593 (SC) upholding the judgment of the Special Bench of Tribunal in Dy. CIT v. Syncome Formulations (I) Ltd. (2007) 106 ITD 193, the impugned judgment of the High Court is set aside and the judgments of the ITAT in these cases stand affirmed.

Al-Kabeer Exports Ltd. v. CIT (SC) www.itatonline.org

S. 115JA : Company - Book profit - Export [S. 80HHC, 115JB]

In computing book profits under section 115JA, 115JB, the deduction under section 80HHC had to be allowed on the basis of book profits and not by applying the normal provisions of the Act for computation deduction. (A.Y. 2000-01, 2003-04.)

CIT v. C. P. S. Textiles P. Ltd. (2012) 340 ITR 590 (Mad.)(HC)

S. 115JA : Company - Book profit - Deduction of withdrawal from the revaluation reserve account - Creation of the revaluation reserve account referable to the balance sheet assets portion and not by way of appropriation to the profit and loss account - Hence no deduction allowed

The assessee while computing the book profit for the A.Y. 1989-90, reduced withdrawal from the revaluation reserve account. The High Court deciding in the favour of the department held that since the creation of the revaluation reserve account was referable to the balance sheet assets portion and not by way of appropriation to the profit and loss account, the question of claiming deduction does not arise. Therefore assessee was not entitled to deduction in respect of withdrawal from the reserve account in terms of Section 115JA. (A.Y. 1989-90)

CIT v. W. S. Industries (India) Ltd. (2012) 342 ITR 231 / 72 DTR 133 / 251 CTR 328 (Mad.)(HC)

S. 115JA : Company - Book profit - Debenture redemption reserve - Adjustment of debenture redemption reserve, the amount held not to be reserve within the meaning of expln. (b) to section 115JA

It was held that mere fact that the debenture redemption reserve is labelled as a reserve will not render it as a reserve in the true sense or meaning of that concept. An amount which is retained by way of providing for a known liability is not reserve. Accordingly order of Tribunal affirmed and appeal of revenue was dismissed. (A.Y. 1997-98)

CIT v. Raymond Ltd. (2012) 71 DTR 265 / 209 Taxman 65 (Bom.)(HC)

S. 115JA : Company - Books profit - Limited powers of assessing officer - Prior period expenses is deductible

The assessee has computed the book profits after deducting the prior period expenses The Assessing Officer held that prior period expenses adjustments could not be reduced for arriving the net profit of that particular years. On appeal to the High Court the Court held that, the assessing authority has no jurisdiction to go further into the accounts hence, no exception could be taken to the course adopted by the assessee in adjusting the prior period expenses in computing the net profit. Accordingly following the ratio in Apollo Tyres v. CIT (2002) 255 ITR 273 (SC), the appeal of the assessee was allowed. (A.Y. 1997-98)

Tamil Nadu Cements Corporation Ltd. v. JCIT (2012) 349 ITR 58 / 209 Taxman 58 (Mad.)(HC)

S. 115JA : Company - Book profit - Exempted income - While computing book profits under section 115JA / JB, if actual expenditure to earn tax-free income not debited in P&L A/c, section 14A cannot apply [S. 14A]

For A.Y. 2007-08, the assessee invested Rs. 10 crores in shares and units. The assessee claimed that it had incurred no expenditure to earn tax-free income though the Assessing Officer & CIT(A) made a disallowance of Rs. 19.58 lakhs under section 14A r.w. Rule 8D. Before the Tribunal, the assessee claimed that (i) Rule 8D could not apply to A.Y. 2007-08 and (ii) No disallowance under section 14A could be made for purposes of computing book profits under section 115JB. Held by the Tribunal:

Under the normal provisions of the Act, Rule 8D cannot apply till A.Y. 2008-09 though the Assessing Officer is at liberty to identify actual expenditure incurred to earn tax-free income & make disallowance. However, while computing book profit under section 115JB, no actual expenditure was debited in the profit & loss account relating to the earning of exempt income. Section 14A cannot be imported into while computing the book profit under section 115JB because clause (f) of Explanation to section 115JB refers to the amount debited to the profit & loss account which can be added back to the book profit while computing book profit under section 115JB of the Act. In Goetze (India) Ltd. v. CIT (2009) 32 SOT 101 (Delhi) it was held that sub-section (2) & (3) of section 14A cannot be imported into clause (f) of the Explanation to section 115JA. Accordingly, it is held that no addition to book profit can be made on account of alleged expenditure incurred to earn exempt income while computing income under section 115JB.

Quippo Telecom Infrastructure Ltd. v. ACIT (Delhi)(Trib.) www.itatonline.org

S. 115JA : Company - Book profit - Loss by amalgamating company has to be taken into consideration while computing book profits

Assessee acquired bulk drug division of SPCL. As per the scheme sanctioned by the High Court the date of transfer was 1st April, 1997, while the effective date of such acquisition was 19th June, 1997. Loss of SPCL for the aforesaid period has to be taken into consideration despite the fact that the assessee has not shown this loss in its P & L A/c prepared in accordance with the provisions of the Companies Act, 1956 and has reduced the same from the general reserve. (A.Y. 1997-98)

Addl. CIT v. Nicholas Piramal India Ltd. (2012) 78 DTR 369 / 150 TTJ 1 (Mum.)(Trib.)

S. 115JA : Company - Book profit - Amount transferred to debenture redemption reserve is to be reduced [Companies Act, 1956]

Amount transferred to the reserve account to meet the liability on account of redemption of debentures issued by the assessee is a provision made for an ascertained or known liability and, therefore, it is to be reduced from the profit as per P & L A/c prepared in accordance with the provisions of companies Act, 1956 to arrive at the book profit under section 115JA. (A.Y. 1997-98)

Addl. CIT v. Nicholas Piramal India Ltd. (2012) 78 DTR 369 / 150 TTJ 1 (Mum.)(Trib.)

S. 115JAA : Company - Book profit - Deemed income - Surcharge - Amount of surcharge and education cess cannot be included in amount of MAT credit under section 115JAA

In allowing credit of MAT of previous year under section 115JAA against the claim of Rs. 63,51,128/-, the claim was allowed only for an amount of Rs. 56,05,585/-. There was a short fall in the allowance of credit of MAT by Rs. 7,45,543/- being the amount of surcharge and education cess. The assessee filed an appeal before Commissioner(Appeals) and prayed that due credit of MAT including surcharge & education cess should be considered under section 115JAA and in support relied upon Explanation 2 of section 115JB which was inserted by Finance Act, 2008 with retrospective effect from 1-4-2001.Tribunal held that amount of surcharge and education cess cannot be included in amount of MAT credit under section 115JAA. (A.Y. 2010-11)

Richa Global Exports (P.) Ltd. v. ACIT (2012) 54 SOT 185 (Delhi)(Trib.)

S. 115JB : Company - Book profit - Assessment was made under normal provisions of the Act - Matter remanded to the Assessing Officer to consider the applicability of book profit and decide [S. 143(3)]

The Assessee submitted its return of income showing nil income and book profit under section 115JB. Assessing Officer did not proceed to consider the case under section 115JB. Assessing Officer completed the assessment of the assessee company under section 143(3) after issuing statutory notices under section 142(1) and 143(2) by making certain additions/disallowances, though making a reference to section 115JB in one line in the operative part of the order. The CIT(A) also proceeded to decide the matter as though it was a regular assessment under section 143(3) and deleted the additions after examining the relevant material facts. Tribunal erred in holding that the Assessing Officer has not made the impugned additions under the regular provisions i.e. section 143(3) and in upholding the deletion of the additions merely because of the aforesaid one line in the operative part of the Assessing Officer's order. On appeal by revenue the orders of the Tribunal and the CIT(A) and the assessment order are set aside and the matter was remanded to the Assessing Officer to decide whether the assessment was required to be made under section 115JB or under section 143(3). (A.Y. 2005-06)

CIT v. International Auto Ltd. (2012) 254 CTR 298 / 78 DTR 309 (Jharkhand)(HC)

S. 115JB : Company - Book profit - Bad debts - Cannot be added while computing book profit

Bad and doubtful debts can never be said to be liability and cannot be added up for computing the book profit under section 115JB. (A.Y. 1999-2000)

CIT v. Fusion Software Engg. (P) Ltd. (2012) 79 DTR 130 / 205 Taxman 396 (Karn.)(HC)

S. 115JB : Company - Book profit - STP unit - Exempt income - Companies Act [S. 10A]

Book profits prepared by Company in accordance with Companies Act can neither be interfered with by Assessing Officer nor could assessee adjust the same except as provided under the Companies Act. In terms of clause (3) of Explanation to section 115JB(2) lower of amount of loss brought forward or unabsorbed depreciation is to be reduced from book profit and it is amount as per books of account and not as per Income tax records which has been computed under the provisions of Income-tax Act. Therefore while computing book profit under section 115JB and making adjustments thereunder as

provided in Explanation thereto, aggregate of profits / losses of both STP and non STP units is to be taken in to consideration and not profit or losses of non STP units only. (A.Y. 2005-06)
Yokogawa India Ltd. v. Dy. CIT (2012) 49 SOT 173 (Bang.)(Trib.)

S. 115JB : Company - Book profit – Foreign exchange fluctuations - For the purpose of computing book profit only permissible adjustments in form of additions and deductions are provided under explanation 1 to section 115JB and no more deductions or allowance are permissible
The assessee company is in the business of running a multiplex theatre. The Assessing Officer found that while computing the book profit the assessee had reduced an amount of Rs. 33,11,687/- which pertained to "foreign exchange fluctuation" due to restating of term loan at the year end, which was rejected by him. On appeal the Commissioner(Appeals) also up held the view of Assessing Officer. The Tribunal held that for the purpose of computing of "Book profit" only permissible adjustments in form of additions and deductions are provided under Explanation 1 to section 115JB and no more deductions or allowances other than what are stated in said Explanation permissible. Accordingly the Tribunal up held the order of Assessing Officer. (A.Y. 2005-06)
City Gold Media Ltd. v. ITO (2012) 134 ITD 535 / 146 TTJ 510 / 71 DTR 103 / 17 ITR 192 (Ahd.)(Trib.)

S. 115JB : Company - Book profit - Companies Act - Not crediting profit on sale of shares to profit and loss account is against the accounting policy - Assessing Officer is right in considering the profit on sale of shares to taxation under MAT provisions [S. 115J, 115JA]
The assessee company sold certain shares and earned the profit. The assessee has not routed the said transaction through profit and loss account but had directly credited to capital reserve account. The Assessing Officer computed the book profit by including profit on sale of shares. The view of Assessing officer was up held by the Commissioner(Appeals). On appeal to the Tribunal it was contended that the accounts were duly certified by auditors in accordance with the Companies Act, the Assessing Officer has no jurisdiction to the net profit shown in the profit and loss account except to the extent provided under explanation to sub section (2) to section 115JB. The Tribunal held that the not crediting the profit on sale of shares to profit and loss account was contrary to significant accounting policy of assessee itself as well as against requirements of Accounting Standard AS-13 and requirements of Parts II and III of Schedule VI of Companies Act, 1956, therefore, Assessing Officer was justified in treating the profit on sale of shares, to taxation under MAT provisions of section 115JB. (A.Y. 2005-06)
Sumer Builders (P) Ltd. v. Dy. CIT (2012) 50 SOT 198 (Mum.)(Trib.)

S. 115JB : Company - Book profit - Prior period expenses - There is no provision for any adjustment on account of disallowance of prior period expenses while computing book profit
The Assessing Officer while computing the Book profit added the amount in respect of prior period expense debited to the profit and loss account. The Commissioner(Appeals) upheld the addition. On appeal the Tribunal held that, there is no provision for any adjustment on account of prior period expenses in Explanation 1 to section 115JB(2) and therefore any addition on account of disallowance of prior period expenses while computing book profit is not permitted. (A.Y. 2000-01 to 2003-04)
Shivshahi Punarvasan Prakalp Ltd. v. ITO (2012) 135 ITD 51 / 145 TTJ 457 / 69 DTR 1 (Mum.)(Trib.)

S. 115JB : Company - Book profit - Interest - Adjustment by the Assessing Officer is held to be not justified
Assessing Officer disallowed assessee's claim of interest expenditure observing that amount of interest had been described as 'interest capitalized' in earlier years written off during current year and

added said amount to book profit for computation of tax under section 115JB. Held that amount of interest would not fall under provisions of section 115JB(2) and Explanation 1 thereunder. Therefore, Assessing Officer was wrong in adding amount of interest to book profit under section 115JB. (A.Y. 2008-09)

JCIT v. Shreyans Industries Ltd. (2012) 137 ITD 79 / 18 ITR 169 / 74 DTR 437/2013) 154 TTJ 52(UO) (Chd.)(Trib.)

S. 115JB : Company - Book profit - Exempt income - Special Economic Zone units continue to be exempt from minimum alternative tax (MAT) [S. 10A, 10AA]

The assessee had two undertakings, one of which was a SEZ unit and the other which was a STPI unit. Both units were eligible for deduction under section 10A. By the Special Economic Zone Act, 2005, s. 10AA was inserted w.e.f. 10.2.2006 to provide deduction in respect of units established in SEZs. By the same Act, sub-section (6) was inserted in section 115JB to provide that the profits of an SEZ unit would not be liable to MAT. By the Finance Act, 2007, clause (f) to explanation (1) to section 115JB(2) was amended w.e.f. 1.4.2008 so as to delete the words "sections 10A or 10B" though sub-section (6) of section 115JB was retained. The Assessing Officer & CIT(A) held that the effect of the deletion of the reference to section 10A & 10B in section 115JB meant that the units which were eligible for section 10A & 10B deduction were no longer exempt from section 115JB and only units which were eligible for section 10AA deduction would be exempt from section 115JB. On appeal by the assessee, Held, allowing the appeal:

Section 115JB(6) does not refer to either section 10A or section 10AA but simply provides that the MAT provisions shall not apply to income arising from any business carried on in an unit located in a SEZ. Consequently, despite the fact that an amendment was made in clause (f) of Explanation (1) to section 115JB(2) to provide that MAT shall apply to units eligible for section 10A or 10B, a unit which is situated in a SEZ will continue to be exempt from MAT by virtue of section 115JB(6). (A.Y. 2008-09, 2009-10)

Genesys International Corpn. Ltd. v. ACIT (2012) 80 DTR 23 / (2013) 55 SOT 10 / 151 TTJ 606 (Mum.)(Trib.)

S. 115JB : Company - Book profit - Provision for site restoration expenses debited to profit and loss account held to be allowable

The assessee created a provision for site restoration expenses and debited same to profit and loss account. The Assessing Officer added the same for the purpose of computing the profit under section 115JB as unascertained liability. On appeal, the Commissioner(Appeals) after analyzing the various clauses of the production sharing agreement, held that the said provision was for ascertained liability. On appeal to the Tribunal the Tribunal also confirmed the view of Commissioner(Appeals). (A.Y. 2002-03, 2004-05)

ACIT v. Tata Petrodyne Ltd. (2012) 54 SOT 191 (Mum.)(Trib.)

S. 115JB : Company - Book profit - Fringe benefit tax to be excluded

Working under section 115JB has to be considered on basis of book results disclosed in profit and loss account in accordance with provisions of Part II and III of Schedule VI of the Companies Act, 1956, without taking recourse to normal computation of income under provisions of Act. Amount of fringe benefit tax has to be excluded in computation of book profits under section 115JB. (A.Y. 2005-06 to 2007-08)

ASB International (P.) Ltd. v Dy. CIT (2012) 54 SOT 140 (URO)(Mum.)(Trib.)

S. 115JB : Company - Book profit - Insurance companies - Prrior to 1-4-2013 provisions of section 115JB are not applicable in case of insurance company not required to prepare accounts as per Parts II and III of Schedule VI of Companies Act

The assessee's contention before the Assessing Officer was that provisions of section 115JB were not applicable to the assessee insurance company as the assessee prepared its accounts as per the insurance Regulatory And Development Authority (IRDA) (Preparation of Financial Statements and Auditor's Report of insurance Companies) Regulation, 2002 and not as per provisions of Parts II and III of Schedule VI of the Companies Act, 1956.

However, the Assessing Officer held that the assessee income had to be computed by applying section 115JB. On appeal before the Tribunal, the assessee raised the additional ground regarding the applicability of section 115JB. An amendment has been brought in statute by the Finance Act, 2012 whereby sub-section 2 has been substituted w.e.f. 1-4-2013; therefore, prior to 1-4-2013, the provisions of section 115JB cannot be applied in the case of Companies which are not required to prepare accounts as per the provisions of part II of Schedule VI of the Companies Act, 1956. Revenue contended that even as per the pre-amend provisions of section 115JB, the accounts prepared in accordance with the Regulatory Act can be taken for the purpose of computation of book profit under section 115JB. Tribunal admitted the additional ground and held that prior to 1-4-2013 provisions of section 115JB are not applicable in case of insurance company not required to prepare accounts as per Parts II and III of Schedule VI of Companies Act. Accordingly the provisions of section 115JB are not applicable in the case of the assessee. (A.Y. 2003-04)

ICICI Lombard General Insurance Co. Ltd. v. ACIT (2012) 54 SOT 538 / (2013) 82 DTR 379 / 154 TTJ 83 (Mum.)(Trib.)

S. 115VD : Shipping bussiness - Qualifying ship - Tonnage tax scheme - Ship operating in coastal waters and ship operating in international waters - Entitled to the benefit of tonnage tax scheme

Tonnage tax scheme does not distinguish between ships operating in costal waters and ships operating in International waters and therefore, the ship operated by the assessee for transporting thermal coal from one location to another location within country is a qualifying ship under section 115VD and assessee is entitled for the benefit of tonnage tax scheme. (A.Y. 2006-07)

ACIT v. West Asia Maritime Ltd. (2012) 65 DTR 16 / 143 TTJ 129 / 16 ITR 175 (TM)(Chennai)(Trib.)

S. 115VJ : Shipping bussiness - Qualifying ship - Tonnage tax scheme - Treatment of common costs - Allocation of expenses on fair and reasonable basis was up held

Assessee is engaged in shipping business and also other business activities. For shipping business the assessee offered income under tonnage tax scheme under section 115VJ. The Assessing Officer allocated the common expenses between shipping and other business in the ratio of gross receipts between two business and made an addition of Rs. 8 lakhs. Commissioner(Appeals) confirmed the order of Assessing Officer. On appeal to the Tribunal, the Tribunal held that as the assessee has failed to demonstrate the basis of allocation of common expenses, the allocation of expenses by the Assessing Officer was up held (A.Y. 2005-06)

Rajamahendri Shipping & Oil Filed Services Ltd. (Intervener) (2012) 51 SOT 242 / 19 ITR 616 (Visakha.)(Trib.)

S. 115VJ : Shipping bussiness - Tonnage tax scheme - Treatment of common costs - Reasonable basis vis-à-vis proportionate basis - Matter set aside

Assessee as also the authorities below have proceeded to use the expression ‘reasonable basis’ as interchangeable with ‘proportionate basis’. This approach is fallacious in as much as proportionate basis is not essentially a reasonable basis in all the situations, particularly in the context of passive income like rent and interest. Further, the allocation of the depreciation cost has to be also on the basis of usage of the asset in respect of which depreciation is claimed. Thus, allocation of all the

common costs on proportionate basis is neither reasonable nor meets the prescription of the statute. The matter was set aside to Assessing Officer for adjudication de novo. (A.Y. 2005-06)
Surendra Overseas Ltd. v. Dy. CIT (2012) 68 DTR 34 / 144 TTJ 746 / 51 SOT 200 (URO)(Kol.)(Trib.)

S. 115WA : Fringe benefits - Hospitality and sales promotion - Hospitality - Providing free car accessories cannot be treated as hospitality and is not covered under section 115WA
Assessee is a car dealer. Assessing Officer held that car accessories provided free of cost to the customers was in the nature of hospitality and hence covered under section 115WB(2)(B). On appeal the High Court held that providing free car accessories cannot be treated as hospitality provided by the appellant to any person nor can be treated as sales promotion expenses, as consideration thereof is in built in the price of the car and therefore provision of such accessories to customers is not covered by section 115WA. (A.Y. 2006-07)
T & T Motors Ltd. v. ACIT (2012) 341 ITR 332 / 67 DTR 98 / 247 CTR 384 (Delhi)(HC)

S. 115WA : Fringe benefits - Residential accommodation to managing director - Free security deposit - Notional interest on security deposit is in nature of fringe benefit and to be added to value of fringe benefit, however, since no valuation rule has been provided in respect of such fringe benefit same could not be subjected to tax
The assessee company has provided a residential accommodation to its chairman cum-managing director. It had taken the said premises on lease for monthly rent and had given a deposit Of Rs. 5 crores as interest free deposit. The assessee also had borrowings to the extent of Rs. 5 Crores. The Assessing Officer calculated notional interest at rate of 9% and added same to value of fringe benefit. On appeal before the Commissioner(Appeals), the assessee, submitted that since no valuation was possible for such benefit, hence the same could not be subject to FBT relying on Board Circular No. 8 dated 29-8- 2005. The Commissioner(Appeals) also confirmed the addition. On appeal to Tribunal, the Tribunal held that, benefit of notional interest on security deposit is in the nature of fringe benefit under clause (a) of sub section (1) of section 115WB. However, since no valuation rule has been provided in respect of such fringe benefit, same could not be subjected to tax. (A.Y. 2007-08)
DP World (P) Ltd. v. Dy. CIT (2012) 135 ITD 141 / 72 DTR 237 / 147 TTJ 206 (Mum.)(Trib.)

S. 115WA : Fringe benefits - Charge - Expenses incurred - Value - FBT on expenses incurred by employer [S. 115WC]
In the present case there was no dispute to the fact that as per Rule 8 of the Income-tax Rules in the case of a tea company, only 40% of the total not income is liable to pay tax under the Act at the prescribed rate and the balance 60% is to be considered as agricultural income, which is not liable to be taxed under the Act, as it is within the domain of the states. However in case of FBT, it is leviable as per provisions of chapter-XII-H, FBI is basically the tax on the expenses incurred by the assessee to provide certain privilege, fercilitate amenities to it's employees. Therefore, FBI is not linked with the income of an employer but it is with reference to the expenditure incurred by the employer on the benefits / privileges provided to its employees. Hence there was no similarity between the provisions of section 115WA vis-à-vis section 115O. (A.Y. 2006-07)
Dy. CIT v. McLeod Russell India Ltd. (2012) 50 SOT 21 (URO)(Kol.)(Trib.)

S. 115WB : Fringe benefits - Sales promotion - Gift - Sales promotion expenses cannot classified as gift [S. 115WD, 115WO]
Assessee in order to promote its products, from time to time formulated schemes which entitled distributors / dealers / stockiest to specific articles / presents depending upon volume of sales achieved through stockiest / dealer, etc. Value of said articles presents would be considered as advertising / sales promotion expenses falling under section 115WB(D) and could not be classified

under section 115WB(O) treating it as gift as the expenditure has direct nexus with sales promotion and publicity. (A.Y. 2006-07)
Birla Corporation Ltd. v. Dy. CIT (2002) 134 ITD 142 / 16 ITR 60 (Kol.)(Trib.)

S. 115WB : Fringe benefits - Deeming fixation - Sales promotion - Where benefit was fully attributable to employees or where expenditure did not result in any benefit at all to employees, deeming fiction under section 115WB(2) was not attracted
Assessee-company, filed return of Fringe benefits without considering expenses on sales promotion, conveyance, tour and travel and employee referral scheme gifts on ground that said expenditure was neither incurred for benefit of employees nor was it paid to them and there was no employer-employee relationship with person on whom said expenses were incurred. Assessing Officer, however, held that as per section 115WB(2) and Circular No. 8 of 2005, FBT was leviable even though there was no employer-employee relationship. Expenditure on employee referral scheme gift even though satisfied employer-employee relationship, could not be subject to FBT since employees had paid tax on such amount. Legitimate business expenditure in nature of sales promotion, conveyance, tour and travel and gifts, which did not result in any benefit to employees, was not liable for FBT. (A.Y. 2008-09)
Toyota Kirloskar Motor (P.) Ltd. v. Addl. CIT (2012) 54 SOT 70 (URO)(Bang.)(Trib.)

S. 115WB : Fringe benefits - "Employees' Welfare" - Distribution of souvenirs is employees welfare expenditure
Assessee treated expenditure incurred on distribution of souvenirs to employees as resulting in "employees' welfare" and computed value of FBT at 20 per cent. Assessing Officer applied 50 per cent rate, treating same as 'Gifts'. The Tribunal held that revenue could not dictate as to how and in what manner assessee was to incur expenditure on employees' welfare and expenditure, in instant case, been had correctly been treated as "employees' welfare expenditure". (A.Y. 2008-09)
Toyota Kirloskar Motor (P.) Ltd. v. Addl. CIT (2012) 54 SOT 70 (URO)(Bang.)(Trib.)

S. 115WB : Fringe benefits - gifts to the customers with condition attached - Said gifts not given voluntarily or free of consideration - Held the expenses on gifts to be included in sales promotion expenses for assessment of FBT
In the instant case, the assessee gave gifts like vouchers, televisions, etc to members who took timeshare units with a condition that the value of the said gifts would be deducted in case of termination of membership. What would fall under Section 115WB(2)(O) was pure gifts would any conditions attached. It was held that there was no element of quid pro quo in the gifts given by assessee to its customers and that there was a condition inbuilt. In such a situation, the gift would fall within what was normally considered as sales promotion and would fall under section 115WB(2)(D) and thus, Assessing Officer was to consider the amount as sales promotion for assessment of fringe benefit tax. (A.Y. 2006-07, 2007-08)
Mahindra Holidays and Resort India Ltd. v. ACIT (2012) 16 ITR 412 (Chennai)(Trib.)

S. 115WB : Fringe benefits - Telephone - Other expenses under the head telephone expenses are not covered under Fringe benefit - For tour and travel expenses rate applicable will be 5% and not 20% as applied by the Assessing Officer
The Assessing Officer held that postages, E-mail and courier charges debited under the head telephone expenses has to be considered for the applicability of Fringe benefit, which was confirmed in appeal by the Commissioner(Appeals). On appeal the Tribunal it was held that expenditure debited under the head postage, E-mail, lease line and courier are not covered by section 115WB(2)(J) of the Act hence, no disallowance can be made. The Tribunal also held that for the relevant year FBT is

applicable at 5% and not 20% as applied by the Assessing Officer. Accordingly the addition made by the Assessing Officer was deleted. (A.Y. 2007-08)
SGS India (P) Ltd. v. Addl. CIT (2012) 75 DTR 221 / 149 TTJ 392 (Mum.)(Trib.)

S. 115WB : Fringe benefits - Expenditure on non-employee - Not fringe benefit
Any expenditure incurred by employer in the course of his business or profession, which is not a consideration for employment, cannot be considered as "fringe benefit" cannot arise when expenditure is incurred on person who are not employees. (A.Y. 2006-07)
Dy. CIT v. Kotak Mahindra Old Mutual Life Insurance Ltd. (2012) 134 ITD 388 / 149 TTJ 332 / 77 DTR 108 (Mum.)(Trib.)

S. 115WB : Fringe benefits - Expenditure on non-employees
Expression "any consideration for employment" in section 115WB(1) is significant in as much as the benefits listed in cls. (a) to (d) therein are directed towards the employees or their families including former employees. Section 115WB(2) includes fringe benefits which are deemed to have been provided by the employer to the employees. Though section 115WB(2) does not contain the expression "means any consideration for employment", since sub-section (1) of section 115WB itself states that the meaning of the expression 'fringe benefits' contained therein is "for the purposes of this chapter", it implies that the overriding condition of incurrence of expenditure in consideration for employment is even relevant for the purposes of ascertaining fringe benefits which are deemed to have been provided by the employer to its employees in terms of sub section (2) of section 115WB also. Therefore, even in the circumstances provided in sub-section (2) of section 115WB, fringe benefits can be deemed to have been provided by the employer to his employees only in cases where the prescribed expenditure is incurred in consideration for employment. Clarification issued by the CBDT vide question No. 14 Circular No. 8 of 2005, dated 29th Aug., 2005 seeks to enlarge the scope of levy of FBT, which is not supported by the language of the statute. It can be clearly observed from the speech of the Finance Minister in the Parliament while introducing the relevant provisions that the import and intent of introducing chapter XII-H was to tax such benefits which are collectively enjoyed by the employees and cannot be attributed to any individual employee. Therefore, the expenses prescribed in section 115WB(2) are liable to be considered as fringe benefits only to the extent the same are incurred in consideration for employment i.e. for employees. (A.Y. 2006-07)
Intervalve (India) Ltd. v. Addl. CIT (2012) 77 DTR 113 / 149 TTJ 365 (Pune)(Trib.)

S. 115WB : Fringe benefits - Available only on expenses incurred on employees
Expenses prescribed in section 115WB(2) are liable to be considered as fringe benefit only to the extent the same are incurred in consideration for employment i.e. for employees and not with respect to expenses incurred on person who are not employees of the assessee. (A.Y. 2006-07)
Intervalve (India) Ltd. v. Addl. CIT (2012) 149 TTJ 365 / 77 DTR 113 (Pune)(Trib.)

S. 115WB : Fringe benefits - Charge of tax - Day to day travelling and taxi hire charges - Expenses paid to employees for day-to-day local travelling and tax hire charges during their working hours cannot be regarded as fringe benefit
Expenditure under consideration are day to day local travelling expenditure and taxi hire charges for movement of employees during their working hours; it is not conveyance expenses paid to the employee for travelling between his residence and office; under these circumstances, the payment is not consideration for employment and fringe benefit tax was not chargeable. Expenses paid to employees for day-to-day local travelling and tax hire charges during their working hours cannot be regarded as fringe benefit. (A.Y. 2006-07)
Dy. CIT v. Kotak Mahindra Old Mutual Life Insurance Ltd. (2012) 134 ITD 388 / 149 TTJ 332 / 77 DTR 108 (Mum.)(Trib.)

S. 115WB : Fringe benefits - Freebies and products along - Not be treated as fringe benefit

Expenditure incurred by the assessee on the freebies and giving products free along with sale of products of assessee cannot be treated as fringe benefits; expenditure on celebrity endorsement also cannot be treated as fringe benefit. (A.Y. 2006-07 to 2008-09)

Glaxo Smithkline Consumer Health Care Ltd. v. Addl. CIT (2012) 149 TTJ 246 / 76 DTR 114 / 51 SOT 52 (Chd.)(Trib.)

S. 115WB : Fringe benefits - Expenditure on non-employees

Any expenditure incurred by an employer in the course of his business or profession, which is not a consideration for employment, cannot be considered as "fringe benefit", "fringe benefit" cannot arise when expenditure is incurred on persons who are not employees. (A.Y. 2006-07)

Dy. CIT v. Kotak Mahindra Old Mutual Life Insurance Ltd. (2012) 77 DTR 108 / 134 ITD 388 / 149 TTJ 332 (Mum.)(Trib.)

S. 115WB : Fringe benefits - Telephone expenses

Expenditure incurred on office telephones. No benefit flows to the employee by reason of his employment as far as expenditure on office telephone is concerned. CIT(A) was justified in deleting the FBT levied on telephone/fax expenses in respect of telephones installed in the office premises. (A.Y. 2006-07)

Dy. CIT v. Kotak Mahindra Old Mutual Life Insurance Ltd. (2012) 77 DTR 108 / 134 ITD 388 / 149 TTJ 332 (Mum.)(Trib.)

S. 115WB : Fringe benefits - Conveyance expenses

Expenditure under consideration are day to day local travelling expenditure and taxi hire charges for movement of employees during their working hours; it is not conveyance expenses paid to the employee for travel between his residence and office; under these circumstances, the payment is not consideration for employment and fringe benefit tax was not chargeable. (A.Y. 2006-07)

Dy. CIT v. Kotak Mahindra Old Mutual Life Insurance Ltd. (2012) 77 DTR 108 / 134 ITD 388 / 149 TTJ 332 (Mum.)(Trib.)

S. 119 : Instructions - CBDT - Requantification of income - CBDT was directed to pass speaking order after hearing the assessee - Attachment to be lifted after furnishing bank guarantee

The petitioner company represented to CBDT stating that income declared by earlier management in the return of income had been overstated and tax credit thereon was excessively claimed as evident from the subsequent restatement of accounts at the instance of company law Board and consequent upon investigation by SFIO. The CBDT rejected the representation of the company for re-quantification / reassessment of income for various years, however no hearing was given to the assessee. The assessee filed a writ petition, the High Court directed the petitioner company to pay 350 crores and bank guarantee for Rs. 267 crores pending the hearing and disposal of writ petition. Against the said order special leave petition was filed. The Court directed the company to file a fresh comprehensive petition/representation before the CBDT giving all requisite details / particulars in support of its case and the CBDT is directed to dispose of the case by a reasoned order after hearing the petitioner company. Company was directed to file undertaking with the Registry of the Supreme Court to furnish bank guarantee of a nationalized bank in the sum of Rs. 617 crores where upon the attachment levied by the department is to be lifted. (A.Y. 2003-04 to 2008-09)

Satyam Computer Services Ltd. v. CBDT (2012) 346 ITR 566 / 77 DTR 434 / 253 CTR 175 (SC)

S. 119 : Instructions - CBDT - Waiver of interests - Due to financial difficulties there was delay in payment of advance tax, interest levied under section 234B and 234C cannot be waived [S. 234B, 234C, Constition of India, Art. 14]

The assessee was acting as a real estate agent. Due to financial difficulties, there was delay in payment of advance tax. The assessee filed application for waiver of interests levied, which was rejected. The assessee filed writ petition against the said order, and contended that it had made out a case for grant of waiver / refund and the same had been declined by misinterpretation and / or narrow interpretation of the order F. No. 400/29/2002 - IT(B) dated 26-6-2006 (Said order) issued by the Central Board of Direct Taxes (CBDT). In the alternative, it was contended that paragraph 3 of the said order, to that extent it declined the benefit of waiver of interest charged under section 234B, and 234C to the class or classes referred to in paragraphs 2(a) and 2(d) of the said order dated 26-6-2006, was arbitrary and unequal and was in violation of Article 14 of the Constitution of India. The High Court held that said order specifically mentioned that it would not apply to sections 234B and 234C, in view of above, the assessee was not entitled to any waiver / reduction of interest. Accordingly the writ petition was dismissed. (A.Y. 2008-09)

De Souza Hotels (P.) Ltd. v. CCIT (2012) 207 Taxman 84 / 78 DTR 135 / 253 CTR 541 (Bom.)(HC)

Editorial:- SLP of assessee was rejected. De Souza Hotesls Pvt. Ltd. v. CCIT [SLP (Ciivil) C. C. No. 13729 of 2012, dated 21-8-2012 (2012) 210 Taxmam 96(Mag.) (SC)]

S. 119 : Instructions - CBDT - Delay in claiming refund - Dedcution of tax at source - Condonation of delay - Trust was not under obligation to file return hence the delay condoned and refund was directed to be granted [S. 237, 239]

The petitioner filed application under section 119(2) before CCIT submitting along with the application a note explaining that the delay in filing return to the office of CCIT was caused by the bifurcation of trust and the power grid corporation with consequential bifurcation of the fund. It was held that the Trust was deprived of the refund for which it could not be blamed at all and it had no liability whatsoever to pay this amount to the Revenue and hence, petitioner was entitled to condonation of delay in the filing claim for refund. Assessee's income being exempt, it was entitled to refund of Tax deducted at source not withstanding the fact that returns were filed belatedly. The Court held that the assessee isentitled to condonation of delay in terms of section 119(2)(b). (A.Y. 1995-96 to 1998-99)

North Eastern Electric Power Corporation Employees Provident Fund Trust v. UOI (2012) 348 ITR 584 / (2013) 256 CTR 308 (Gauhati)(HC)

S. 119 : Instructions - CBDT - Fringe benefits - Instructions to subordinate authorities is not binding on assessee, appellate authorities and Courts

Circulars can bind ITO but they are not binding on assessee, appellate authorities and Courts therefore in view of facts stated under heading 'Fringe benefits', Circular No. 8 of 2005 could not be relied upon to disadvantage of assessee in support of conclusion that expenditure in instant case was liable for FBT. (A.Y. 2008-09)

Toyota Kirloskar Motor (P.) Ltd. v. Addl. CIT (2012) 54 SOT 70 (URO)(Bang.)(Trib.)

S. 127 : Power to transfer cases - Question whether the section 127(2) transfer order is invalid for want of reasons referred to Full Bench

The CIT, Valsad, passed an order under section 127(2) centralizing the assessee's case from Vapi to Surat "to facilitate coordinated and effective investigation". The assessee challenged the order on the ground that as no reasons were given in the section 127(2) order (though given in the affidavit-in-reply), the section 127(2) order had to be struck down as per Ajanta Industries and others v. CBDT (1976) 102 ITR 281 (SC). The department relied on Arti Ship Breaking vs. DIT (2000) 244 ITR 333

(Guj.) where it was held that Ajanta Industries was no longer good law and reasons were not required to be stated in the order. Held by the Court:
In Ajantha Industries and others v. CBDT (1976) 102 ITR 281 (SC), it was held that the requirement of recording reasons under section 127(1) is mandatory and non-communication thereof is not saved by showing that the reasons exist in the file. However, in Arti Ship Breaking v. CIT (2000) 244 ITR 333 (Guj.) this law was not followed on the basis that in two subsequent decisions it was held non-communication of reasons recorded by the authority would not vitiate the proceedings. This view of the division bench does not appear to be correct because the said later two decisions related to irregularities in course of disciplinary proceedings which had nothing to do with section 127 conferring power of transfer. Accordingly, it cannot be said that Ajantha Industries has lost its force in view of those two subsequent decisions. Accordingly, the matter has to be referred to a larger bench to consider the following question:
"Whether the decision of the three-judge-bench of the Supreme Court in the case of Ajantha Industries reported in (1976) 102 ITR 281 so far as it lays down the law that the requirement of recording reasons under section 127(1) of the Income tax Act is a mandatory direction under the law and non-communication thereof is not saved by showing that the reasons exist in the file although not communicated to the assessee is still a good law in view of the subsequent decisions of the Supreme Court in the cases of Managing Director, ECIL v. B. Karunakar, AIR 1994 SC 1074, and State Bank of Patiala v. S. K. Sharma, AIR 1996 SC 1669 as held by a Division Bench of this court in the case of Arti Ship Breaking v. Director of Income Tax (Investigation) and others reported in (2000) 244 ITR 333."
Millenniun Houseware v. CIT (2012) 71 DTR 217 / (2013) 355 ITR 242 (Guj.)(HC)

S. 127 : Power to transfer cases - Condition precedent for transfer - Opportunity to be heard must be given
In a case where the Assessing Officer from whom the case is to be transferred and the Assessing Officer to whom the case is to be transferred are not subordinate to the same Director General, or Chief Commissioner or Commissioner, two basic requirements are required to be satisfied before making an order transferring the case under section 127(2) of the I.T. Act, 1961, viz., the concerned Director General, Chief Commissioner o Commissioner from whose jurisdiction the case is to be transferred is required to give the assessee a reasonable opportunity of being heard; and the concerned authority is required to record reasons for doing so. In Ajantha Inds. v. CBDT (1976) 102 ITR 281 the Supreme Court has held that not only is the requirement of recording reasons under section 127(1) a mandatory direction under the law but that non communication thereof is not saved by showing that reasons exist in the file although not communicated to the assessee. Thus, non communication of the reasons recorded would also vitiated the order made under section 127(2).
Madhu Khurana v. CIT(2012) 347 ITR 183 / (2011) 237 CTR 304 / 200 Taxman 297 / (2010) 47 DTR 289 (Guj.)(HC)

S. 127 : Power to transfer cases - Reassessment - Conduct of ACIT and Commissioner of Income-tax in seeking to circumvent the law strongly condemned and awarded cost [S. 148]
Pursuant to the assessee's request, the Commissioner of Income-tax passed an order dated 22.11.2011 under section 127(2) transferring the assessee's case from Mumbai to Pune. Despite the said transfer, the ACIT, Mumbai, issued a section 148 notice seeking to reopen the assessee's case. The assessee filed a Writ Petition to challenge the reopening on the ground that the ACIT, Mumbai, had no jurisdiction. Before the Court, the department revealed that the ACIT had written a letter to the CIT requesting that the transfer of the case be cancelled "to circumvent any jurisdictional issue" and that the CIT had passed a "corrigendum order" stating that the transfer order was "temporarily withdrawn for the sake of administrative convenience". The said "corrigendum order" was passed without hearing the assessee and even a copy thereof was not served on the assessee. Held by the Court

allowing the Petition: The conduct of the ACIT & CIT is highly deplorable. Once the jurisdiction to assess the assessee was transferred from Mumbai to Pune, it was totally improper on the part of ACIT Mumbai to request the CIT to pass a corrigendum order with a view to circumvent the jurisdictional issue. Making this request was in gross abuse of the process of law. If there was any time barring issue, the ACIT Mumbai ought to have asked his counterpart at Pune to whom the jurisdiction was transferred to take appropriate steps in the matter instead of taking steps to circumvent the jurisdictional issue. It does not befit the ACIT Mumbai to indulge in circumventing the provisions of law and his conduct has to be strongly condemned. Instead of bringing to book persons who circumvent the provisions of law, the ACIT has himself indulged in circumventing the provisions of law which is totally disgraceful. The CIT ought not to have succumbed to the unjust demands of the ACIT and ought to have admonished the ACIT for making such an unjust request. The CIT ought to have known that there is no provision under the Act which empowers the CIT to temporarily withdraw the order passed by him under section 127(2) for the sake of administrative convenience or otherwise. If the CIT was honestly of the opinion that the order passed under section 127(2) was required to be recalled for any valid reason, he ought to have issued notice to that effect to the assessee and passed an order after hearing it. Further, though the CCIT agrees that the actions of the CIT and ACIT are patently unjustified and not as per law, he has expressed his helplessness in the matter. It is expected that the CCIT shall take immediate remedial steps to ensure that no such incidents occur in the future. The department shall pay costs of Rs. 10,000/- which may be recovered from the CIT & ACIT. (A.Y. 2005-06)

Fiat India Automobiles Ltd. v. ACIT (2012) 211 Taxman 570 / 80 DTR 1 / 254 CTR 345 (Bom.)(HC)

S. 127 : Power to transfer cases - Opportunity of hearing is mandatory

As per provisions of section 127(1) and (2), requirement of granting an assessee a reasonable opportunity of being heard, wherever it is possible to do so is mandatory. Accordingly the writ petition of assessee was allowed. The Commissioner was directed to hear and pass the order. (A.Y. 2003-04 to 2009-10)

Sahara Hospitality Ltd. v. CIT (2012) 211 Taxman 15 / (2013)352 ITR 38 (Bom.)(HC)

S. 131 : **Power - Discovery - Production of evidence - Survey - Retention of books of account - Violation thereof - Directed to be released and awarded cost of Rs. 25,000/-**

Survey action was conducted at the premises of the Assessee. Books produced in pursuance to notice issued during survey. Assessing Officer retained the books for unreasonable period. A long period of five years had lapsed and the Revenue did not complete the assessment and still wants to continue to retain the books which is nothing but amounts to the abuse of powers available under section 131(3)(b). Therefore, it is a fit case for entertaining the Writ and issuing direction to return the book of accounts and to award cost of Rs. 25,000/-.

CIT v. Subha & Prabha Builders Ltd. (2012) 342 ITR 14 / 250 CTR 106 / 70 DTR 291 (Karn.)(HC)

S. 131 : Power - Discovery - Production of evidence - Statement - Retraction - Held not justified - Block assessment order held to be valid [S. 158BD]

The Assessee made a statement in the enquiry conducted by the Department as regards the parting of a sum over and above what was recorded in the sale deed. A reading of the questions and answers shows that the assessee was well aware of the contents of the statement made by him. The statement was recorded in the year 1999 and the assessee thereafter too participated in the enquiry until 2003 and he had no doubt about the truthfulness of the statement made. However, for some reason, best known to him, the assessee in the letter on 26th June, 2003, took a plea that the statements were not recorded in the presence of Dy. Director of Income Tax (Investigation) and statements were not given

voluntarily. Taking note of the time of retraction, in the absence of any materials to substantiate the said contention, coupled with other material documents available in the form of seizure made on the premises of K and A and the consistency in the answers made by the assessee, the contention of the assessee that the Department committed serious error in ignoring the retraction is liable to be rejected. The contention of the assessee that the statement was in violation of the provisions of CPC and CPC, is also not sustainable. Objection of assessee that the notice issued did not indicate the block period also rejected on the ground that the assessee participated in the proceedings and filed the block return for the period. (Block period 1st April, 1989 to 19th August, 1999)

K. Sakthivel v. ACIT (2012) 76 DTR 79 / 252 CTR 531 / 211 Taxman 22 (Mag.)(Mad.)(HC)

S. 131 : Power - Discovery - Production of evidence - Summons - Validity of service of notice [S. 292BB]

Summons under section 131 was served on N who has acknowledged the same. Averments in the reply affidavit show that the petitioner is admitting service of summons on him and also that he appeared before the respondent in pursuance of the summons. Though section 292BB is not retrospective, this section governs all proceedings initiated subsequent to 1st April, 2008, even if such proceedings are in relation to assessment years prior to 1st April, 2008. Thus, petitioner having admitted service of summons and appeared before the respondent in pursuance of the summons, cannot contend that the summons was not duly served on him or that the service was improper for any reason. As regards the contention of the petitioner that the impugned notices were wrongly addressed, petitioner does not have a case that the address indicated in the documents was not that of his residence. Therefore, the fact that in some of the documents the petitioner's address as been shown differently did not invalidate the documents that were served at his residential address which was mentioned by the petitioner himself in his letter and the sworn statement. (A.Y. 2003-04 to 2009-10)

K. M. Mehaboob (Dr.) v. Dy. CIT (2012) 76 DTR 90 / 211 Taxman 52 (Ker.)(HC)

S. 132 : Search and seizure - Warrant of authorization - Condition precedent - Satisfaction - Inspection must be allowed [S. 153A]

For issuing warrant of authorization satisfaction must be based on information coming into possession of department. In the absence of new material with authorities, loose satisfaction notes placed by authorities based on the high growth of company, is not sufficient to meet the requirements of provisions. Accordingly the action of search and seizure was held to be invalid. As the search and seizure was held to be invalid the notices under section 153A was held to be bad in law. The Court also held that if appropriate prayer is made, inspection of such documents may be required to be allowed. (A.Y. 2004-05 to 2009-10)

Spacewood Furnishers Pvt. Ltd. and others v. DIG (Investigation) (2012) 340 ITR 393 / 65 DTR 281 / 204 Taxman 392 / 246 CTR 313 (Bom.)(HC)

S. 132 : Search and seizure - Interrogation till late night amounts to "torture" & violation of "human rights" - Officers are held liable for to pay compensation from their salary

The assessee's premises were searched under section 132 and alleged undisclosed income of Rs. 4.18 crores was detected. The assessee filed a complaint before the Bihar Human Rights Commission stating that interrogation & recording of statement was conducted for more than 30 hours and till the odd hours of the night without any break or interval and this violated his human rights. The Commission upheld the plea and directed the concerned officials to show-cause why the assessee should not be compensated from their salary. The Department filed a Writ Petition to challenge the order, held by the Court:

(i) The interrogation continued till 3.30 a.m. on the second night of search and seizure as per the department's record. The search and seizure manual does not prescribe any time limit for search and survey operation and the same may continue for days if required, but it has to be in keeping with the

basic human rights and dignity of an individual. The purpose of the Act is to give effect to the process of execution of actions of executive and bureaucratic machinery in line of accepted standard of basic human rights which are internationally recognized. The laws and approach to law for its execution must confirm to the charter of human values and dignity. Even a person accused of a serious offence has to be produced before the nearest Magistrate within 24 hours minus the time taken in reaching the Court. There is no possible justification to continue interrogation and keep the assessee awake till 3 a.m. on the second night of search and interrogations. No reason has been assigned as to why the interrogations could not have been deferred till the morning of the next day. The officials could have continued with the interrogation on the next day in the morning after allowing the assessee to retire at an appropriate time in the night. Sleep deprivation method of interrogation amounts to inhuman treatment and violation of Article 3 of the European Convention on Human Rights. The Convention prohibits in absolute terms torture or Inhuman or degrading treatment or punishment. No exception to Article 3 can be made even in the event of Public Emergency threatening the life of the Nation. Accordingly, the department is guilty of violating human rights even though the operations were conducted in best interest of revenue and good faith (Ireland v. UK (1978) ECHR 1, Kalashnikov v. Russia (2002) ECHR 596 & Salmouni v. France (2000) 29 EHRR 403 followed; Rajendran Chingaravelu 2010 (1) SCC 45 distinguished)

(ii) However, as the Commission, without issuing any notice to the officials engaged in the search (as to the violation of Human Rights), issued notice on why monetary compensation be not awarded and be recoverable from their salary, it had pre-judged the officials as being guilty of violation of human rights, without affording them an opportunity of hearing. This was contrary to section 16 of the Protection of Human Rights Act, 1993 and had to be reversed.

CCIT v. State of Bihar, Through Chief Secretary (Rajendra Singh) (2012) 205 Taxman 232 / 71 DTR 268 / 250 CTR 304 (Patna)(HC)

S. 132 : Search and seizure - Warrant of authorization - Firm - Dissolution - Validity -Writ - Warrant of authorization which had been issued in the name of dissolved firm as well as in the name of assessee and his wife cannot be said to be invalid [S. 189, Art. 226]

The assessee and his wife formed a partnership. The firm was dissolved on 19/4/2004. The assessee continued the business of the firm as sole proprietor. Warrant of authorization were issued under section 132 at the business premises and residential premises of assessee and his wife. The notice was issued to file the return for the A.Y. 2001-02 to 2004-05. The assessment was done and when the appeal was pending the assessee challenged the validity of search issue of warrant of authorization by way of writ petition on the ground that the DIT(Investigation) did not entertain a bonafide belief as required under section 132(1) and secondly, warrants of authorisation were issued in name of a dissolved firm which was not in existence in law. The court held that the warrant of authorization was issued in the name of assessee as well as his spouse hence, the issue of warrant of authorization was held to be valid. Accordingly the writ petition was dismissed. (A.Y. 2001-02 to 2004-05)

Hemedra Ranchhoddas Merchent v. DIT (2012) 206 Taxman 596 / 71 DTR 361 / 250 CTR 229 / (2013) 351 ITR 206 (Bom.)(HC)

S. 132 : Search and seizure - Warrant - legal representative - Warrant in the name of mother as legal representative - block assessment in consequence of search held to be valid

Search was carried out to find out the undisclosed income of deceased P. Balaji. On his demise the estate was represented by his legal heirs including the minor son. The estate was represented by the minor through his mother. Block assessment was made pursuant to the search made in the premises of the deceased and the warrant in the name of mother as a representative of the legal heir (Minor son) of the deceased was held to be valid. The High Court confirmed the order of Tribunal and dismissed the appeal of assessee. (Block period 1988 to 1997-98)

P. Balaji v. Dy. CIT (2012) 251 CTR 418 / 75 DTR 6 (Mad.)(HC)

CIT v. P. Shanthi (Smt.) LR of Minor P. Balaji (2012) 251 CTR 418 / 75 DTR 6 (Mad.)(HC)

S. 132 : Search and seizure - Warrant - No evidence produced by persons carrying silver articles to establish ownership - Action of authorities held proper - Criminal Court - Appropriate Authority [S. 132A, Cr. P.C. S. 451]

The restrictions placed by the provisions of sections 132 and 132A of the Act, and rule 112A of the Income-tax Rules, 1962, are not unreasonable restrictions on the freedom under articles 19(1)(f) and (g) or Article 14 of the Constitution. No documentary evidence was produced by the persons carrying silver ornaments and articles in response to inquiries made at the time of recording of statements under section 131 of the Act to establish the source, acquisition and ownership of the silver articles. Thus, the act on the part of the concerned authority could not be said to be unreasonable justifying interference at this stage. Section 451 of the Code of Criminal Procedure, 1973, makes the criminal court custodial egis of the property produced before the court in connection with the case regarding which an offence appears to have been committed or which appears to have been used for the commission of the offence. Therefore, the contention of the petitioners that the criminal court was not the appropriate authority or the person in terms of sub-section (2) of section 132A was not tenable.

Sunil Vidhyasagar Gat & Anr. v. Shalini Verma Dy. Director of Income-tax (Invt.) & Ors. (2012) 347 ITR 1 / 249 CTR 172 / 69 DTR 233 (Guj.)(HC)

S. 132 : Search and seizure - Stock-in-trade - Seizure of stock-in-trade was directed to be returned in view of specific provision contained in proviso to section 132(1)((iii)

Section 132(1)(iii), empowers the authorized officer to seize any such books of account, other documents, money billion, jewellery or other valuable article or thing found as a result of such search which represent either wholly or partly undisclosed income or property of the person, however, the proviso carves out an exception. It provides that bullion, jewellery or other valuable article or thing, being stock-in-trade of the business, found as a result of search shall not be seized but the authorized officer shall make a note or inventory of such stock-in-trade of the business, therefore the court held that in view of the specific provision contained in proviso to section 132(1)(iii) and third proviso to section 132(1)(v), bullion, jewellery or other valuable article or things being stock-in-trade of business found as a result of search could not be seized, even if said stock-in-trade represents wholly or partly undisclosed income or property of the assessee. On writ the Court directed the Income tax authorities to return the jewellery seized.

Puspa Ranjan Sahoo v. ACIT (2012) 252 CTR 113 / 75 DTR 341 (Orissa)(HC)

S. 132 : Search and seizure - Authorisation in joint names - In view of section 292CC with retrospective effect from 1st April, 1976, authorization in joint names was held to be valid, and matter was set aside to Commissioner(Appeals) to decide the appeal on merits [S. 292CC]

The Court held that the effect of insertion of section 292CC with retrospective effect from 1st April, 1976 is that (1) it is not necessary for the authorities to issue an authorization under section 132 or requisition under section 132A separately in the name of search person; (2) if an authorization / requisition has been issued in the names of more than one person, it shall not be construed that it was issued in the name of Assessing Officer or BOI, consisting under section 132A in the names of more than one person, the assessment or reassessment can be made separately in the name of search of the person mentioned in the authorization / requisition. As the provisions of section 292CC have come into force retrospectively i.e. from 1st April, 1976, it shall be deemed that the aforesaid provision was on the statute book i.e. The IT Act, 1961 since 1st April, 1976 and the consequence of issue of a warrant of authorization under section 132 if issued in joint names of more than one person has to be adjudged in the light of the provisions of section 292CC. In the present case the warrant of authorization under section 132 has been issued on 10th Nov., 2006 in the joint names of three persons. In view of section 292CC with retrospective effect from 1st April, 1976, authorization in

joint names was held to be valid, and matter was set aide to Commissioner(Appeals) to decide the appeal on merits. Both the orders passed by the Commissioner(Appeals) and the Tribunal are set aside and the matter was remanded to the Commissioner(Appeals) to decide the appeal on merits. (A.Y. 2001-02 to 2006-07)

CIT v. Devesh Singh (2012) 252 CTR 356 / 76 DTR 403 / 209 Taxman 267 (FB)(All.)(HC)
CIT v. Yogendra Singh (2012) 252 CTR 356 / 76 DTR 403 / 209 Taxman 267 (FB)(All.)(HC)

S. 132 : Search and seizure - Warrant of authorization - Law applicable - Effect of amendment of section 132(1) w.e.f. 1-6-1994 - Additional Director has power to issue authorization

The Finance (No. 2) Act, 2009 has inserted the words "Additional Director" in section 132(1) of the Act, with effect form June 1, 1994, besides other authorities. Therefore, the Additional Director has the power under section 132(1) to issue search and seizure warrant.

Held accordingly, allowing the appeals, that the search action on the basis of the authorization of the additional director was valid. Accordingly the search action on the basis of the authorization of the Additional Director was valid.

CIT v. Trilochan Pratap Singh & Ors. (2012) 349 ITR 314 (All.)(HC)
CIT v. Suhail Ahmad (2012) 349 ITR 314 (All.)(HC)
CIT v. Praveen Suhail (2012) 349 ITR 314 (All.)(HC)
CIT v. Azad Education Society (2012) 349 ITR 314 (All.)(HC)

S. 132 : Search and seizure - Authorisation - Reason to believe

Income tax department based on the records of the year 2002 and the report of the Addl. Director after visiting the clinic in 2005 on four occasions alongwith decoy patients, and having examined the IT returns and balance sheets in which negligible income was returned, authorized the search, there was no illegality in recording the satisfaction note by the competent authorities based on relevant and credible evidence collected by the Dept. Accordingly the writ petition filed by the Assessee was dismissed.

Dr. Roop & Ors v. CIT (2012) 254 CTR 14 / 79 DTR 56 / 209 Taxman 421 (All.)(HC)

S. 132 : Search and seizure - Authorization - Warrant in joint names / group name Held to be not invalid - Orders of Tribunal set aside

All the concerns are housed in one and the same building and the department proceeded to search the premises as it a group concerns with common store rooms and common facilities. All the concerns are owned and managed by same party though under separate group names and concerns for the purpose of income tax. When the notice was issued the assessee has not taken objection. It was before the Tribunal the assessee raised the objection stating that the warrant was not issued separately. The Tribunal without reading the entries in the prescribed form, up held the claim of assessee. On appeal the court held that, it was held that search warrant issued in the name of group of concerns, names of each and every assessee separately and specifically mentioning the premises to be searched where all the concerns are housed could not be said to be invalid. Order of Tribunal set aside and the appeals are restored back to Tribunal for decision on merits.

CIT v. Khyber Foods & Anr. (2012) 254 CTR 629 (Ker.)(HC)

S. 132 : Search and seizure - Survey - Conversion - Conversion of survey into search without application of mind held to be invalid - Consequently all proceedings including the impugned assessment order held to be null and void

There was survey on 6-2-2003 at business premises of the assessee, and detailed inventory was prepared. Survey was converted into search. On verification of satisfaction note the Tribunal found that the satisfaction note has been prepared after the officials of the department were stoned and incriminating documents were snatched. The Additional Commissioner has put up the satisfaction

note for conversion of survey into search. The Commissioner authorized the search on the basis of satisfaction note of Additional Commissioner. The Tribunal after examining the records found that there being nothing on the record to suggest that reason for conversion of survey in to search nor the recorded reason showed that the assessee would not comply with the directions if he is called upon to produce. There was no material before the department to convert the survey in to search. The Tribunal also observed that the department has not found nothing other than what was inventorised during the survey, therefore the search held to be invalid.

Badri Ram Choudhary v. ACIT (2012) 67 DTR 107 / 145 TTJ 7 (Jodh.)(Trib.)

S. 132(4) : Search and seizure - Statement on oath - Retraction - Computation of undisclosed income - Additions made on the basis of statement held to be valid. [S. 158BB, 158BC]

In the course of search action the statement of assessee was taken under section 132(4), the assessee made admission of undisclosed income. The statement was retracted thereafter. The Assessing Officer made the additions on the basis of statement under section 132(4). In appeal the First appellate authority made some modifications with regard to additions of one property which was accepted by revenue. Assessee challenged the additions confirmed by the Commissioner(Appeals). The Tribunal deleted the additions on the ground that additions cannot be made only on the ground of statement under section 132(4). On appeal to High Court the Court held that the assessee has not proved that statement recorded under section 132(4) was due to threat or coercion and further having failed to prove that the amounts shown in documents were the only payments made the Tribunal was not right in deleting the additions. The Court also observed that the retraction made by the assessee can only be considered as self serving afterthought and no reliance can be placed on the same to disbelieve the clear admission made in the statement. (Block period 1988-89 to 1998-99)

CIT v. O. Abdul Razak (2012) 68 DTR 237 / 2012 Tax LR 505 /207 Taxman 193 (Mag.) (2013) 350 ITR 71 (Ker.)(HC)

Editorial:- The Supreme Court has granted special leave to the assessee to appeal against this judgment (2013) 350 ITR 4(St.)/(2013) 216 Taxman 208 (Mag.)(SC)

S. 132(4A) : Search and seizure - Presumption - Block assessment - Diary seized -Presumption is applicable [S. 158BC]

In the course of search a diary was found which contained the noting of higher value of value purchase of property than shown in the books of account. The author of the diary was son of the partner, who stated that he has written the diary as per instruction of his partner. On the basis of diary addition was made in the block assessment. The addition was deleted by the Tribunal. On appeal the court held that the presumption under section 132(4A) is applicable hence, addition is justified in block assessment as the author of diary was son of the partner.

CIT v. Ambika Appalam Depot (2012) 340 ITR 497 / 73 DTR 112 (Mad.)(HC)

S. 132(4A) : Search and seizure - Presumption - Expenditure shown in the documents must be allowed [S. 37(1), 68]

The assessee's business was to charter and operate flight for transportation of goods. Consequent to a search, block assessment was made against the assessee in which, on the basis of the documents seized, certain sums were added under section 68 of the I.T. Act, 1961.Held, dismissing the appeals, (i) that if the revenue was of the opinion that the expenses claimed towards green boxes was inadmissible or was excessive, or not genuine, in order to reject the entries in the books of account and other documents of the assessee seized during the search, it ought to have relied on other materials. Having once drawn the presumption that the contents of the documents of the assessee taken into possession during the search were true, the revenue could not, consistently with that presumption, have proceeded to require the assessee to produce materials in support of the expenditure entries. Such an inconsistent approach in respect of the contents of the same book was

founded only on suspicion that they were not genuine. However, suspicion cannot replace proof. Moreover, the full effect of the presumption should be given effect, whenever the statute directs a particular nonexistent state of affairs to be assumed. Therefore, in the absence of any materials in the form of documents, the revenue could not have denied the benefit of any expenses which would otherwise have ensured to the assessee, as an allowable deduction under section 37(1).
(ii) That in so far as the heads of expenses were concerned, the revenue was unable to show how any of them were prohibited by law or amounted to offences. (Block period 1-4-1998 to 20-8-1998)
CIT v. Indeo Airways P. Ltd. (2012) 349 ITR 85 / 79 DTR 289 (Delhi)(HC)

S. 132A : Powers - Requistion of books of account - Unexplained cash - Seized by police - Writ is not maintainable - Warrant of authorization is held to be valid - Article 226
Cash of Rs. 6.5 Lacs was seized by police from the vehicle in which the petitioner was travelling. Thereafter warrant of authorization was issued under section 132A, by Director of IT (Inv.) requiring the police authorities to deliver the seized cash to the Income-tax department and the cash was deposited in Court. Assessee filed a writ petition to quash the proceedings on the ground that the amount of Rs. 6.50 seized from him on 23rd Jan., 2001 was the amount received by him on sale of agricultural lands and as against sale of house on various dates beginning from 3rd June, 1994. The Court held that it was not clear how and under what circumstances the amounts received by the petitioner during the period of six years were kept by him or were carried by him on the said date. As the explanation was not a convincing, the writ is not maintainable under Article 226 of the Constitution of India.
Atta Husain v. DIT (Investigation) & Ors. (2012) 246 CTR 207 / (2011) 60 DTR 25 (MP)(HC)

S. 132A : Powers - Requisition of books of account - Reason to believe - Recovery of cash and silver - Requisition held valid
Police recovered about 118 kgs. of silver and about Rs. 4 lakh in cash from the petitioner in a hotel and later tried to conceal his identity by not giving out his correct name or residential address and could not disclose the source of these possessions, there was 'reason to believe' for the Income Tax Authority to come to the conclusion that there was a likelyhood of non-disclosure of these assets and therefore, impugned requisition issued by the Income Tax department to the police is held to be valid under section 132A.
Krishna Gopal v. DIT (Investigation) (2012) 66 DTR 231 / 247 CTR 239 (MP)(HC)
S. 132B : Application of seized or requisitioned assets - Interest - Shares used as working capital was seized, interest is not payable on value of such shares
Assessee was a member of the Madras Stock Exchange carrying on business as a share broker. During a search the shares and debentures were also seized. The shares were released subsequently on different dates. The Assessee claimed that the shares formed part of his working capital and he should be paid interest on the shares. The claim was rejected. On writ petition against the order, the dismissing the petition the Court held that merely because the shares seized did form part of the capital assets of the petitioner and the petitioner as jobber was in the process of buying and selling shares which was his vocation, it did not mean that the shares should be construed as money, for the purpose of claiming interest. (A.Y. 1991-92, 1992-93, 1993-94)
Anil Kedia v. Settlement Commissioner of Income-tax and Wealth-tax (2012) 341 ITR 613 / 250 CTR 322 / 71 DTR 228 (Mad.)(HC)

S. 132B : Application of seized or requisitioned assets - Pendency of penalty proceedings - Expression "penalty levied" in section 132B(1) should be read as penalty to be levied in a proceeding under section 271(1)(c) [S. 271(1)(c)]
Expression "penalty levied" in section 132B(1) should be read as penalty to be levied in a proceeding under section 271(1)(c); section 132B(1) therefore entitles the I.T. department to retain the seized

gold in question with them until penalty is levied and apply the same towards the liability so determined, provided the assessee is in default or deemed to be in default. (A.Y. 2003-04 to 2009-10)
Sree Balaji Refinery v. Dy.CIT (2012) 71 DTR 297 / 208 Taxman 383 / 250 CTR 297 (Ker.)(HC)

S. 132B : Application of seized or requisitioned assets - Cash [S. 132]
Authorised Officer conducted a serach and seizure under section 132 upon assessee, who was close assossciate of "B". Commsiissioner(Appeals) confirmed the capital gain to be asseaable in the hands of assessee, however directed the Assessing Officer to ive credit to cash seized in the hands of "B" against the tax liability of assessee. The Court held that when money seized was already adjusted against the tax liability of "B" and there was no material to show that money seized belonging to assessee, direction issued by Commissioner(Appeals) to give credit of money seized to assessee was unjustified. Appeal of revenue was allowed. (A.Y. 1992-93)
CIT v. B.Sumangaladevi (Smt) (2013) 352 ITR 143/212 Taxman 362 (Karn.)(HC)

S. 132B : Application of seized or requisitioned assets - Cash and other assets - Assets seized from partners cannot be adjusted against advance tax liability of firm
During the course of search proceedings, cash and other documents from business premises as well as residential premises of partners of assessee firm were seized. After completion of assessment of the firm, the assessee filed application under section 154 and requested the Assessing Officer to adjust payment of Rs. 1.52 croresin P.D. account against tax liability of assessee. Revenue authorities were rejected the application. The Tribunal held that in view of provisions of section 132B(3), Assessing Officer cannot apply seized assets for discharge of liability of person other than person from whose custody assets were seized. Since in instant case, unexplained cash and jewellery were seized from partners of assessee firm said, unexplained cash and jewellery could be adjusted against partners of firm and not firm. Even otherwise since the request for adjustment of amount of PD had been made by concerned persons / partners after due date of payment of advance tax, request made could be considered only against regular and final tax liability of assessee and not against advance tax liability. (A.Y. 2007-08)
Summer Builders v. Dy. CIT (2012) 49 SOT 210 (Mum.)(Trib.)

S. 133A : Survey - Statement - Survey does not empower any ITO to examine any person on oath, statement recorded under section 133A has no evidenciary value - Addition cannot be made merely on the basis of such statement [S. 69]
The Tribunal deleted the addition made by the Assessing Officer on the basis of statement recorded during the survey proceedings. In an appeal before the High Court, the High Court by passing a detailed order and referring the circular of Board dated 10th March, 2003 has held that merely on the basis of statement recorded in the Course of survey, which was retracted subsequently addition cannot be made. High Court explained the difference between section 132(4) and section 133A. High Court held that statement obtained under section 133A would not automatically bind upon the assessee and confirmed the order of Tribunal. On appeal by the Department to the Apex Court, the Court held that in view of the concurrent findings of fact, the civil appeal of department was dismissed. (A.Y. 2001-02)
CIT v. S. Khader Khan Son (2013) 352 ITR 480 / (2012) 210 Taxman 248 / 79 DTR 184 / 254 CTR 228 (SC)
Editorial:- View of Madras High Court in CIT v. S. Khader Khan Son (2008) 300 ITR 157 (Mad.) affirmed.
Instruction No.: F. No 286/2/2003 -IT (Inv) dt 10-3-2003 (April 2003 AIFTP Journal P. 25)

S. 139 : Return of income - Revised computation - Revised statement is nor revised return, assessment has to be based on as per original return

Assessee cannot revise his return by way of filing a revised statement of income, after filing original return. In the absence of revised return as prescribed under section 139(5), Assessing Officer is bound to make the assessment as per original return. (A.Y. 2006-07)

Orissa Rural Housing Development Corporation Ltd. v. ACIT (2012) 343 ITR 316 / 66 DTR 73 / 247 CTR 137 / Vol. 42 Tax L R 219 / 204 Taxman 673 (Orissa)(HC)

S. 139 : Return of income - Electronic filing of return - Non-receipt of form ITR-V by the department - Assessee is permitted to file the return

Assessee furnished adequate material to show that after filing the return electronically, it had also submitted Form ITR-V by ordinary post thrice the impugned communications issued by the Department treating the return as invalid on the ground that Form ITR-V has not been received is thoroughly misconceived, since the order of assessment for the relevant A.Y. has still not been passed, assessee is permitted to file a verification of the return before the Assessing Officer with in a period of one week. (A.Y. 2009-10)

Crawford Bayley & Co. v. UOI (2012) 343 ITR 232 / 66 DTR 157 / 246 CTR 459 / 204 Taxman 598 (Bom.)(HC)

S. 139 : Return of income - Carry forward and set off of loss - Return filed within extended time loss is allowed to be set off

For the A.Y. 1986-87, the assessee claimed to carry forward the share of loss from the association of persons determined in the previous year to be set off for the future years. The Assessing Officer held that in view of fact that association of persons did not file the return of income for the A.Y. under section 139(1) of the Act or with in such time as granted by the department is not entitled to carry forward the loss. In appeal Commissioner(Appeals) held that the assessee had filed the return of income within the extended time granted by the Assessing Officer is entitled to be set off. The view of Commissioner(Appeals) was confirmed by Tribunal. On appeal by revenue the Court held that as the return of income was filed within extended time, the assessee is allowed to be carry forward and set off of loss. (A.Y. 1986-87)

CIT v. Arunajyothi Balasubramanian (2012) 345 ITR 81 (Mad.)(HC)

S. 139 : Return of income - Revised return - Loss - Carry forward and set off is allowed [S. 70, 71, 80]

Assessee filed the original return under section 139(1) declaring the positive income. Assessee found certain mistake thereafter and filed revised return declaring the loss and to be carried forward and set off in future. The Tribunal held that the revised return to be treated as valid return and the assessee is entitled to carry forward of 'long term capital loss'. (A.Y. 2005-06)

Ramesh R. Shah v. ACIT (2012) 65 DTR 104 / 143 TTJ 166 (Mum.)(Trib.)

S. 139 : Return of income - Assessment can be below the returned income or undisclosed income [S. 143(3), 158BC]

There is no basis for determining the undisclosed income even on the returned income offered as precautionary measure. Assessing Officer is directed to determine the undisclosed income accordingly without reference to any admitted income in the return filed under protest.

United Phosphorous Ltd. v. Dy. CIT (2012) 67 DTR 395 / 144 TTJ 683 (Mum.)(Trib.)
ACIT v. United Phosphors Ltd. (2012) 67 DTR 395 / 144 TTJ 683 (Mum.)(Trib.)

S. 139 : Return of income - Loss carry forward - Loss finally determined after giving effect to order of the appellate authorities has to be carried forward

Assessee filed the return of income disclosing the nil income. After giving effect to the order of appellate authorities the assessed income was loss. The Assessing Officer refused to carry forward the

loss determined. The Tribunal held that once the loss is determined the same has to be carried forward as per section 72 of the income tax Act. The Tribunal has directed the Assessing Officer to allow the carry forward the loss determined after giving effect to the appellate order. (A.Y. 1999-2000)
ACIT v. Mehsana Distric Co-operative Milk Producers Union Ltd. (2012) 67 DTR 470 / 145 TTJ 107 / (2011) 46 SOT 218 (Ahd.)(Trib.)

S. 139 : Return of income - Electronic filing of return is not mandatory, hence, return filed manually before due date cannot be ignored [S. 80IC]
It is directed by CBDT as to there is no provision in Act or Rules making electronic filing of return mandatory. Hence, Return filed manually before due date cannot be ignored. Thus, Denial of deduction under section 80IC on ground electronic return filed only after due date is not permissible. (A.Y. 2008-09)
Gemini Communication Ltd. v. ACIT (2012) 19 ITR 1 (Chennai)(Trib.)

S. 139 : Return of income - Revised return cannot be filed where original return was not filed in time, however additional claim could be made before appellate authority [S. 32]
Revised return cannot be filed where original return was not filed in time. The Tribunal l held that an additional claim could be made before appellate authority and he is duty bound to consider the same. Accordingly the depreciation allowance under explanation 5 of section 32 is held to be allowable. (A.Y. 2007-08)
Rakesh Singh v. ACIT (2012) 139 ITD 128 / (2013) 152 TTJ 46 / 82 DTR 235 (Bang)(Trib.)

S. 139 : Return of income - Newly established undertaking - For claiming deduction under section 10A, filing of return under section 139(1) is mandatory [S. 10A(IA), 234A]
The special bench was constituted to decide the following question, "Whether the proviso to section 10A(IA) of the Income-tax Act which says that no deduction under section 10A shall be allowed to an assessee who does not furnish a return of his income on or before the due date specified under section 139(1) is mandatory or merely directory?". The Tribunal held that provisions of section 10A(IA) are mandatory and not directory; deduction under section 10A cannot be allowed to an assessee who does not furnish return on or before due date specified under sub section (1) of section 139. The charging of interest is held to be mandatory. When one of the consequences for not filing return of income within due date prescribed under section 139(1) is mandatory then other consequences cannot be held to be directory and the same is also mandatory. (A.Y. 2006-07)
Saffire Garments v. ITO (2013) 140 ITD 6 / 151 TTJ 114 / 20 ITR 623 / 81 DTR 131 (SB)(Rajkot)(Trib.)

S. 139 : Return of income - Capital gains - Non-resident - Investment in shares - Transfer pricing - MAT - DTAA - India-Mauritius - Capital gains on sale of shares to group company - Filing of return of income - India-Mauritius DTAA - Capital gain in hands of Mauritian applicant - Exempt under Article 13 - Transfer pricing and Minimum alternative tax provisions be applicable. Return of income is to be filed compulsory [S. 2(14), 92, 115JB, 195, Art. 13(4)]
The applicant incorporated in Mauritius was part of Glaxo Smithkline group of companies (GSK group). It claimed to be a tax resident of Mauritius. It had held the shares of Glaxo Smithlkine Pharmaceuticals Limited ('GSKPL') (a company incorporated in India), as investment so as to benefit from the profits accruing in the long term. As a part of reorganization of the group structure, the applicant proposes to transfer the shares of GSKPL to group company GSK Pte, the Singapore Company. The transfer was for cash consideration at fair market value and off-market.
The issues were whether such transfer of shares is taxable in India, applicability of TP provisions, MAT and whether return of income should be filed in India. The Revenue contented that the whole scheme devised by the group is one for avoidance of capital gains in India by taking advantage of the

India-Mauritius DTAC and that there is round tripping as well as treaty shopping and such an attempt should not be allowed to succeed.
Authority observed that even if one takes it that there was treaty-shopping, that has been held to be not taboo in UOI v. Azadi Bachao Andolan, by the Supreme Court. It hence ruled that the capital gains would not be chargeable to tax in India in view of paragraph 4 of Article 13 of the DTAC between India and Mauritius.
While considering applicability of TP provisions, it took a view contrary to earlier rulings. After considering the purpose for which sections 92 to 92F are enacted and on an interpretation of its provisions under the golden rule of construction, it observed that applicability of section 92 does not depend on the chargeability under the Act. Whether ultimately the gain or income is taxable in the country or not, sections 92 to 92F would apply if the transaction is one coming within those provisions.
Further, it held that it would be mandatory for the foreign company to file the return of income so as to take the benefit of DTAA as, in terms of section 90(2) of the Act, it has to be shown that the benefit of a DTAA is being claimed, that the claimant is eligible to make that claim and that DTAA is more beneficial to the concerned person, which cannot be done without filing return of income.
As regards applicability of MAT provisions it ruled that they would equally apply to a foreign company as section 115JB is an overriding provision. It observed that there may be practical difficulties for foreign companies to prepare an account in terms of Schedule VI of the Companies Act, but that is no reason to whittle down the scope of section 115JB of the Act. The difficulties are for the legislature to consider and remove and not for itself.
Castleton Investment Ltd. (2012) 348 ITR 537 / 252 CTR 131 / 211 Taxman 282 (AAR)
SmithKline Beecham Port Louis Ltd. (2012) 348 ITR 556 / 252 CTR 255 / 211 Taxman 282 (AAR)

S. 139(4) : Return of income - Notice - Notice under section 142(1) cannot be issued after time - Limit for issuance of notice under section 143(2) has expired
The Assessing Officer not to issue notice under section 142(1) for the purpose of making an assessment after filing of return after time limit of the issuance of notice under section 143(2) has expired. (A.Y. 2007-08)
Madan Singh Kangarot v. ITO (2012) 134 ITD 379 / 145 TTJ 262 / 69 DTR 113 (Jp.)(Trib.)

S. 139(5) : Return of income - Revised return - Intimation does not constitute assessment - Revised return held to be valid [S. 143(1)(a)]
A revised return filed within the time limited allowed under section 139(5) of the Act cannot be treated as invalid as the original return was proceed and an intimation under section 143(1)(a) was issued to the assessee before filing the revised return, as the intimation under section 143(1)(a) does not constitute assessment. (A.Y. 2005-06)
Tarsem Kumar v. ITO & Ors. (2012) 80 DTR 164 / (2013) 256 CTR 116 / 214 Taxman 70 (Mag.)(P&H)(HC)

S. 142(1) : Inquiry before assessment - Limitation - Notice - Held to be invalid
By Finance Act, 2006, the legislature has added proviso in section 142(1)(i) to the effect that an assessment framed pursuant to a notice issued under section 142 after the end of the A.Y. would also be valid, therefore, notice issued after the end of the relevant A.Y. i.e. after 31stMarch, 1988 was not invalid. (A.Y. 1997-98)
DIT v. Ericsson A.B. (2012) 343 ITR 470 / 66 DTR 1 / 246 CTR 422 / 204 Taxman 192 (Delhi)(HC)
DIT v. Ericsson Radio System A.B. (2012) 343 ITR 470 / 66 DTR 1 / 246 CTR 422 / 204 Taxman 192 (Delhi)(HC)

DIT v. Metapath Software International (2012) 343 ITR 470 / 66 DTR 1 / 246 CTR 422 / 204 Taxman 192 (Delhi)(HC)

S. 142(1) : Inquiry before assessment - Validity - Notices held to be valid [S. 143(2)]

Section 142(1) empowers the Assessing Officer to issue notice under section 142(1) for production of accounts and documents for the purpose of making assessment. Notice under section 143(2) is issued requiring the assessee to produce his accounts, evidences and particulars on which the assessee may rely in his support of his claim made in the return. On the facts the notice under section 142(1) was issued on 3rd October, 2008 where as notice under section 143(2) was issued on 10th October, 2007. There is no sequence prescribed as to what manner notices under section 142(1) and 143(2) are to be issued, therefore, there is nothing to say that notice under section 142(1) should precede notice under section 143(2). Therefore notice issued under section 143(2) on 10th October 2007 is within the period of limitation. (A.Y. 2006-07)

Orissa Rural Housing Development Corporation Ltd. v. ACIT (2012) 343 ITR 316 / 66 DTR 73 / 247 CTR 137 / Vol .42 Tax L R 219 / 204 Taxman 673 (Orissa)(HC)

S. 142(2A) : Inquiry before assessment - Special audit - Condition precedent - Direction issued by the Assessing Officer for a special audit, without considering the objections of assessee was liable to be set aside as it violates principle of natural justice

The books of account was audited and the returns were filed along with the audited profit and loss account. There was survey proceedings in the A.Y. 2008-09 and it was found that purchases from 11 parties were bogus. It was sated that the findings recorded during the course of assessment proceedings for the A.Y. 2008-09 and the material impounded during the survey indicate a similar state of affairs for other A.Y. starting from A.Y. 2005-06. The assessee was given show cause notice by the Assessing Officer as to why a special audit should not be ordered for the A.Y. 2005-06, 2006-07 and 2007-08 on the grounds that purchases made from eleven parties were bogus. The assessee has filed a detailed reply in respect of show cause notice, however without considering the reply the Assessing Officer referred the matter to special audit. The assessee challenged the said order directing for special audit by way of writ petition. The Court allowing the writ petition held that there is violation of the principle of natural justice on the part of the Assessing Officer in issuing a direction for special audit under section 142(2A), without considering the objections of the assessee, accordingly the court directed the Assessing Officer to pass an order considering the objections raised by the assessee and upon affording to the assessee a reasonable opportunity of being heard in terms of section 142(2A). (A.Y. 2005-06 to 2007-08)

Nickunj Eximp Enterprises Pvt. Ltd. v. ACIT (2012) 346 ITR 6 (Bom.)(HC)

S. 142(2A) : Inquiry before assessment - Special audit - Opinion of the Assessing Officer as to complexity of accounts - Approval was granted same day without giving an opportunity is held to be invalid

Assessing Officer having submitted a report to the CIT expressing a clear opinion that "the apparent complexities noticed and confronted to the assessee have been answered by the assessee" and that the relevant details of the issues raised in the show cause notice are being examined in the assessment proceedings, there could be no approval for audit under section 142(2A) by CCIT; fresh proposal for special audit initiated by Assessing Officer on the very next day stating that the reply of the assessee needs detailed examination in view of the complexity of the accounts was based on vague and unconvincing reasons and did not justify the approval for special audit; such approval is not valid also for the reason that no opportunity was given to the assessee to show cause against the fresh proposal and the CCIT accorded approval thereto without serious application of mind, on the very same day. (A.Y. 2009-10)

DLF Commercial Projects Corporation & Anr v. ACIT (2012) 80 DTR 89 / (2013) 212 Taxman 43 (Delhi)(HC)

S. 142A : Estimation by valuation officer - Income from undisclosed source - Reference to valuation officer [S. 69B]

When the books of account in respect of cost of construction have been maintained by the assessee and the same were not rejected, the matter could not be referred to the DVO for assessing the value. (A.Y. 2007-08)

CIT v. Chohan Resorts (2012) 76 DTR 163 / 253 CTR 106 (P&H)(HC)

S. 142A : Estimation by valuation officer - Income from undisclosed sources - Reference to valuation officer - Stamp valuation -Mistake in mention of provision in notice in accordance with law, not invalid- Writ petition was held not maintainable [S. 50C, 69, 292B, Constitution of India, Art. 226]

Mentioning of section 50C in the notice instead of section 142A is not fatal, also saved by section 292B. Section 142A does not require that for exercise of power under section 142A(1), the Assessing Officer should first reject the books of account of the assessee in which he has shown the valuation of such investment, as a pre-condition for enquiring into the same. Even otherwise, third respondent did not accept the valuation shown by the petitioner in its balance sheet and accounts and he was asking for more information to arrive at the fair market value of the petitioner's plant and civil works connected with it. In fact, that can be treated as amounting to rejecting the books of account of the petitioner by implication and hence no formal order rejecting the books of account is necessary. Mistake in mention of provision in notice in accordance with law, not invalid.Writ petition was also not maintainable in view of alternate remedy. (A.Y. 2009-10)

Bharathi Cement Corporation (P) Ltd. v. CIT (2012) 76 DTR 155 / 253 CTR 98 (2013) 356 ITR 74(AP)(HC)

S. 142A :Estimate by valuation officer - Matter remanded [S. 55A]

Assessee constructed a building and admitted cost of construction as Rs. 1.75 crores, Assessing Officer referred matter to District Valuation Officer to estimate cost of construction under section 55A. District Valuation Officer assessed cost of construction at Rs. 2.61 crores. Assessee filed objections to report of District Valuation Officer. Assessing Officer without considering objections raised by assessee worked out difference amount at Rs. 88 lakhs and added same to income of assessee. In view of amendment made to Income-tax Act incorporating new section 142A by Finance (No. 2) Act, 2004, with retrospective effect from 15-11-1972 Assessing Officer had got power to refer matter to District Valuation Officer for purpose of valuation. Since Assessing Officer had proceeded with matter without considering valid objections raised by assessee, matter required to be reconsidered by Assessing officer afresh. Matter remanded. (A.Y. 1998-99, 1999-2000)

CIT v. M. Nagaraja (2012) 211 Taxman 118 (Mag.) / 79 DTR 381 (Karn.)(HC)

S. 143(1)(a) : Assessment - Intimation on basis of return - Details of payment - No power to disallow claim for lack of proof of claim - When proof is required notice for production of evidence in support of return to be issued [S. 43B]

The Assessing Officer under section 143(1)(a) of the Act, in the assessee's return of income for the A.Y. 1989-90, made three adjustments in respect of scientific research expenses of Rs. 82,310/- club payments Rs. 2,577/- and under section 43B Rs. 16,69,470/- totaling Rs. 17,54,357/-. On a writ petition challenging the three adjustments:

Held, allowing the petition, that with regard to the first two adjustments, these were not prima facie adjustments which could have been made by the Assessing Officer in exercise of his power under section 143(1)(a) of the Act. No power was given to the I.T. Officer to disallow a claim for the reason that there was no proof in support of the claim made by the assessee. Only where it was evident from the return as filed, alongwith the documents in support thereof, that a claim of the assessee was

inadmissible, can an adjustment under the proviso be made. If proof in support of the claim was not furnished by an assessee, then for the lack of proof, no disallowance or an adjustment could be made. The only option which was open to the Income-tax Officer, in such a case, was to require the assessee to furnish proof in which case he would have to issue notice under section 143(2). Adjustment could be made only if there was information available in such return that prima facie a claim or allowance was inadmissible. With regard third adjustment the assessee had given details of payments made to PF and also the sales tax does in form of chart, therefore addition not justified. Assessee has shown details of payment made till date of filing of return in the form of chart hence disallowance under section 43B cannot be made. (A.Y. 1989-90)

Easter Industries Ltd. v. UOI (2012) 349 ITR 324 / (2013) 213 Taxman 56 (Mag.)(Delhi)(HC)

S. 143(1)(a) : Assessment - Intimation - Adjustment - Assessing Officer cannot disallow claim and make addition for lack of evidence - Intimation to be set aside

On a writ petition by the assessee, a public sector undertaking, for quashing of intimation under section 143(1)(a) of the Act, and also for quashing the consequential orders. It was held, that if the Assessing Officer wanted to disallow any expenditure for want of proof, he should have issued notice and called for the evidence for deciding the question. The Assessing Officer could not have made the addition for want of documents. The adjustments made were not covered by the scope of section 143(1)(a).

Indian Drugs and Pharmaceuticals Ltd. v. UOI (2012) 349 ITR 32 (Dehil)(HC)

S. 143(1)(a) : Assessment - Prima facie adjustment - Intimation - Addition related to debatable issues and documents not required to be filed with return

For the A.Y. 1989-90, the assessee filed a return claiming loss of Rs. 99,99,575/-. In the adjustment explanatory sheet enclosed with the intimation under section 143(1)(a) of the Act, the Assessing Officer made some adjustments disallowing deductions of cash payments, charity and donations, entertainment expenditure, depreciation, entry tax, welfare cess, employers contribution to provident fund and interest paid to public financial institutions, and created a demand of additional tax. On a writ petition,

Held, (i) that as far as disallowance of cash payments, charity and donation, entertainment expenditure and depreciation was concerned, the adjustments were impermissible and not mandated under clause (iii) of section 143(1)(a) of the Act. These additions related to debatable issues or aspects which required examination of explanation or production of documents which were not required to be filed with the return.

That in respect of entry tax, welfare cess, employers contribution to provident fund and interest paid to public financial institutions, there was failure on the part of the assessee to file the requisite documents as required under section 43B.

The Assessing Officer had acted on the basis of the tax audit report and the documents which were enclosed with the return to make the disallowance in accordance with law. Therefore, the adjustment made by the Assessing Officer was appropriate and in accordance with the then applicable existing provisions. (A.Y. 1989-90)

Abhishek Cement Ltd. v. UOI (2012) 349 ITR 1 (Delhi)(HC)

S. 143(2) : Assessment - Notice - Issue - "Issue" of notice is equivalent to its "service" - Assessment cannot be held to be bad in law

In respect of A.Y. 2009-10, the assessee filed a ROI on 29.09.2009. The last date for service of the section 143(2) notice was 30.09.2010. A notice under section 143(2) was served by affixation at 11.20 p.m. on 30.09.2010. The assessee filed a Writ Petition claiming that under section 282(1), a notice or requisition had to be served either by post or as if it was a summons issued by a Court under the CPC and that service by affixture was invalid. The assessee relied on CIT v. AVI-OIL India P.

Ltd. (2010) 323 ITR 242 (P&H) where it was held that a notice under section 143(2) had not only to be issued, but had to be served before the expiry of 12 months (now 6M) from the end of the month in which the return was furnished. ACIT v. Hotel Blue Moon (2010) 321 ITR 362 (SC) was relied upon to contend that in the absence of a section 143(2) notice, the assessment was invalid. Held dismissing the Petition:

Section 143(2)(ii) provides that no notice shall be "served" on the assessee after the expiry of six months. The question is that what is the meaning of expression 'served'? Is it used literally, so as to mean actual physical receipt of notice by the addressee or the expression 'served' is inter changeable with the word issue. We are of the opinion that the expressions 'serve' and 'issue' are interchangeable. In view of the law laid down in several judgments, the date of receipt of notice by the addressee is not relevant to determine, as to whether the notice has been issued within the prescribed period of limitation. The expression "serve" means the date of issue of notice. The date of receipt of notice cannot be left to be undetermined, dependent upon the will of the addressee. Therefore, to bring certainly and to avoid attempts of the addressee to evade the process of receipt of notice, the purpose of the statute will be better served, if the date of issue of notice is considered as compliance of the requirement of proviso to section 143(2) of the Act. In fact that is the only conclusion that can be arrived at to the expression 'serve" in section 143(2). In CIT v. AVI-OIL India P. Ltd. (2010) 323 ITR 242 (P&H), a literal meaning of the term "service" was taken in ignorance of the binding precedents. It does not lay down any binding principle and is per incuriam. (A.Y. 2009-10)

V. R. A. Cotton Mills (P) Ltd. v. UOI (2012) 70 DTR 439 / 250 CTR 188 (P&H)(HC)

S. 143(2) : Assessment - Notice - Mandatory - Notice deemed to be valid in certain circumstances - Very foundation of the jurisdiction of Assessing Officer was on the issue of the notice under section 143(2), as the notice was not issued the assessment was held to be bad in law [S. 292BB]

The Tribunal held that as the mandatory notice under section 143(2) was not issued the order is bad in law. Revenue filed an appeal before the High Court and contended that the assessee not objected or raised the issue of notice under section 143(2) before the Assessing Officer. On behalf of revenue it was contended that the Supreme Court in ACIT v. Hotel Blue Moon (2010) 321 ITR 362 (SC), did not have an occasion to consider section 292BB as the said section was inserted by the Finance Act, 2008. The Court held that section 292BB is a rule of evidence, which validates the notice in certain circumstances, however, it cannot validate the non issue of notice which is mandatory and very foundation of the Jurisdiction of Assessing Officer, hence non consideration of section 292BB, will not have any effect on the Judgment in Hotel Blue Moon. Hence, the High Court dismissed the appeal of revenue.

CIT v. Mukesh Kumar Agarwal (2012) 345 ITR 29 (All.)(HC)

S. 143(2) : Assessment - Notice - Correct address - Notice was not served on the correct address mentioned in the return, assessment held to be not valid

The Assessing Officer issued a notice under section 143(2) of the Income-tax Act, 1961 to the assessee. The notice could not be served and was received back with the postal remark of the postal authority that no such person existed at the above mentioned address. An inspector was deputed to serve the notice personally but he also reported that the company was not available at the address. The Assessing Officer thereafter served the notice by affixture. The assessment was made ex-parte. On appeal the Commissioner(Appeals) and Tribunal held that the service by affixture was not valid on the ground that the assessee had mentioned a different address in the return of income-tax for the A.Y. 2006-07. On appeal by the revenue, the Court held that no attempt was made to serve the assessee on the correct address which was available with the department and in fact stated in the

return of the income for the A.Y. 2006-07. Subsequent attempt to serve another notice long after the expiry of the limitation period prescribed by the proviso could not help the assessee. (A.Y. 2006-07)
CIT v. Mascomptel India Ltd. (2012) 345 ITR 58 (Delhi)(HC)

S. 143(2) : Assessment - Notice - Block assessment - Notice under section 143(2) was not served - The assessment is bad in law - Proviso to section 292BB was not applicable in a case where the authority did not have jurisdiction to proceed further and make assessment [S. 292BB]
The block assessment under section 158BC was completed without issue of notice under section 143(2). The assessee contended that the assessment was bad in law. The appeal of the assessee was allowed by the Commissioner(Appeals) which was confirmed by Tribunal. On appeal to the High Court by revenue the court up held that order of tribunal by holding that as no notice under section 143(2) of the Act had been served upon the assessee the assessment was bad in law. The Court also held that the proviso to section 292BBB was not applicable in a case where the authority did not have jurisdiction to proceed further and make assessment, therefore, the block assessment was not valid.
CIT v. Bihari Lal Agrawal (2012) 346 ITR 67 (All.)(HC)

S. 143(2) : Assessment - Notice - Jurisdiction - Search and seizure - Notice - Block assessment - Non issue of notice - Assessment held to be bad in law, deeming provision did not have the effect [S. 158BC, 292BB]
Where notice under section 143(2) of the Act is not issued to the assessee, the assessing authority does not have jurisdiction to proceed further and frame block assessment proceedings. The Hon'ble Court further held that provisions of section 292 BB of the Act did not have any effect on the judgment of Apex Court in the case of, ACIT v. Hotel Blue Moon (2010) 321 ITR 362 where in the court held that the very foundation of the jurisdiction of the assessing officer is on issuance of notice under section 143(2) of the Act. On facts there was finding that no notice was issued under section 143(2) hence the block assessment held to be bad in law. The Court also held that non consideration of section 292BB, which is rule of evidence and deeming provision to validate the notice in certain circumstances did not have any effect, when the notice was not served.
Manish Prakash Gupta v. CIT (2012) 68 DTR 112 / 249 CTR 57 (All.)(HC)

S. 143(2) : Assessment - Notice - Served on person, not authorized to receive - Assessee participated in assessment proceedings, therefore the assessment is held to be valid [S. 282, 292BB]
Notice was served on a person who was not authorized to receive. The assessee's authorized representative appeared before the Assessing Officer. The issue of notice as challenged before the Commissioner of Income-tax (Appeals), who up held the validity of assessment, however gave relief on merit. Revenue filed an appeal before the Tribunal and the assessee has filed the cross objection challenging the jurisdiction to make the assessment without issue of notice. Tribunal quashed the assessment order on the ground that there was no valid issue of notice. As the assessment was quashed, the Tribunal has not decided the issue on merits. On appeal by revenue, the Court held that as notice under section 143(2) having been served on a person, though not authorized to receive the same, assessee's representative participated in assessment proceedings on the basis of that notice, assessment order passed thereafter could not be said to be invalid. Accordingly the order of tribunal in ACIT v. Vision Inc. (2010) 130 TTJ 696 (Delhi)(Trib.) is set aside. (A.Y. 2003-04)
CIT v. Vision Inc (2012) 73 DTR 201 / 208 Taxman 153 (Delhi)(HC)

S. 143(2) : Assessment - Notice - Block assessment - Notice was not issued under section 143(2) - Assessment annulled [S. 158BC, 292BB]
Once it is admitted that the Assessing Officer has repudiated the return filed by the assessee under section 158BC the entire proceedings in the absence of notice under section 143(2) subsequent

thereto suffer from lack of jurisdiction. When the notice under section 143(2) was not issued, question of service, or improper service is not relevant. Therefore, section 292BB is not attracted. The Assessment was annulled. The appeal of assessee was allowed.
Nawal Kishore & Sons Jewellers v. CIT (2012) 79 DTR 241 (All.)(HC)

S. 143(2) : Assessment - Notice - Block assessment - Notice is mandatory [S. 158BC, 158BD, 292BB]
Notice under section 143(2) is necessary, where for any reason the Assessing Officer repudiates the return field by the assessee in response to the notice under section 158BC(a) relating to the block assessment section 292BB is a rule of evidence, and not a rule which dispenses with the requirement of giving notice under the Act. In the absence of notice under section 143(2) assessment under section 158BD / 158BC was not sustainable.
CIT v. Parikalpana Estate Development (P) Ltd. (2012) 79 DTR 246 (All.)(HC)

S. 143(2) : Assessment - Notice - Limitation - Return of income - Electronic filing - Date of filing relates back on which it is electronically up loaded, hence notice under section 143(2) beyond limitation - Assessment held to be invalid [S. 139(1), 139D]
The assessee filed the return for the A.Y. 2009-10 electronically on September 25, 2009. Form ITR-V generated by the computer was dispatched to the Centralised Processing Centre at Bangalore by ordinary post on October 5, 2009. The Centralised Processing Centre received form ITR-V on November 29, 2010. Notice was issued under section 143(2) of the Income-tax Act, 1961 on September 6, 2011. The Central Board of Direct Taxes by Circular No. 3 of 2009 ((2009) 313 ITR (St.) 15 dated May 21, 2009 extended the time limit for filing of form ITR-V up to December 31, 2010 or 120 days from the date of uploading of the return, whichever is later. The question was whether the notice dated September 6, 2011 was within time and the assessment valid. Tribunal considering the scheme held that for all practical purposes, the date of filing of the return shall relate back to the date on which the return was electronically uploaded, i.e., September 25, 2009. Therefore, the notice served on the assessee under section 143(2) was beyond the period of six months from the end of the financial year in which the return was furnished and could not be acted upon. Consequently, the assessment order passed by the Assessing Officer cannot stand in the eyes of law. (A.Y. 2009-10)
E. K. K. and Co. v. ACIT (2012) 20 ITR 325 / (2013) 151 TTJ 790 / 81 DTR 396 (Cochin)(Trib.)

S. 143(2) : Assessment - Notice - Sending of notice on address, other than that given in return of income and subsequent returned therof, does not amount to either service or deemed service of such notice [S. 142(1), 143(2), 144, 292BB]
No assessment under section 143(3) or 144 can be said to be have validly made where notice under section 143(2) is not served or where such notice is served beyond prescribed period or improperly served. The Assessing Officer cannot wash off his hands from duty to serve notice under section 143(2) on address given in return, simply on premise that assessee shifted his base to another address at subsequent date. Sending of notice under section 143(2) on address, other than that given in return of income, and its consequent return by postal authorities, does not amount to either service or deemed service of such notice. (A.Y. 2008-09)
Prakash Ramji Gavali v. ITO (2012) 138 ITD 1 / 80 DTR 161/(2013) 152 TTJ 725 (Mum.)(Trib.)

S. 143(3) : Assessment - Dead person - Non-existing amalgamating company - Mere participation by the assessee in such proceedings is of no estoppels against the law, therefore assessment in the name of a company which has been amalgamated with another company and stands dissolved is null an void. [S. 292B]

Assessee filed the return and the fact of amalgamation was brought into the notice of Assessing Officer, it was incumbent on the Income Tax Authorities to substitute the successor in place of "dead person". A company dies on its dissolution as per the provisions of the Companies Act. Therefore assessment order made in the name of assessee is void. Mere participation by the assessee in such proceedings is of no estoppels against the law, therefore assessment in the name of a company which has been amalgamated with another company and stands dissolved is null an void; assessment in the name of a non existing entity is a jurisdictional defect and not merely a procedural irregularity of the nature which can be cured by invoking the provisions of section 292B. (A.Y. 2002-03, 2003-04)
Spice Infotainment Ltd. v. CIT (2012) 65 DTR 391 / 247 CTR 500 (Delhi)(HC)

S. 143(3) : Assessment - Business expenditure - Natural justice - Cross examination - Breach of natural justice / cross examination should be raised at the earliest opportunity - Disallowance of expenses held to be justified [S. 37(1)]
The principle of natural justice cannot be construed in isolation from the factual matrix of the case. Though the Inspectors report was not given to the assessee, the contents thereof were communicated, the identity of persons in question was given and the manner in which the enquiry was held also set out and the assessee was given a chance to explain. Accordingly, the principle of natural justice were substantially complied with at the assessment stage, the assessee did not feel prejudiced categorically indicated that it had submitted whatever materials were within its possession and did not have anything more to submit. It did not ask for a copy of the report or the cross examination of the inspector. If a party fails to avail of the opportunity to cross-examination a person at the appropriate stage in the proceeding, the said party would be precluded from raising such issue at a later stage of the proceedings. Plea of violation of natural justice taken at the appellate stage is an afterthought. Appeal of assessee was dismissed. The disallowance of expenses were confirmed. (A.Y. 1994-95)
Hindusthan Tobacco Company v. CIT (2012) 77 DTR 237 / 211 Taxman 111 (Cal.)(HC)
Editorial:- The view of third member in Dy. CIT v. Hindustan Tobacco Company (2003) 87 ITD 129 (TM)(Kol.)(Trib.), affirmed.

S. 143(3) : Assessment - Income from undisclosed income - No evidence of excess consumption of fuel - Additions to income cannot be made
The assessee was engaged in the business of running a solvent extraction plant and sale of rice bran oil and mustard oil, etc. The Assessing Officer made additions to the income of the assessee. Rs. 17,18,494/- on account of excess fuel consumption. The Tribunal deleted the additions. On appeal to the High Court held that there could not be any addition until and unless it is proved that there had been excess consumption of fuel which was not recorded in the books of account. The Assessing Officer had taken the figure from the auditors report and at the same time he had taken the figure from the profit and loss account without considering the quantity mentioned in the purchase vouchers. Moreover, the Assessing Officer had made the addition on estimate basis which was merely a question of fact. Appeal of revenue was dismissed. (A.Y. 2003-04)
CIT v. Raghuraji Agro Inds. P. Ltd (2012) 349 ITR 260 (All.)(HC)

S. 143(3) : Assessment - Additions to income - Search and seizure - Loose paper - Additions confirmed on the basis of facts - Order is not perverse [S. 132]
During search conducted against assessee, a loose paper was seized which contained reference to several amounts. Statements of assessee were recorded. Assessee disclosed Rs. 6 lakh as his extra income. Assessing Officer, on basis of totals as available on loose paper made further addition of Rs. 31.81 lakhs under head 'income from undisclosed sources'. Tribunal had taken into account all relevant factors, examined evidence on record and reduced addition by Rs. 10 lakhs. On appeal by the assessee the Court held that since conclusions of Tribunal were purely factual in nature and there was

no perversity therein, order of Tribunal could not be upturned. Appeal of assessee was dismissed. (A.Y. 1987-88)
Laxmanbhai J. Patel v. CIT (2012) 211 Taxman 72 (Mag.)(Guj.)(HC)

S. 143(3) : Assessment - Validity - Assessment order without Assessing Officer's signature is void [S. 156, 292B]
The Assessing Officer passed an assessment order under section 143(3) and issued the Income-tax Computation Form (ITNS 150), Demand Notice under section 156 and Penalty Notice under section 271(1)(c). While all the other documents were signed by the Assessing Officer, the assessment order was not. In reply to the assessee's contention that the assessment order was invalid, the department relied on section 292B and Kalyankumar Ray v. CIT (1991) 191 ITR 634 (SC) and argued that the Act does not require the service of an assessment order and the service of a valid ITNS 150 & demand notice was sufficient. Tribunal held rejecting the department's plea:
Section 143(3) contemplates that the Assessing Officer shall pass an order of assessment in writing. If the assessment order is signed then because the computation of tax is a ministerial act, ITNS-150 need not be signed by the Assessing Officer. However, if the assessment order is not signed, then the fact that he has signed the tax computation form and the notice of demand is irrelevant. The omission to sign the assessment order cannot be explained by relying on section 292B. If such a course is permitted to be followed than that would amount to delegation of powers conferred on the Assessing Officer by the Act. Delegation of powers of the Assessing Officer under section 143(3) is not the intent and purpose of the Act. An unsigned assessment order is not in substance and effect in conformity with or according to the intent and purpose of the Act [Kilasho Devi Burman (Mrs.) and other v. CIT (1996) 219 ITR 214 (SC) followed; Kalyankumar Ray (1991) 191 ITR 634 (SC) explained] (A.Y. 2005-06)
Vijay Corporation v. ITO (2012) 50 SOT 33 (URO)(Mum.)(Trib)

S. 143(3) : Assessment - Revised computation - Deduction on interest - Direction to consider the claim and allow
Assessee during the course of assessment proceedings filed revised computation of income and claimed additional deduction in respect of payment of interest. Assessing Officer refused to consider the revised claim on the ground that the assessee has not filed the revised return under section 139(5). On appeal, Commissioner(Appeals) upheld the order of Assessing Officer relying on the Supreme Court decision in Goetze India Ltd. (2006) 284 ITR 323 (SC). Tribunal referring the judgment in Pradeep Kumar Harlakar v. ACIT (2011) 47 SOT 204 (URO)(Mum.)(Trib.) admitted the claim made by the assessee and restored the matter to the file of Assessing Officer with the direction to consider the revised computation of income filed by the assessee and decide the issue a fresh. (A.Y. 2006-07)
Rachna S. Talreja v. Dy. CIT (2012) 16 ITR 53 (Mum.)(Trib.)

S. 143(3) : Assessment - Set aside order by Tribunal - Fresh assessment - In fresh assessment passed pursuant to remand by ITAT, assessee cannot be worse off than what he was in the original assessment order [S. 254(1)]
The Assessing Officer passed a s. 143(3) assessment order in which he disallowed 50% of the expenditure on an ad-hoc basis. This was reduced to 25% by the CIT(A). On further appeal by the assessee, the Tribunal set aside the matter to the Assessing Officer to examine the issue afresh. In the second round of appeal, the Assessing Officer disallowed 100% of the expenditure on the ground that the assessee had already claimed the same expense under some other head and that there was a claim for double deduction. This was upheld by the CIT(A). Before the Tribunal, the assessee argued that once a matter has been set aside by the Tribunal, the assessee cannot be put into a worse situation than what it was at the time of original assessment. Held by the Tribunal upholding the plea:

It is a settled proposition of law that the Tribunal under section 254(1) has no power to take back the benefit conferred by the Assessing Officer or enhance the assessment. Once the matter has been restored by the Tribunal, the income cannot be enhanced from what was determined at the time of original assessment proceedings, which was the subject matter of dispute before the Tribunal. This proposition of law has been upheld by the Supreme Court in Hukumchand Mills Ltd. (1966) 62 ITR 232 (SC) and reiterated in Mcorp Global v. CIT (2009) 309 ITR 434 (SC). Therefore, the enhancement of assessment by making 100% disallowance in respect of free food allowance cannot be sustained and the same is restricted to 50%, as was made by the Assessing Officer in the original round of proceedings. (A.Y. 2002-03, 2003-04)

Kellogg India Pvt. Ltd. v. ACIT (2012) 19 ITR 220 (Mum.)(Trib.)

S. 143(3) : Assessment - Notice - Service of notice at address other than address shown on return which was returned un served, assessment held to be invalid - Provisions of section 292BB is not applicable prior to A.Y. 2008-09 [S. 292BB]

The assessment was completed on the basis that notice issued under section 143(2) was received back unserved. When penalty proceedings were initiated the assessee challenged the assessment order stating that no notice were served on the assessee under section 143(2), as the notice issued was not sent to correct address hence returned un served. The Commissioner(Appeals) dismissed the appeal on the ground that the assessee participated in the proceedings through authorized representative and by virtue of section 292BB, the assessee was precluded from challenging the notice. On appeal Tribunal held that the service of notice at address other than address shown on return, which returned un served held to be not proper service. Provision precluding assessee from taking such objection is not applicable to A.Y. prior to 2008-09, hence the assessment order passed by the Assessing Officer under section 143(2)(ii) was held to be bad in law. (A.Y. 2007-08)

Ashok B. Bafna v. Dy. CIT (2012) 18 ITR 43 (Mum.)(Trib.)

S. 143(3) : Assessment - Natural Justice - Tribunal cannot issue any direction to the Assessing Officer to disclose to the assessee the material relied upon by him for making the addition in a particular manner

Majority view expressed by three members constituting the earlier Special Bench on the question whether the Tribunal should give direction to the Assessing Officer for disclosing complete material in respect of 31 items being in favour of Revenue, the Tribunal cannot issue any direction to the Assessing Officer to disclose to the assessee the material relied upon by him for making the addition in a particular manner or to a particular extent. (A.Y. 1984-85 to 1986-87)

Golden Tobacco Ltd. v. ACIT (2012) 147 TTJ 1 / 72 DTR 123 (SB)(Mum.)(Trib.)

S. 143(3) : Assessment - Demand notice and order served 130 days of completion of assessment order - Held communication is condition precedent to order of assessment becoming effective, order is held to be time barred

It was held that communication is condition precedent to an order of assessment becoming effective. In the instant case, though the assessment order was made on 31st December, 2009 but the demand notice and assessment order was served on same days on 10th May, 2010 i.e. after 130 days late. It was held that the order was barred by limitation. (A.Y. 2007-08)

ACIT v. Tulsi Prasad Mohapatra (Dr) and Anr. (2012) 16 ITR 449 / 145 TTJ 73 (UO) (Cuttack)(Trib.)

S. 143(3) : Assessment - Set aside - Limitation - Despite set aside for "de novo consideration", Assessing Officer cannot look at fresh issues

The CIT(A) disposed off the appeal filed by the assessee by observing "A perusal of the above additions clearly show that the Assessing Officer has made the assessment in a very casual manner…

Considering the heavy additions made and the necessity for making adequate enquiries into the matter, it is considered necessary to set aside the assessment for denovo consideration". In the order passed pursuant to the said order of the CIT(A), the Assessing Officer made additions on issues other than those that were covered in the first order. The assessee challenged this on the basis that even though the CIT(A) had set aside for "denovo consideration", the Assessing Officer could not look into new issues. Held by the Tribunal:
The scope of proceedings after remand depend on the terms of the remand order. If the appellate authority has set aside the assessment and directed the making of a fresh assessment without imposing any restrictions or limitations, the Assessing Officer has the same powers in making fresh assessment as he originally had. However, if any restrictions are placed, the Assessing Officer cannot travel beyond those restrictions. The scope of the remand order has to be determined depending on the subject matter of the appeal and the appellate order read as a whole in its proper context. On facts a perusal of the findings of the CIT(A) shows that he was concerned with the additions made in the original assessment order and it was in the light of the additions made therein, that the assessment was set aside for de novo consideration. This clearly shows that the directions of the CIT(A) for de novo assessment were restricted to the additions made by the Assessing Officer in the original assessment order and, therefore, the Assessing Officer had no jurisdiction to look at other issues. (A.Y. 1996-97)
Gemini Oils Pvt. Ltd. v. ITO (Mum.)(Trib.) www.itatonline.org

S. 143(3) : Assessment - Cash credits - Appeal - Tribunal - Remand - Enhancement [S. 68]
Tribunal remanding matter to Assessing Officer. Assessing Officer enhancing amount relating to cash credits after verification held to be justified. (A.Y. 1990-91)
Siltex India v. ITO (2012) 20 ITR 300/(2013) 58 SOT 82 (URO)(Mum.)(Trib.)

S. 144 : Best judgment aseesment - Books of acconts - Audited - Books of accounts audited cannot be rejected without pointing out specifc defects
The Assessing Officer cannot reject the books of accounts maintained by the assessee without pointing out specific mistake in the books of accounts which are audited by the Chartered Accountant.
ACIT v. Roopchand Tharani (2012) 66 DTR 104 / 249 CTR 326 (Chhattisgarh)(HC)

S. 144 : Best judgment assessment - Findings of fact same as were available to Assessing Officer - Hence, deletion of disallowance justified as a change in stand not be made when finding of facts remained the same [S. 40(a)(ia)]
The assessee derived income from publication and trading books. For the relevant A.Y. the Assessing Officer passed an assessment order under section 144 making certain disallowances. On appeal to Tribunal, it was held that a change in stand could not be made when finding of facts remained the same as were available to the Assessing Officer in view of fact that part deduction of tax on certain payments did not lead to the finding that all expenditure incurred was susceptible to be disallowed under section 40(a)(ia) for want of deduction of tax at source. Hence, the deletion of disallowance was justified. (A.Y. 2008-09)
ITO v. Sahadev Pradhan (2012) 18 ITR 180 (Cuttack)(Trib.)

S. 144C : Reference to dispute resolution panel Draft assessment order - Application for withdrawal of reference - Order passed by the Panel confirming the draft order was not justified - Draft order without jurisdiction
Assessing Officer framed the draft assessment order. Assessee submitted the objection to the Dispute Resolution Panel. Subsequently the assessee came to know that a Clarification had been issued by the Central Board of Direct taxes regarding the objections before Dispute Resolution panel which

clarified that a choice had been given to the assessee to go before the Dispute Resolution panel or prefer normal appellate Channel. The assessee wrote to the Panel to withdraw the reference and pursue the normal appellate Channel. The Dispute Resolution Panel held that as the assessee had chosen to withdraw the appeal hence, the order passed by the Assessing Officer is correct. The Dispute Resolution Panel further directed the Assessing Officer under section 144C(5) of the Act to pass the assessment order in accordance with the draft assessment order passed by him. The Assessee filed the Writ petition against the said order. During pendency the Assessing Officer passed the order. The High Court held that the order of Dispute Resolution Panel is contrary to facts, law and non application of mind. The order has caused immense prejudice to the assessee in the circumstances the order of Dispute Resolution Panel could not be sustained. Consequently the assessment order could not be sustained. The writ petition was decided in favour of assessee. (A.Y. 2006-07)

AIA Engineering Ltd. v. Dispute Resolution Panel and another (2012) 341 ITR 145 / (2011) 240 CTR 287 / 196 Taxman 477 / 54 DTR 111 (Guj.)(HC)

S. 144C : Reference to dispute resolution panel - Order - Matter set a side to pass a speaking order

The order passed by DRP was a non speaking order and not stating objections raised by assessee and reasons also not been given only orders of TPO and Assessing Officer were referred, Tribunal set aside the entire matter to DRP to pass a detailed order stating all objections of assessee and disposing them by giving cogent and germane reasons. (A.Y. 2006-07)

Evalueserve.com (P) Ltd. v. ITO (2012) 134 ITD 546 / 145 TTJ 763 / 16 ITR 442 / 69 DTR 93 (Delhi)(Trib.)

S. 144C : Reference to dispute resolution panel - Constitution - Natural justice - Jurisdiction commissioner cannot be a member of DRP - DRP order is set aside to pass a speaking order

In Hyundai Heavy Industries Ltd. v. UOI (2011) 243 CTR 313 (Uttarakhand)(HC), the Court observed that the jurisdictional Commissioner is not nominated as member of DRP, following the observation of High Court, the Tribunal set aside the order passed by the Assessing Officer. The Tribunal also held that the DRP has not passed a speaking order in conformity with the principles of natural justice and provisions of Act, accordingly the order is set aside and is directed to pass fresh order in conformity with the provisions of Act. (A.Y. 2007-08)

Lionbridge Technologies (P) Ltd. v. Dy. CIT (2012) 137 ITD 229 / 144 TTJ 726 / 68 DTR 7 / 51 SOT 40 (URO)(Mum.)(Trib.)

S. 144C : Reference to dispute resolution panel - Draft Order mistakenly termed as Final Order by Assessing Officer - Corrigendum issued by Assessing Officer rectifying the mistake not prejudicial to the interest of assessee

The Draft Assessment order passed by Assessing Officer was mistakenly termed as Final Order and demand notice was issued along with the order. The Assessing Officer issued a corrigendum and withdrew the demand notice. It was held by the Tribunal that corrigendum issued by Assessing Officer was not prejudicial to assessee. A statutory authority has inherent power to issue corrigendum and once the corrigendum is issued, that mistake is undone and first communication of the Assessing Officer assumes character of the draft order. (A.Y. 2007-08)

Lason India (P.) Ltd. v. ACIT (2012) 50 SOT 583 / 73 DTR 273 / 147 TTJ 481 / 17 ITR 203 (Chennai)(Trib.)

S. 145 : Method of accounting - Valuation of stock - Excise duty is not includible in valuing closing stock

The assessee valued its closing stock without including excise duty. The Assessing Officer held that excise duty had to be included in the closing stock, though the CIT(A), Tribunal and High Court,

upheld assessee's plea. On appeal by the department to the Supreme Court, held dismissing the appeal:
The assessee has been following consistently the method of valuation of closing stock which is "cost or market price whichever is lower." Also, while the Assessing Officer revalued the closing stock, he did not make any adjustment to the opening stock. Excise duty is on the manufacture of the finished product though it is quantified and collected on the selling price. Valuation of unsold stock at the close of the accounting period is a necessary part of the process of determining the trading results of that period. It cannot be regarded as source of profits. The true purpose of crediting the value of unsold stock is to balance the cost of the goods entered on the other side of the account at the time of the purchase, so that on cancelling out of the entries relating to the same stock from both sides of the account would leave only the transactions in which actual sales in the course of the year has taken place and thereby showing the profit or loss actually realized on the year's trading. The entry for stock which appears in the trading account is intended to cancel the charge for the goods bought which have remained unsold which should represent the cost of the goods. (A.Y. 1987-88)
CIT v. Dynavision Limited (2012) 348 ITR 380 / 252 CTR 351 / 76 DTR 351 / 210 Taxman 239 (SC)
Editorial:- View in CIT v. Dynavision Ltd. (2004) 267 ITR 600 (Mad.)(High Court is upheld)

S. 145 : Method of accounting - Valuation of stock - Incentive sugar - To implement the incentive scheme, sugar was rightly valued at levy price which was less than the cost of manufacture of sugar
The assessee company engaged in the business of manufacture and sale of sugar. The assessee valued the closing stock of sugar at levy price which is less than the cost price. Department valued the same at cost price. The question raised before the Apex court was "whether on the facts and in the circumstances of the case, ITAT was right in holding that closing stock of incentive sugar has to be valued at levy price and not cost price".
The Court observed that, valuation of opening and closing stock is very important of true profits. An improper valuation could result in rejection of books of account though all that is needed for rectifying it is to make an addition or necessary adjustment based on proper valuation. Valuation of stock, whatever may be the method should be consistently followed. Method of valuation is generally at cost or the market value whichever of the two, is lower. As the incentive scheme was held to be a capital receipt in CIT v. Ponni Sugars and chemicals Ltd. (2008) 306 ITR 392 (SC), the assessee is right in valuing the closing tock of incentive sugar at levy price which was less than the cost of manufacture of sugar (Cost price). The court also observed that "If we were to accept the case of the Department that the excess amount realized by manufacturer(s) over the levy price was a revenue receipt taxable under the Act ten the very purpose of the incentive scheme formulated by Sampat committee would have been defeated. One cannot have a stock valuation which converts a capital receipt in to revenue income". Appeal filed by the Department were dismissed. (A.Y. 1992-93 to 1997-98) (C.A. No. 7014 of 2012 arising out of SLP No. 9263 of 2009 dated 26-9-2012 and others)
CIT v. Bannari Amman Sugars Ltd. (2012) 349 ITR 708 / 210 Taxman 271 / 254 CTR 91 / 79 DTR 1 (SC)
Editorial:- Decision of Madras High Court in CIT v. Bannari Amman Sugars Ltd. (2012) 349 ITR 709 (Mad.)(HC) affirmed.

S. 145 : Method of accounting - Valuation of stock - Excise duty to be excluded from value of closing stock of finished goods at the end of accounting period, when assessee is following net method for valuing closing stock
The assessee company has been following the net method for valuing closing stock. It includes excise duty at the time of removal of goods. The auditors have out the remark in the notes as under:-

"As per the practice consistently followed, excise duty payable estimated at Rs. 1,43,66,145/- on finished goods held in factory are neither included in expenditure nor valued in such stocks but are accounted for on clearance of goods from factory. The accounting treatment however has no impact on the profit for the year. Following the order of Supreme Court in CIT v. Indo Nippon Chemicals Ltd. (2003) 261 ITR 275 (SC), the civil appeals of department was dismissed. (A.Y. 1995-96, 1997-98)

CIT v. Sri Ram Honda Power Equipment Ltd. (2012) 210 Taxman 577 (SC)

S. 145 : Method of accounting - Valuation of stock - Excise duty to be excluded from value of closing stock of finished goods at the end of accounting period, when assessee is following net method for valuing closing stock

The assessee company has been following the net method for valuing closing stock. It includes excise duty at the time of removal of goods. Following the order of supreme court in CIT v. Shri Ram Honda Power equipment Ltd. (2012) 210 Taxman 577 (SC), Civil Appeal filed by the department was dismissed. (A.Y. 1995-96)

ACIT v. Torrent Cables Ltd. (2012) 210 Taxman 579/(2013) 354 ITR 163/258 CTR 331/85 DTR 392 (SC)

S. 145 : Method of accounting - Lease - In a finance lease, claim for "lease equalization charge" as per ICAI Guidelines is allowable [S. 28(i)]

The assessee received lease charges and claimed a reduction towards "lease equalization charges" on the ground that reduction was in accordance with the Guidance Note dated 20.09.1995 issued by the ICAI in respect of Accounting for Leases and the Accounting Standard AS-1 notified under section 145 which mandated that the accounting policy of the assessee should represent a true and fair view. The Assessing Officer & CIT(A) rejected the claim on the ground that it was a "notional charge" and that the accounting guidelines could not override the Act. The Tribunal, however, allowed the claim. On appeal by the department, held dismissing the appeal:

(i) As the method for accounting for lease rentals was based on the Guidance Note "Accounting For Leases" issued by the ICAI, the Assessing Officer was not entitled to disregard the same. The Guidance Note reflects the best practices adopted by accountants the world over and the fact that it was not mandatory is irrelevant. The ICAI is recognized as the body vested with the authority to recommend Accounting Standards for ultimate prescription by the Central Government under section 211(3C) of the Companies Act. Also AS-1 pertaining to Disclosure of Accounting Policies has mandatory status for periods commencing on or after 01.04.1991. The change by the assessee in the policy of accounting for leases had the imprimatur of the ICAI and so the Assessing Officer was not entitled to disregard the books of accounts or the method of accounting for leases;

(ii) The department's contention that the "lease equalization charge" is a claim in the form of a deduction which cannot be allowed as there is no provision under the Act is based on a complete misappreciation of what constitutes a lease equalization charge. As the transaction was a finance lease, the charge had to be provided as per the ICAI Guidelines. As long as the method employed for accounting of income meets with the rudimentary principles of accountancy, one of which, includes offering only revenue income for tax, no fault can be found with the assessee debiting lease equalization charges in its profit and loss account. This represented the true and fair view of the accounts; a statutory requirement under section 211(2) of the Companies Act, enabled determination of real income. (A.Y. 1996-97, 2000-01)

CIT v. Virtual Soft Systems Ltd. (2012) 341 ITR 593 / 67 DTR 410 / 205 Taxman 257 (Delhi)(HC)

Editorial:- Refer Tribunal order of Virtual Soft Systems Ltd. v. ACIT (2010) 38 SOT 412 (Delhi)(Trib.)

S. 145 : Method of Accounting - Business expenditure - Deduction of unutilized Modvat credit - No accounting procedure involved in determining deduction - Matter remanded back to Assessing Officer giving opportunity to assessee to prove payment of excise duty on inputs

The assessee claimed deduction of unutilized Modvat credit as reflected in the books of accounts from the value of its stock. The Assessing Officer rejected the books of accounts of the assessee. It was held that the Assessing Officer was not justified in rejecting the method of accounting as it was not accounting procedure which was involved in the claim made by the assessee but a specific deduction claimed in respect of available Modvat credit. The matter thus remanded back to the Assessing Officer to give opportunity to assessee to make good its claim towards the value of excise duty paid by the assessee to its vendors and seek reduction in value proportionately. (A.Y. 1995-96, 1996-97, 1997-98, 1998-99)

CIT v. H. P. Global Soft Ltd. (No. 1) (2012) 342 ITR 263 / 67 DTR 306 / 247 CTR 562 / 206 Taxman 41 (Karn.)(HC)

S. 145 : Method of Accounting - Valuation of closing stock - Addition on account of under valuation of goods in process as there is no independent application of mind, matter remanded back

Addition on account of under-valuation of goods in process and on account of non-inclusion of direct cost could not be deleted by Tribunal without independent application of mind by merely observing that CIT(A) had elaborately discussed the issue. The matter therefore remanded for reconsideration. (A.Y. 1990-91)

CIT v. Raymond Ltd. (2012) 71 DTR 249 (Bom.)(HC)

S. 145 : Method of accounting - Scrap generation - Method of accounting accepted in earlier years and latter years, deletion & addition by ITAT was upheld

The assessee which carries on business of ship breaking, maintained regular books of account. In the books of account the assessee claimed the actual recovery of scrap and sold the said scrap. The Assessing Officer based on the report of a committee appointed by the Minstry of Steel and Mines and based on cases engaged in the similar line of business rejected the scrap shown by the assessee and estimated the sale of scrap. In appeal The Tribunal deleted the addition. On appeal by revenue the Court up held the order of Tribunal The Court held that no substantial question of law arise out of Tribunal, accordingly the appeal of revenue was dismissed. (A.Y. 1986-87)

CIT v. Virendra & Co. (2012) 77 DTR 210 / 253 CTR 488 (Bom.)(HC)

S. 145 : Method of accounting - Hire purchase - When character of transaction as hire purchase transaction, income that flew from transaction had to necessarily follow treatment that was given under hire purchase agreement hence the EMI method for taxation was accepted

Assessee had entered into agreements to give vehicles on hire purchase basis. In books of account, assessee was computing income under sum of digits (SoD) method. However, while returning income under Act, assessee had followed equated monthly installment (EMI) method. Assessing Officer held that the assessee was prohibited from adopting a different method of accounting for purpose of returning income. It was apparent from records that assessee had not given any loan or money for purchase of vehicle in question and thus, transaction was not a loan transaction, but only a hire purchase agreement. Once revenue had accepted character of transaction as hire purchase transaction, income that flew from transaction had to necessarily follow treatment that was given under hire purchase agreement. Appeal of revenue was dismissed. (A.Y. 1991-92, 1992-93, 1999-2000, 2003-04)

CIT v. Ashok Leyland Finance Ltd. (2012) 210 Taxman 95 / 77 DTR 72 (Mad.)(HC)

S. 145 : Method of accounting - Accrual - Mercantile system of accounting - When the assessee was following mercantile system of accounting, accrual of interest income was to be assessed in year in which it had accrued and had become due [S. 5]

Assessee was following mercantile systems of accounting. It advanced loan of Rs. 25 lakhs to a company on 11/5/1995 and received interest till 16/8/1996. Thereafter assessee did not receive any interest. Subsequently, during year ending on 31/3/199, assessee created a contingency reserve for Rs. 25 lakhs and ultimately in year 2007, wrote off said amount. For relevant year assessee claimed that accrual of interest income was shown in book which was only an hypothetical income and, hence, same was not available for taxation. The Court held that since assessee was following mercantile system of accounting, accrual of interest income was to be assessed in year in which it had accrued and had become due hence the assessee was liable to tax on interest shown in the books of account. Appeal of Assessee was dismissed. (A.Y. 1998-99)

United Nilagiri Tea Estates Co. v. Dy. CIT (2012) 210 Taxman 62/(2013) 84 DTR 83 (Mad.)(HC)

S. 145 : Method of accounting - Estimation of income - Higher income on TDS certificates - Addition was held to be justified [S. 4, 144]

The Assessing Officer found that the tax deducted at source (TDS) certificates attached to the return of income showed receipt of higher amount as compared to the books. The assessee failed to explain the difference. The Assessing Officer rejected the books of account and assesses the income under section 144. The addition was confirmed by Commissioner(Appeals) and Tribunal. On appeal the High Court up held the order of Tribunal by observing that the documents alleged to have been produced before the Tribunal during the course of hearing, were in fact not produced. This being finding of fact, no interference was called for. (A.Y.1998-99)

Laxmi Ventures (Bombay) (P) Ltd. v. Dy. CIT (2012) 210 Taxman 560 / (2013) 83 DTR 36 (Bom.)(HC)

S. 145 : Method of accounting - Valuation of stock - Valuation to be at cost price or market price whichever is lower - Reimbursement payments not includible in net realizable value

The assessee was engaged in the business of export of sugar. It did not manufacture sugar but procured or purchased sugar from manufacturers. It did not engage itself in domestic sales (except sale of damaged stock). For the A.Y. 1993-94, the Assessing Officer examined the valuation of closing stock and made in addition holding, inter alia, that the assessee in the past years had been regularly following the cost method for valuing the closing stock. Similar additions were made for the A.Y. 1995-96 to 1998-99 and 2001-02 to 2004-05. The Commissioner(Appeals) confirmed the additions. The Tribunal deleted the additions. The Assessing Officer made another addition of Rs. 71.80 lakhs on the ground that the assessee had wrongly not included reimbursements that had not been paid under the head 'export loss reimbursement'. The Commissioner(Appeals) deleted the addition and this was confirmed by the Tribunal. Held, dismissing the appeals, (i) that the Revenue had not been able to demonstrate that in the earlier A.Y., the assessee had valued the closing stock at cost and not on the net realizable value basis. The Tribunal was right in holding that there was no change in the method of valuation of closing stock during the A.Y. 1993-94.

(ii) That the assessee was entitled to value the closing stock at cost price or market price, whichever was lower.

(iii) That there was no statutory or contractual obligation under which the assessee could have claimed reimbursement of export losses from the manufacturers from whom it had procured sugar for export. Hence, the Tribunal was right in accepting the net realizable value as declared by the assessee and was right in not adopting the cost price for computation of the closing stock. (A.Y. 1993-94, 1995-96 to 1998-99, 2001-02 to 2004-05)

CIT v. Indian Sugar and Gen. Industry Export Import (2012) 349 ITR 38 / 80 DTR 300 (Delhi)(HC)

S. 145 : Method of accounting - Accrual of income - Retention money - Retention money received pursuant to furnishing of bank guarantee is not taxable until successful completion of the contract and expiration of the guarantee [S. 5]

As per the contract 5% of the amount was to be held as retention money. When the retention money reached 2% of the contract price, the tax payer could ask for release of 1% of retention money by furnishing bank guarantee. The Tax payer received the retention money by furnishing the bank guarantee. The Assessing Officer held that the same is taxable. On appeal CIT(A) held that since the tax payer did not have an absolute right over the payments they were not taxable. On appeal to the Tribunal, the Tribunal held that as long as performance guarantee remains and enforceable without notice to the tax payer, the retention money received cannot be recognised as income until successful completion of contract and expiration of the guarantee. (A.Y. 2004-05)(ITA No. 999/M/08 dt 30-12-2011

ADIT v. Ballast Nadam Dredging (2012) BCAJ Pg. 26, Vol. 43 B Part 6, March 2012-P. 28 (Mum.)(Trib.)

S. 145 : Method of accounting - Loss on valuation of interest swap - Deduction of loss on account of valuation of interest swap is allowable as deduction in current year is subject to verification of corresponding adjustment

The valuation of interest rate swap as on the balance sheet date only indicates computation of profit or loss on account of these profits as on that date. The assessee is entitled to deduction of loss on account of valuation of interest rate swap subject to the rider that allowability of deduction in the current year is subject to verification of corresponding adjustment in the year in which next settlement date falls. (A.Y. 2003-04)

ABN Amro Securities India (P) Ltd. v. ITO (2012) 145 TTJ 702 / 69 DTR 161 / (2011) 133 ITD 343 (Mum.)(Trib.)

S. 145 : Method of accounting - Estimation of Profit - Rejection of books of account is held to be justified

For relevant assessment, assessee declared gross profit rate at 12.67 percent as compared to gross profit rate at 15.07 per cent shown in immediate preceding year. He pointed out that main reason for fall in gross profit rate was that during year receipts of fabrication charges were substantially reduced. He did not maintain stock register of raw material, work-in-progress, consumable and finished products. He also did not give any plausible explanation regarding fallin gross profit rate particularly when turnover had remained almost consistent as per past year. Assessing Officer applied provisions of section 143(5) and estimated gross profit rate at 14 per cent. Held that, Assessing Officer had correctly applied provisions of section 145(3). Since Assessing Officer had partly accepted contention of assessee that main reason for fall in gross profit rate was reduction in receipts of fabrication charges, gross profit rate deserved to be reduced to 13 percent. (A.Y. 2007-08)

Vinod Kumar v. JCIT (2012) 137 ITD 48 / 19 ITR 246 (Chd.)(Trib.)

S. 145 : Method of accounting - Rejection of accounts - Manufacturing results could be ascertained properly hence rejection of books of account is held to be justified

Assessee derived income from manufacture and sale of cattle feed, oils, oil cakes etc. In course of assessment, Assessing Officer found that although quantity of cotton seed, mustard and ground nut crushed during previous year were shown separately but yield of oil and oil cakes had been given in consolidated form. Further, sales of oil and oil cakes had been shown in manufacturing account in consolidated form although there was a wide variation in market price of those products. Thus,

Assessing Officer asked assessee to explain reasons for mixing up cotton, mustard and groundnut oil seeds in same category when there was vast variation in market price of those types of oil seeds and other products. In reply assessee stated that there was not much difference in market price of both these oils and, therefore, he made sales of khal and oil of both these varieties jointly. On facts, unless yield of oil obtained on crushing of three types of oil seeds was separately given, manufacturing results could not be appreciated in their proper perspective. Therefore, books of account of assessee had correctly been rejected under section 145(3). (A.Y. 2008-09)

Pawan Kumar v. ITO (2012) 137 ITD 85 / 19 ITR 185 / 150 TTJ 253 / 79 DTR 17 (Chd.)(Trib.)

S. 145 : Method of accounting - Valuation of stock - Cost of production of film - The method of reducing the value of the closing stock by revaluing the film at the cost or net realizable value whichever is less, not justified on facts [Rule 9A]

Cost of production of film cannot be allowed as deduction until and unless the conditions are specified under Rule 9A are satisfied hence, such deduction cannot be permitted by adopting an indirect method of reducing the value of the closing stock by revaluing the film at the cost or net realizable value whichever is less. (A.Y. 2007-08)

Sagar Sarhadi v. ITO (2012) 135 ITD 153 / 148 TTJ 86 / 73 DTR 192 (Mum.)(Trib.)

S. 145 : Method of accounting - Estimation of profits - Advance money - Income could be assessed only when amount received in advance had reached certainty and hence, impugned addition was deleted

The assessee firm was engaged in the business of civil work and road construction as a contractor. It entered into an agreement with the State Road Transport Corporation for development of commercial complex. The assessee as a developer had been allowed to find intending allottees and to collect sale consideration from such lessees. Intending lessees could become allottees only on approval by State Road Transport Corporation. Assessee collected certain advance money from customers. The Assessing Officer relying on AS-7, opined that assessee should have declared profit of the said project on percentage of completion method. Thus, on value of work-in-progress, the Assessing Officer held that the 10% was income generated which was added to the total income. It was held that assessee could be regarded as a contractor and also a developer, revenue could not be recognized in terms of AS-9 guidelines. Thus, income could be assessed only when amount received in advance had reached certainty and hence, impugned addition was deleted. (A.Y. 2004-05, 2005-06)

ACIT v. National Builders (2012) 137 ITD 277 / (2013) 88 DTR 196 / 155 TTJ 209 (Ahd.)(Trib.)

S. 145 : Method of accounting - Project completion method - Sale of TDR - TDR has direct nexus with the project undertaken can be brought to tax only in the year in which the project is completed [S. 28(i)]

The assessee is following project completion method of accounting. During the F.Y. 2005-06 the assessee sold the TDR allotted to it by BMC, which TDR was directly linked to the projects undertaken by assessee. As the project was not completed this amount was reflected in the balance sheet as advance. The Assessing Officer brought to tax entire amount as income of the assessee in the A.Y. 2006-07. In appeal Commissioner(Appeals) confirmed the order of Assessing Officer. On appeal to the Tribunal, the Tribunal held that in the case of an assessee following the completion method, receipts by way of sale of TDR which TDR has direct nexus with the project undertaken can be brought to tax only in the year in which the project is completed. (A.Y. 2006-07)

Pushpa Construction Co. v. ITO ITA No. 193/Mum/2010/dated 25-4-2012 (2012) BCAJ July P. 59 (Mum.)(Trib.)

S. 145 : Method of accounting - Not produced ledger copies, etc. - Rejection of accounts was held to be justified

Assessee firm was engaged in business of civil contracts. During course of assessment proceedings, assessee did not produce account books before Assessing Officer. On plea that same were impounded by local police; however, no evidence was labour charges, salary expenses, etc. Assessing Officer was vested with discretion of either rejecting book results to estimate profit or to proceed on basis of ledger copies. Assessing Officer having chosen second option, Tribunal could not substitute its opinion to that of Assessing Officer to hold that it was a fit case for rejection of books of account, unless it was pointed out that in process of adopting alternative option, Assessing Officer had arbitrarily made addition which had no rational basis. Hence, in absence of such a finding/conclusion, order passed by Assessing Officer was not erroneous. Order of Assessing Officer was held to be justified, matter was decided in favour of revenue. (A.Y. 2005-06)

Pragati Engineering Corporation v. ITO (2012) 137 ITD 355 / 77 DTR 121 / 149 TTJ 273 (TM)(Luck.)(Trib.)

S. 145 : Method of accounting - Deductions of interest paid to third parties - Estimation of income by applying net profit rate

In view of the earlier year Tribunal order which has not been reversed by any higher forum, the Tribunal directed Assessing Officer to allow deduction of interest paid to the parties from the income determined after applying net profit rate. (A.Y. 2004-05, 2005-06)

ACIT v. G. R. Contractor (2012) 150 TTJ 65 (Jodh.)(UO)(Trib.)

S. 145 : Method of accounting - Project completion method - Year of taxability - Addition made by the Assessing Officer was set aside

Assessee-construction firm was following project completion method of accounting. During relevant A.Y., assessee had not offered any income tax and entire expenditure incurred on project had been transferred to balance sheet as work-in-progress. Assessing Officer holding this method unfair, adopted percentage completion method and estimated profit by adopting profit percentage of 21.51 per cent. Assessee itself had shown same profit rate in return for A.Y. 2008-09. It was apparent from records that project was not completed before 31-3-2008. Construction work as well as sale of flats were less than 30 per cent during assessment year in question. Even otherwise, when assessee offered to tax income from entire project in A.Y. 2008-09 and there would be no revenue effect. Accordingly the Tribunal held that the impugned addition made by Assessing Officer was to be set aside. (A.Y. 2006-07)

ITO v. Kasturi Construction (2012) 54 SOT 384 (Mum.)(Trib.)

S. 145 : Method of accounting - Estimation of income - Search - Non-maintenance of stock register, estimation of gross profit was held to be justified [S. 132]

A search operation was conducted at premises of assessee-owner of two concerns engaged in manufacturing and trading of precious and semi-precious stones. Assessing Officer found that assessee was not maintaining any stock records bearing qualitative and quantitative details of goods and, therefore, purchases were not verifiable. He rejected books of account and made addition to assessee's income by estimating GP rate. Assessee submitted that stock records were maintained to extent feasible as each and every piece of stone had different characteristics and composition and, therefore, it was not possible to maintain stock register quality-wise. There is definite, measurable and discernible criteria on basis of which trade in precious stones. Onus to prove its purchase as genuine was on assessee. Tribunal held that addition to gross profit was justified, appeal of assessee was dismissed. (A.Y. 2002-03, 2004-05)

Champa Lal Choudhary v. Dy. CIT (2012) 54 SOT 398 (Jaipur)(Trib.)

S. 145 : Method of accounting - Project completion method - Rejection of method is held to be not valid - Estimation of income was deleted

The assessee which is following the project completion method on the basis of completion of project and the occupation certificate issued by the City Municipal Corporation on 22-9-2006. The Assessing Officer, held that 80 per cent of the total project costs including land cost, construction cost and administrative expenses had been incurred up to the end of the relevant A.Y. Hence, he concluded that by following the work completion method, the assessee was creating loss to the revenue and estimated the profit at the rate of 8 per cent of the total cost including land cost, construction cost and administrative expenses. The Commissioner(Appeals) came to the conclusion that the Assessing Officer was correct in bringing to tax the amount of deemed profit in the current years and not in A.Y. 2007-08, which according to the revenue authorities was postponement of tax liability. On second appeal the Tribunal held that **i**t was apparent from records that assessee was maintaining its books of account in accordance with AS-9. Further, revenue authorities had not observed that results declared by assessee did not show correct results. Moreover, as per project completion method followed by assessee, entire profit of the project had been offered to tax in A.Y. 2007-08, which had been accepted by Assessing Officer. In view of above, there was no justification in rejecting method of accounting followed by assessee and substituting same, and adopting AS-7 and computing profit by estimation. Appeal of assessee was allowed. (A.Y. 2005-06, 2006-07)

Prem Enterprises v. ITO (2012) 54 SOT 367 (Mum.)(Trib.)

S. 145A : Method of accounting - Valuation of stock - Provision applies only to valuation of purchase and sale of goods and inventory and not to service contract

The provisions of section 145A applies only in respect of valuation of purchase and sale of goods and inventory and not to service contracts. Thus, provisions of said section cannot be invoked for adding service tax to gross receipts. (A.Y. 2007-08)

Pharma Search v. ACIT (2012) 53 SOT 1 / (2013) 82 DTR 303 (Mum.)(Trib.)

S. 145A : Method of accounting - Valuation of closing stock - Closing stock of modvat cannot be included without modifying the figures of purchases, sales and opening stock.

The Assessing Officer held that the assessee has not included the excise duty in the valuation of closing stock. Accoeding to the Assessing Officer under the provisions of section 145A, the assessee should include the excise duty component of purchase price of raw material while valuing stock of raw material, work in progress (WIP) and finished goods. The assessee contended that non inclusion of the same will have no effect on its profits, however the Assessing Officer added the said amount. In appeal the Commissioner(Appeals) confirmed the addition with certain directions. On further appeal to Tribunal the tribunal held that according to prescription of section 145A which is applicable to year under consideration, amount of tax, duty, cess, etc., is liable to be included in value of purchases, sales, opening and closing stock and it is not appropriate to include closing amount of Modvat in figure of closing stock without modifying figures of purchases, sales and opening stock.Accordingly the appeal of assessee was allowed. (A.Y. 2007-08)

R. R. Kabel Ltd. v. Addl. CIT (2012) 54 SOT 374 (Mum.)(Trib.)

S. 147 : Reassessment - Reopening after expiry of four years - Loss was speculative or business loss - Mere "change of opinion" is not permissible for reopening of assessment In the instant case, the assessee claimed a deduction which was allowed by the Assessing Officer in section 143(3) assessment. Subsequently, after the expiry of 4 years, the Assessing Officer reopened the assessment under section 147 on the ground that the said loss was a "*speculative loss*" and could not be allowed as a deduction. It was held by the apex court that the assessee had disclosed full details in the Return of Income in the matter of its dealing in stocks and shares. According to the assessee, the loss incurred was a business loss, whereas, according to the Revenue, the loss incurred was a speculative loss. It was therefore held that rejection of the objections of the assessee to the re-opening of the assessment by the Assessing Officer vide his Order dated 23rd June, 2006, was clearly based on

change of opinion and thus, reopening of assessment merely on change of opinion was not maintainable. (A.Y. 1999-2000)

ACIT v. ICICI Securities Primary Dealership Ltd. (2012) 348 ITR 299 / 253 CTR 305 / 78 DTR 153 (SC)

Editorial:- Appeal from the judgement of Bombay High Court W. P. No. 1919 of 2006 dated 22-8-2006 is affirmed.

S. 147 : Reassessment - Change of opinion - Beyond four years - Subsequent reversal of Judgment by Supreme Court - Subsequent reversal of legal position by judgment of Supreme Court does not authorize department to re-open assessment, which stood closed on basis of law, as it stood at relevant time [S. 80HH, 149(IA)]

At the relevant time, when the assessment order got completed, the law as declared by the jurisdictional High Court, was that the civil construction work carried out by the assessee would be entitled to the benefit of section 80HH of the Act, which view was squarely reversed in the case of CIT v. N. C. Budharaja & Co. (1993) 204 ITR 412 (SC). The Court held that the subsequent reversal of the legal position by the judgment of the Supreme Court does not authorise the Department to reopen the assessment, which stood closed on the basis of the law, as it stood at the relevant time. The Court also observed that once limitation period of four years provided under the Act expires then the question of reopening by the Department does not arise. Accordingly the Civil appeal of department was dismissed.

Dy. CIT v. Simplex Concrete Piles (India) Ltd. (2012) 79 DTR 82 / 254 CTR 221 / 210 Taxman 278 (SC)

Dy. CIT v. Geo Miller & Co. Ltd. (2012) 79 DTR 82 / 254 CTR 221 (SC)

Editorial:- Refer, Simplex Concrete Piles (India) Ltd. v. Dy. CIT (2003) 262 ITR 605 (Cal.)(HC) / Concretae Piles (India) Ltd. / Geo Miller & Co. Ltd. v. Dy. CIT (2003) 183 CTR 47 (Cal.)(HC)

S. 147 : Reassessment - Setting aside of assessment - Reasoned order

High court has set aside the order, reassessment order. On appeal to Supreme Court the Supreme Court set aside the order of High Court and remitted the matter to the High Court for de novo consideration in accordance with law.

Pavez Nazir Hussein Jafri v. CIT (2012) 210 Taxman 581 / (2013) 85 DTR 416/ 354 ITR 235 (SC)

Editorial:- Order of Bombay High Court in WP No. 1807 of 2011 dated 23-12-2011 is set aside.

S. 147 : Reassessment - Full and true disclosure - Notice after expiry of four years - Failure to disclose - Exemption - Investment in specified bonds - Reopening is held to be valid [S. 54EC]

Assessee submitted computation of total taxable long term capital gains of Rs. 23.19 crores in its return of income and sought exemption under section 54EC of Rs. 23.24 crores. Assessment was completed under section 143(3). Assessing Officer issued notice under section 148. The assessee challenged the notice in a writ petition. The Court held that Assessee having claimed exemption under section 54EC without making any reference to the dates on which amounts were invested in the specified bonds either in the return or in the disclosures which were made in response to the query of the Assessing Officer there was no full and proper disclosure of all material facts by the assessee and therefore, Assessing Officer was justified in reopening the assessment beyond the period of four years on the ground that income has escaped assessment. (A.Y. 2004-05)

Indian Hume Pipe Co. Ltd. v. ACIT (2012) 348 ITR 439 / 65 DTR 26 / 246 CTR 31 / 204 Taxman 347 (Bom.)(HC)

S. 147 : Reassessment - Full and true disclosure - Notice after expiry of four years - Failure to disclose material facts necessary - Waiver of part of loan disclosed in the notes on account - Reassessment held invalid

Assessee had disclosed the waiver of loans in the notes on account. The Assessing Officer called for details and after satisfying with the explanation the assessment was passed under section 143(3). Thereafter the notice was issued under section 148 read with 147 to reopen the assessment. The assessee challenged the reassessment proceedings. The Court held that there was no failure on the part of assessee to disclosure material facts hence the reassessment after four years held to be invalid. (A.Y. 2004-05)

Kimplas Trenton Fittings Ltd. v. ACIT (2012) 340 ITR 299 / 70 DTR 43 (Bom.)(HC)

S. 147 : Reassessment - Full and true disclosure - Income forming subject matter of appeal - Reassessment held to be invalid

The assessee had claimed certain amount as bad debts, which the Assessing officer has allowed partly. In appeal the Commissioner(Appeals) partly allowed the appeal. In the mean time the Assessing Officer issued the notice under section 147 read with 148 on the ground that the assessee had claimed the bad debts, in respect of parties where the income had been exempt under section 10(23G). In a Writ, the Court held that Commissioner(Appeals) having partly allowed the assessee's appeal by accepting its claim under section 36(1)(vii) and allowing a proportionate exemption under section 10(23G), the exercise of power to reopen the assessment on the grounds relating to write off of bad debts under section 36(1)(vii) is in excess of jurisdiction in view of bar of second proviso to section 147, it could not be said that income had escaped assessment by reason of excessive deduction under section 36(1)(viia) when the Assessing Officer has infact, allowed a deduction to the extent of 7.5% of the business income instead of 7.5% of total income and therefore reopening of assessment on this ground is also not valid. (A.Y. 2003-04)

ICICI Bank Ltd. v. Dy. CIT (2012) 65 DTR 249 / 246 CTR 292 / 204 Taxman 65 (Mag.)(Bom.)(HC)

S. 147 : Reassessment - Penalty - Writ - Alternative remedy - Held not maintainable [S. 69B, 271(1)(c), Constitution of India - Art. 226]

Assessee did not file objections against reassessment, hence there was no breach of principle of natural justice. Writ is not maintainable as it does not fall within the exceptional categories for invoking extraordinary jurisdiction under Article 226 and the impugned reassessment order as well as penalty order being appeallable before the Appellate Authority, the writ was dismissed as not maintainable. (A.Y. 2006-07)

Sushila Kanwar Chauhan v. UOI (2012) 65 DTR 5 / 246 CTR 1 (Raj.)(HC)

S. 147 : Reassessment - Not for correction of errors - Not to recompute the income on same set of facts - Reassessment was not valid

The petitioner had been returning its income from plying oil tankers for several years. The claim towards driver's expenses was within the knowledge of the assessing officer and also the subject matter of consideration at the stage of original assessment. The finding of the successor-in-office ignoring the findings of the predecessor on the issue and disallowing the expenses in entirety was a case of change of opinion on the same set of facts and could not be permitted. The reassessment was not valid and was liable to be quashed. (A.Y. 2001-02)

Kumar Stores v. CIT (2012) 340 ITR 90 / 70 DTR 144 / 250 CTR 62 (Patna)(HC)

S. 147 : Reassessment - Reasons - Issues not included in reasons recorded - Reassessment is held to be valid in view of Expl. 3 to sub-section 3 to section 147. [S. 148(2)]

The Court held that Explanation 3 to sub-section 3 to section 147 of the Act has been inserted by the Finance (No. 2) Act, 2009, retrospectively from April 1, 1989, and thus the Assessing Officer is justified in making addition even in respect of those issues which come to his notice subsequently in the course of reassessment proceedings though such issue was not included in the reasons recorded while initiating proceedings under section 147 of the Act. (A.Y. 1998-99)

Balbir Chand Maini v. CIT (2012) 340 ITR 161 / 67 DTR 161 / 247 CTR 468 (P&H)(HC)

S. 147 : Reassessment - Depreciation and revenue expenditure - After four years held invalid and within four years held valid [S. 148]

Notice under section 148 for A.Y. 1991-92 and 1992-93 were issued after four years. There was no mention in the recorded reasons that the escapement of chargeable income from tax was due to omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. The notices in respect of the A.Y. 1991-92 and 1992-93 was quashed. Reassessment for the A.Y. 1993-94, within four years held to be valid in respect of depreciation and revenue expenditure. (A.Y. 1991-92, 1992-93, 1993-94)

Sri Sakthi Textiles Ltd. v. JCIT (2012) 340 ITR 144 / (2010) 235 CTR 494 / 193 Taxman 216 / 46 DTR 191 (Mad.)(HC)

S. 147 : Reassessment - Limitation - After four years but before six years - Clubbing of income - Benamidar - Reassessment is justified [S. 149]

For different financial years up to 2001-02 the assessee made several payments to Mr. Mitra. For the A.Y. 1994-95 an amount of Rs. 3,03,345/- was made by the assessee to Mr. Mitra based on the above information the assessment was reopened. The Court held that as no proper explanation was furnished for payment exceeding three lakhs of Rupees, prima facie escapement of income of more than one lakh of Rupees. On merit clubbing of income of third person as benamidar of assessee was justified. (A.Y. 1995-96)

M. R. Associates v. ITAT & Others (2012) 340 ITR 293 (All.)(HC)

S. 147 : Reassessment - Dropped the proceedings in respect of income referred in the notice - Assessing the other income not mentioned in the notice is not valid [S. 148, 152(2)]

Assessment was reopened on the basis of belief that certain income had escaped assessment but in the reassessment order passed under section 147 by the Assessing Officer no addition was made in respect of said income. In respect of other incomes no notice was issued and the assessee had no opportunity to put forward his case under section 152(2) to avail benefit of said section for dropping the proceedings and the revenue cannot take advantage of the Explanation 3 to section 147. (A.Y. 1997-98)

ACIT v. Major Deepak Mehta (2012) 65 DTR 237 / 246 CTR 255 / 210 Taxman 176 (Chhattisgarh)(HC)

S. 147 : Reassessment - Draft assessment order - Delay - Delay in issue of notice under section 143(2), notice renders assessment invalid [S. 292BB]

The Assessing Officer issued a notice under section 148 to reopen the assessment. Though the assessee filed a ROI, the Assessing Officer did not issue notice under section 143(2) within the prescribed period but passed a draft assessment order under section 144C. The Court had to consider (a) what is the effect of the failure to issue notice under section 143(2) within the period stipulated in the proviso to clause (ii) and (b) the effect of section 292BB of the Act. Held by the Court quashing the assessment proceedings:

(i) The service of notice under section 143(2) within the statutory time limit is mandatory and is not an inconsequential procedural requirement. Omission to issue notice under section 143(2) is not curable and the requirement cannot be dispensed with. Section 143(2) is applicable to proceedings

under section 147 & 148. While the Proviso to section 148 protects and grants liberty to the Revenue to serve notice under section 143(2) before passing of the assessment order for returns furnished on or before 1.10.2005, in respect of returns filed pursuant to notice under section 148 after 1.10.2005, it is mandatory to serve notice under section 143(2) within the stipulated time limit [Hotel Blue Moon (2010) 321 ITR 362 (SC) referred].

(ii) Section 292BB incorporates the principle of estoppels and stipulates that an assessee who has appeared in any proceeding and co-operated in any enquiry relating to assessment or reassessment shall be deemed to be served with any notice which was required to be served and would be precluded from objecting that the notice was not served upon him or was served upon him in an improper manner or was not served upon him in time. However, the principle of estoppels does not apply if the assessee has raised objection in reply to the notice before completion of assessment or reassessment. As the Assessing Officer had passed a draft assessment order and the assessee had raised an objection before completion of assessment, the estoppels in section 292BB did not apply and the section 147 proceedings could not continue.

Alpine Electronics Asia Pte Ltd. v. DGIT (2012) 341 ITR 247 / 249 CTR 59 / 205 Taxman 190 / 68 DTR 167 (Delhi)(HC)

S. 147 : Reassessment - Retrospective amendment - Retrospective amendment no basis Beyond 4 years held to be invalid - Assessing Officer not to delay passing objection order - Direction is given to all the Assessing Officers

For A.Y. 2005-06, the Assessing Officer passed a section 143(3) order in which he allowed section 80-IA deduction. Thereafter, after the expiry of 4 years, he reopened the assessment under section 147 on the ground that in view of the retrospective amendment to the Explanation to section 80-IA by the Finance (No. 2) Act 2009 w.r.e.f. 1.4.2000, the assessee, being a works contractor, was not eligible for section 80-IA deduction. The Assessing Officer took 6 months to deal with the objections and passed the assessment order within 2 weeks. On a Writ Petition filed by the assessee to challenge the assessment order, held allowing the Petition:

(i) The fact that by virtue of the Explanation to section 80IA added with retrospective effect from 1.4.2000, income derived from the works contract would not qualify for deduction under section 80IA does not mean that an assessment can be reopened beyond 4 years without there being any failure to disclose truly and fully all material facts [Sadbhav Engineering Ltd. v. Dy. CIT (2011) 333 ITR 483 (Guj.) followed];

(ii) The argument that the assessee failed to disclose the nature of works executed and that the same was executed only as works contractor and not as a developer, cannot be accepted for two reasons. Firstly, the reasons recorded do not refer to such a ground. Secondly, when the assessee filed the return of income, the Explanation in question was not in picture. The assessee cannot be expected to comply with the requirements of such Explanation by making disclosures in this regard which Explanation did not form part of the statute book when he filed his return;

(iii) The Assessing Officers have a tendency to delay disposing of the objections and, thereafter at the fag end of final time limit, to frame the assessment. This tendency is not approved. This was not the intention of the Apex Court when GKN Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19 (SC) was rendered. This should be brought to the notice of the Assessing Officers by the Department so that such instances do not recur in future. (A.Y. 2005-06)

Doshion Ltd. v. ITO (2012) 342 ITR 6 (Guj.)(HC)

S. 147 : Reassessment - Satisfaction of one authority cannot be substituted by satisfaction of another authority - Procedure should be strictly in accordance with law - Sanction - Sanction of Commissioner instead of JCIT renders reopening invalid [S. 151(2), 292B]

The Assessing Officer issued a notice under section 148 to reopen an assessment. As a section 143(3) order had not been passed & 4 years had elapsed, the Assessing Officer ought to have obtained the

sanction of the Joint/Additional CIT under section 151(2). Instead, he routed the file through the Additional CIT and obtained the sanction of the CIT. On appeal by the assessee, the Tribunal struck down the reopening on the ground that correct sanction had not been obtained. On appeal by the department, held upholding the Tribunal:
(i) Section 151(2) requires the sanction to be accorded by the Joint/Additional CIT. The Assessing Officer sought the sanction of the CIT. Though the file was routed through the Addl. CIT, the latter only made an endorsement "CIT may kindly accord sanction". This showed that the Addl. CIT did not apply his mind or gave any sanction. Instead, he requested the CIT to accord approval. This is not an irregularity curable under section 292B;
(ii) The different authorities specified in section 116 have to exercise their powers in accordance with law. If powers conferred on a particular authority are arrogated by other authority without mandate of law, it will create chaos in the administration of law and hierarchy of administration will mean nothing. Satisfaction of one authority cannot be substituted by the satisfaction of the other authority. If the statute requires a thing to be done in a certain manner it has to be done in that manner alone. Also, the designated authority should apply his independent mind to record his satisfaction and it should not be at the behest of a superior authority. (A.Y. 2002-03)
CIT v. SPL's Siddhartha Ltd. (2012) 345 ITR 223 / 249 CTR 357 / 70 DTR 133 (Delhi)(HC)

S. 147 : Reassessment - Full and true disclosure - Original assessment under section 143(3) - Subsequent decision of Jurisdictional High Court in favour of revenue - Amounts to change of opinion reassessment is invalid [S. 44BB]
Assessing Officer assessed the income of the assessee under section 44BB, by passing the order under section 143(3), after due application of mind and making necessary enquiry. Reopening of assessment on the basis of subsequent decision of Jurisdictional High Court holding in favour of revenue amounted the change of opinion, hence invalid. (A.Y. 2003-04)
B. J. Services Company Middle East Ltd. & Ors. v. Dy. DIT (2011) 339 ITR 169 / (2012) 65 DTR 316 / 246 CTR 381 / (2012) Vol. 42. Tax LR 130 (Uttarakhand)(HC)

S. 147 : Reassessment - Notice - Time available for issue of notice under section 143(2) - Reassessment is held to be bad in law [S. 143(2)]
Reassessment under section 147 cannot be made within the time available for issuing notice under section 143(2) and for completion of assessment under section 143(3). The Court held that as Madras and Delhi High Courts have held that an income escaping assessment under section 147 cannot be completed within the time available for issuing notice under section 143(2) and for completion of assessment under section 143(3) and since these decisions remain unchallenged by the department, the department appeal was dismissed (CIT v. TCP Ltd. (2010) 323 ITR 346 (Mad.), CIT v. Qatalys Software technologies Ltd. (2009) 308 ITR 249 (Mad.) and KLM Royal Dutch Air lines v. ADIT (2007) 292 ITR 49 (Delhi) followed) (A.Y. 1999-2000, 2000-01, 2002-03 & 2003-04)
CIT v. Abad Fisheries (2012) 65 DTR 370 / 204 Taxman 267 / 246 CTR 513 (Ker.)(HC)

S. 147 : Reassessment - Reason to believe - Accommodation entries - Reopening held valid [S. 148]
The Court dismissed the writ petition challenging the reopening on the ground that in the reasons recorded the Assessing Officer had referred to the investigation made by the Director of Income-tax (Investigation), who was in charge of the investigation into groups that operated as entry operators, in the various branches of banks to introduce unaccounted money in the guise of gifts, loans, share application money, etc. After referring to the broad and general modus operandi adopted by the entry providers, the Assessing Officer specifically noticed from the list of entries given to him by the investigation wing that assessee had taken accommodation entry from S in the amount of Rs. 3 lakhs. The reasons to believe recorded in writing by the Assessing Officer were detailed and showed

application of mind .At the stage when reasons are recorded for reopening the assessment, the Assessing Officer is not required to build a fool proof case for making addition to the assessee's income; all that is required to do at that stage is to form a prima facie opinion or belief that income has escaped assessment. On the facts the Court up held the reopening of assessment and dismissed the writ petition. (A.Y. 2004-05)

Rajat Export Import India Pvt. Ltd. v. ITO (2012) 341 ITR 135 / 206 Taxman 50 / 75 DTR 108 / 252 CTR 307 (Delhi)(HC)

S. 147 : Reassessment - Beyond four years - Housing project - Reassessment held to be invalid only on the basis of retrospective amendment as there is no failure to disclose fully and truly all material facts [S. 80IB(10)]

Assessee claimed the deduction under section 80(IB)(10) after enquiry the deduction was allowed. The amendment was introduced by Finance Act, 2009, inserting Explanation with retrospective effect from 1st April, 2001 which denied benefit of deduction under section 80IB(10) to works contractors execution housing project. The only reason for issuing the notice, was amendment brought in the statute book with retrospective effect. The said notice was challenged before the High Court. High Court quashed the notice and held that reopening only on the basis of retrospective amendment of law is not justified. (A.Y. 2004-05)

Pravin Kumar Bhogilal Shah v. ITO (2012) 66 DTR 236 (Guj.)(HC)
Vinayak Construction v. ITO (2012) 66 DTR 233 (Guj.)(HC)

S. 147 : Reassessment - Change of opinion - Once in the course of original assessment the claim of exemption was allowed based on the communication with the Chairman CBDT, reassessment will be a change of opinion hence notice is held to be invalid

The Assessing Officer has allowed the claim based upon the communication to the Chairman of Insurance Regulatory and Development Authority (IRDA). The communication clarifies that the exemption available to any other Assessee under any clauses of section 10 is also available to any other person carrying on non life insurance business subject to fulfillment of the conditions. The Court held that the issue as to whether the assessee is entitled for an exemption under clauses (15), (23G) and (33) of Section is directly covered by the decision of Life Insurance Corporation v. CIT (1978) 115 ITR 45 (Bom.) CIT v. New India Assurance Co. Ltd. (1969) 71 ITR 761 (Bom.), the decision is binding on the Assessing Officer. The communication of Chairman of CBDT has also considered by the Assessing Officer in original assessment proceedings. Accordingly the High Court quashed the reassessment proceedings. (A.Y. 2006-07)

General Insurance Corporation of India v. Dy. CIT (2012) 342 ITR 27 / 204 Taxman 587 / (2012) Vol. 114 (1) Bom. L.R. 0246 (Bom.)(HC)

S. 147 : Reassessment - Notice after expiry of four years - Assessing Officer has discovered in subsequent year that the purchase of components was bogus the reopening of assessment held to be justified

The Assessee for the A.Y. 2004-05 claimed the depreciation on an Effluent Treatment Plant (ETP) which was said to have been supplied by the Vendor. In the A.Y. 2008-09 after enquiry, the Assessing Officer treated the purchase from the said vendor as bogus and disallowed the depreciation. On the basis of said order, the A.Y. 2004-05 was reopened. The Assessee challenged the reopening of assessment, the Court held that reopening of assessment was justified. (A.Y. 2004-05)

Indo European Breweries Ltd. v. ITO (2012) 343 ITR 195 / 66 DTR 479 / 247 CTR 540 (Bom.)(HC)

S. 147 : Reassessment - Notice after expiry of four years - Reassessment held to be invalid

In the course of original assessment proceedings the assessee furnished the details of dividend received and the expenses incurred towards the portfolio management scheme and depository charges. Therefore, reopening of assessment beyond four years held to be invalid. (A.Y. 2004-05)
HCL Corporation Ltd. v. ACIT (2012) 66 DTR 473 (Delhi)(HC)

S. 147 : Reassessment - Withdrwal of approval of industrial park holding - Retrospective amendment - Reopening, even within 4 years, on basis of retrospective amendment to section 80IB(10) is held to be invalid [S. 80IA(4), 80IB(10), 115JB, 148]
The assessee was engaged in building and development of housing projects and development industrial parks. For A.Y. 2005-06, the assessee claimed section, 80IA(4)(iii) and 80IB(10) deduction of Rs. 11.38 crores which was accepted by the Assessing Officer in section 143(3) assessment. Subsequently, within 4 years from the end of the A.Y., the Assessing Officer reopened the assessment under section 148 on the ground that the assessee had not complied with section 80IB(10) including that after the insertion of the Explanation to section 80IB(10) by the F.A. (No. 2) Act, 2009 w.r.e.f. 1.4.2000, a contractor was not eligible for deduction under section 80IB(10). The assessee challenged the section 148 notice by a Writ Petition. Held allowing the Petition:
The main reason for reopening the assessment was the insertion of the Explanation to section 80IB(10) by the F.A. (No. 2) Act, 2009 w.r.e.f. 1.04.2000 which denies deduction to a contractor in respect of works contract awarded by any person and that at the stage of the original assessment, no opinion regarding the allowability or otherwise of deduction under section 80IB(10) was given of the Act. As regards the retrospective amendment, if an Explanation is added to a section for the removal of doubts, the implication is that the law was the same from the very beginni ng and the same is further explained by way of addition of the Explanation. It is not a case of introduction of a new provision of law by retrospective operation. As regards the formation of opinion, the assessee had disclosed all the material relevant for claiming section 80IB(10) deduction and there was no suppression of material. The fact that the Assessing Officer in the section 143(3) assessment did not give any opinion regarding the allowability or otherwise of deduction under section 80IB(10) of the Act cannot be a ground for invoking section 147. Once approval is granted by Minstry of commerece to an Industrail park, CBDT is required to notify the same, hence therefore an assessee who had developed an Industral Park on approval granted by Minsitry of Commerece, but before the notification of same by CBDT, it was eligible for deduction under section 80IA. (A.Y. 2005-06) (SCA No. 15836 of 2010 dated 11-1-2012)
Ganesh Housing Corporation Ltd. v. Dy. CIT (2012) 341 ITR 312 / 66 DTR 106 / 246 CTR 465 / 207 Taxman 180 (Mag.)(Guj.)(HC)
Editorial:- SLP rejected Dy. CIT v. Ganesh Housing Corporation Ltd. SLP (CA) CC No. 14493 of 2012 dated 17-9-2012 (2012) 210 Taxman 94 (Mag.)(SC)

S. 147 : Reassessment - Retrospective amendment - Reopening, even within 4 years, on basis of retrospective amendment to section 80IB(10) is held to be invalid [S. 148]
The assessment was completed under section 143(3) and deduction under section 80IB(10) was allowed. The Assesing Officer reopened the assessment on the ground that Explantion inserted to section 80IB(10) by Fiannce (No. 2) Act, 2009 with retrospective effect from 1st April 2000, deduction under section 80IB(10) shall not be admissible to a contractor in respect of works contract awarded by any person. The assessee challenged the reassessment proceedings by writ pettion. The High Court quashed the reassment proceedings by holding that where the Assessing Officer in the assessment proceedings under section 143(3) allowed the deduction under section 80IB(10), reopening on the basis of insertion of Explanation below section 80IB(10) retrospectively with regard to non-admissiblitty of deduction for works contractor, was not sustainable in the absence of any tangible material. The issue being change of opinion, reassessment proceeding was quashed. (A.Y. 2005-06)

Ganesh Housing Corporation Ltd. v. Dy. CIT (2012) 70 DTR 305 / (2013) 350 ITR 131 (Guj.)(HC)

S. 147 : Reassessment - Sanction - Sanction of commissioner instead of JCIT renders reopening is void [S. 2(28C), 148, 151]

The Assessing Officer issued a notice under section 148 to reopen the assessment for A.Y. 2004-05. As no assessment had been made under section 143(3) or section 147 for that year and four years had expired, the Assessing Officer was required to obtain the sanction of the JCIT (which included an Addl. CIT) under section 151(2). The Assessing Officer submitted a proposal to the CIT through the Addl. CIT. The Addl. CIT forwarded the proposal to the CIT and requested the CIT to grant sanction, which the CIT did. The assessee challenged the reopening inter alia on the ground that as section 151(2) required the JCIT / Addl. CIT to grant approval, the approval of the CIT was not valid. Held upholding the challenge:

There is merit in the contention of the assessee that the requirement of section 151(2) could have only been fulfilled by the satisfaction of the JCIT that this is a fit case for the issuance of a notice under section 148. Section 151(2) mandates that the satisfaction has to be of the Joint Commissioner. That expression has a distinct meaning by virtue of the definition in section 2(28C). The CIT is not a JCIT within the meaning of section 2(28C). The Additional Commissioner forwarded the proposal submitted by the Assessing Officer to the CIT. The approval which has been granted is not by the Addl. CIT but by the CIT. There is no statutory provision under which a power to be exercised by an officer can be exercised by a superior officer. When the statute mandates the satisfaction of a particular functionary for the exercise of a power, the satisfaction must be of that authority. Where a statute requires something to be done in a particular manner, it has to be done in that manner [CIT v. SPL's Siddhartha Ltd. (2012) 249 CTR 357 (Delhi)(HC) followed] (A.Y. 2004-05)

Ghanshyam K. Khabrani v. ACIT (2012) 346 ITR 443 / 70 DTR 137 / 249 CTR 370 (Bom.)(HC)

S. 147 : Reassessment - Intimation - Once the assessment is accepted under section 143(1), though no notice was issued under section 143(2), the assessing officer can issue notice under section 147, read with 148 of the Act subject to other conditions

The assessee is an employee of M/s. Tokio Marine & Nichdo Fire Ins. Co. Ltd. The assessee filed the return of income for the A.Y. 2008-09 enclosing the form No. 16 issued by the employer. Subsequently the assessee filed a revised return enclosing the revised form No. 16, claiming the refund of taxes paid. Assessing Officer called the information from the company and after recording the reasons issued the notice under section 148. The assessee challenged the issue of notice under section 148 on the ground that the Assessing Officer failed to intimate and send the order passed under section 143(1) to the assessee and reasons recorded do not justify and are not 'reasons to believe'. The Court held that once the order under section 143(1) was passed, and no notice under section 143(2) has been issued, the Assessing Officer can issue notice under section 147/148, if preconditions are satisfied. The failure to take steps under section 143(3) will not render the Assessing Officer powerless to initiate proceedings for reopening. Since the period of service of notice under section 143(2) after filing of the original or revised returns has expired, regular assessment proceedings under section 143(3) cannot be initiated and the only option to Assessing Officer is to issue notice under section 148, hence issue of notice under section 148 held to be valid. (A.Y. 2008-09)

Atsushi Yoshida & Ors v. ACIT (2012) 67 DTR 347 / 205 Taxman 45 (Mag.)(Delhi)(HC)

S. 147 : Reassessment - Reason to believe - Non filing of return - Information from sales tax and Central Excise department constitute reason to believe and reassessment held to be valid

The assessee has not filed the return of income for the A.Y. 1993-94, 1994-95 and 1995-96. On receipt of information and sales tax assessment orders showing huge turn over, the Assessing Officer

issued notice under section 148 after recording the satisfaction. The assessments were completed assessing the income for the A.Y. at Rs. 5,62,910/-, A.Y. 1994 -95 at Rs. 7,52,160/- and for A.Y. 1995-96 at Rs. 8,90,000/- respectively. Assessee challenged the reassessment proceedings and quantum of addition before Commissioner(Appeals) who up held the reassessment proceedings. On appeal before the Tribunal the Tribunal held that reopening of assessment was not valid. On appeal by revenue to High Court, the High Court held that the Tribunal fell into grave error of law in unduly restricting the scope of power and jurisdiction under section 147 by holding that there is no evidence on record that the assessee earned income on huge transactions and that assessee in similar business incurred loss before income from other sources during the relevant year. The Court held that the approach of Tribunal as adopted is clearly erroneous in law because that would amount to first finally ascertain on established legal evidences for exercise of power under section 147, that is not the object of section 147, the condition precedent for section 147 is reason to believe and not actual and final assessment on definite material. As the assessee has not filed the return of incomes of income for the relevant A.Y. and information about huge turnover was received from the Sales-tax / Central Excise department very much constituted reason to believe that income has escaped assessment. Accordingly the order of Tribunal was set aside. (A.Y. 1993-94 to 1995-96)

ITO v. Santosh Jain (2012) 247 CTR 488 / 67 DTR 260 (Chhattisgarh)(HC)

S. 147 : Reassessment - Change of opinion - Business expenditure - There was no failure on part of assessee and payment was examined by Assessing Officer hence reassessment held to be not valid [S. 37(1)]

In the course of assessment proceedings after raising specific query, the Assessing Officer examined the details filed allowed the royalty payments as allowable business expenditure and passed the order under section 143(3). The assessment was reopened on the ground that assessee had debited certain amount in its profit and loss account as royalty, however the part of said expenditure was to be considered as capital expenditure as it gave benefit which could be enjoyed over number of years. On appeal the Tribunal set aside the order on the ground that it was based on mere change of opinion. On appeal by revenue the Court held that, there was no failure or omission on part of assessee to disclose head and quantum thereof, even the TDS certificates and other details were filed, hence on facts the assessee's case fell in category of change of opinion as at time of original proceedings the assessing officer has examined and gone in to question of royalty. Even otherwise, if there was any legal error or illegality, same could not be rectified and be made subject matter of reassessment proceedings under section 147. Accordingly the High Court up held the order of Tribunal. (A.Y. 2000-01, 2001-02)

CIT v. Munjal Showa Ltd. (2012) 205 Taxman 351 (Delhi)(HC)

S. 147 : Reassessment - Full and true disclosure - Notice after four years - Reassessment held to be void

The assessment was completed under section 143(3), after detailed enquiry, regarding the reimbursement of expenses allocation of fee etc. Assessing Officer issued notice for reassessment on the ground that certificate under section 197 is valid only for payments or credit made after the date of certificate for non deduction of tax, is not valid in respect of payment of Rs. 1.56 crore, as the certificate was issued after the amount of Rs. 1.56 crore had been credited in the books and also amount mentioned in the certificate does not tally. The assessee challenged the issue of notice by way of writ before the High Court. The Court held that the Assessing Officer has not even indicated in the reasons that have been recorded that there was any failure to disclose fully and truly all material facts and there is merit in the contention of the assessee that there was a full and true disclosure of all necessary material, therefore reopening of assessment after four years was not valid. (A.Y. 2004-05)

Monitor India (P) Ltd. v. UOI (2012) 343 ITR 236 / 68 DTR 313 / 206 Taxman 167 / 252 CTR 78 (Bom.)(HC)

S. 147 : Reassessment - Limitation - Reasons recorded need not be supplied within limitation period, reopening cannot be held to be invalid [S. 148, 149]

For A.Y. 2004-05, the Assessing Officer issued a notice under section 148 on 15.3.2011. The recorded reasons were supplied to the assessee on 30.8.2011 (after the expiry of the limitation period of 6 years). The assessee, relying on Haryana Acrylic Manufacturing Co. v. CIT (2009) 308 ITR 38 (Delhi), challenged the reopening inter alia on the ground that as the recorded reasons were supplied after the expiry of the limitation period, the reassessment proceedings were invalid. Held dismissing the petition:

There is no requirement in section 147, 148 or 149 that the reasons recorded should also accompany the notice issued under section 148. The requirement in section 149(1) is only that the notice under section 148 shall be issued. There is no requirement that it should also be served on the assessee before the period of limitation. There is also no requirement in section 148(2) that the reasons recorded shall be served along with the notice of reopening the assessment. The only mandatory requirement is that before issuing the notice to reopen the assessment the Assessing Officer shall record his reasons for doing so. After GKN Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19 (SC) the Assessing Officer is duty bound to supply the recorded reasons to the assessee after the assessee files the return in response to the section 148 notice. Haryana Acrylic turned on the peculiar facts of that case, where two sets of reasons had been recorded by the Assessing Officer. As the second set of reasons alleging non-disclosure of material facts surfaced for the first time in the affidavit filed by the Revenue before the High Court after the expiry of 6 years, it was held that the reassessment proceedings were invalid. As this is not the fact situation here, the assessee's plea cannot be accepted. (A.Y. 2004-05)

A. G. Holdings Pvt. Ltd. v. ITO (2012) 72 DTR 346 / 207 Taxman 117 (Mag.) / (2013) 352 ITR 364 (Delhi)(HC)

S. 147 : Reassessment - Disclosure in notes on account - Change of opinion - Question whether there is "change of opinion" if Assessing Officer does not specifically apply his mind referred to larger bench

In the Notes to accounts, the assessee had disclosed that it had received Rs. 173 lakhs for transfer of exclusive distribution rights of AC and water coolers and that it was credited to capital reserve and not treated as income. The Assessing Officer passed assessment order undr section 143(3) in which he did not deal with the issue. Subsequently, as the revenue raised an objection, the Assessing Officer, within 4 years from the end of the A.Y., reopened the assessment on the ground that the said amount was chargeable as "Capital gains". The Tribunal, following CIT v. Kelvinator of India Ltd. (2010) 256 ITR 1 (FB) (affirmed in CIT v. Kelvinator of India Ltd. (2010) 320 ITR 561 (SC), struck down the reopening on the ground that it was based on the notes on accounts that was already on record, there was no "fresh material" and so it was a case of "lapse of the Assessing Officer" and a "change of opinion". On appeal by the department, Held:

A case where the Assessing Officer specifically examines an issue and applies his mind poses no difficulty because even if the order is silent, it is a case of "change of opinion". However, in a case where the Assessing Officer does not notice or examine a particular aspect in the assessment order and does not raise any written question or query, can it be said that the doctrine of "mere change of opinion" is applicable. There can be different aspects in which this question may arise including cases where the claim may be a repetition and allowed in earlier years. To what extent the presumption under section 114(e) of the Evidence Act applicable is the issue. The question is whether the presumption is rebuttable and when the presumption is rebutted. Further, whether the said presumption only applies to procedural aspects or even to substantive assertions relevant to the assessment. Though in Kelvinator of India Ltd. (2010) 256 ITR 1, the Full Bench held that section 114(e) of the Evidence Act would apply and the Assessing Officer would be deemed to have applied

his mind, section 114 was not specifically referred to by the Supreme Court nor did it specifically approve or disapprove the observations of the Full Bench. Accordingly, the matter should be examined by a larger bench and the issues requiring consideration are:
i) What is meant by the term "change of opinion"?
ii) Whether assessment proceedings can be validly reopened under section 147, even within four year, if an assessee has furnished full and true particulars at the time of original assessment with reference to income alleged to have escaped assessment and whether and when in such cases reopening is valid or invalid on the ground of change of opinion?
iii)Whether the bar or prohibition under the principle "change of opinion" will apply even when the Assessing Officer has not asked any question or query with respect to an entry/note, but there is evidence and material to show that the Assessing Officer had raised queries and questions on other aspects?
iv) Whether and in what circumstances section 114(e) of the Evidence Act can be applied and it can be held that it is a case of change of opinion?" (A.Y. 2001-02)
CIT v. Usha International Ltd. (2012) 251 CTR 28 / 73 DTR 153 (Delhi)(HC)

S. 147 : Reassessment - Change of opinion - Beyond four years - Tangible material - Reassessment held to be not valid in the absence of any new or additional information [S. 148]
Where the assessee had made full and true disclosure and also there was a note by the auditor in his audit report, reopening of assessment beyond the period of four years was held to be not valid notwithstanding the fact that for subsequent assessment year a similar addition had been made by the Assessing Officer. Assessment cannot be reopened on the basis of a mere change of opinion. There should be some tangible material with the assessing officer to come to the conclusion that there is an escapement of income. A mere change of opinion on the part of the Assessing Officer in the course of assessment for a subsequent year cannot justify the reopening of an assessment. (A.Y. 2006-07)
NYK Line (India) Ltd. v. Dy. CIT (No. 2) (2012) 346 ITR 361 / 68 DTR 90 / 211 Taxman 185 (Mag.)(Bom.)(HC)

S. 147 : Reassessment - Housing project - Amendment of law - Beyond four years - Reassessment held to be not valid
The Assessing officer issued the notice for reopening Notice issued after the expiry of four years from the end of the relevant assessment year merely on the basis of a prospective amendment without placing any evidence on record to demonstrate that the assessee had concealed any material facts was held to be invalid. (A.Y. 2004-05)
Kalpataru Sthapatya (P) Ltd. v. ITO (2012) 346 ITR 371 / 68 DTR 221 / (2012) TLR Vol. 42 March 212 (Guj.)(HC)

S. 147 : Reassessment - Beyond four years - Notice - Reassessment merely on the basis of investigation wing held to be not valid
Notice issued after the expiry of four years from the end of the relevant A.Y. by the Assessing Officer merely acting mechanically on the information supplied by the Investigation wing about the accommodation entries provided by the assessee to certain entities without applying his own mind was led to be not justified. (A.Y. 2004-05, 2006-07)
CIT v. Kamdhenu Steel & Alloys Ltd. (2012) 68 DTR 38 / 248 CTR 33 / 206 Taxman 254 (Delhi)(HC)

S. 147 : Reassessment - Beyond four years - Reopening held to be valid on the basis of disclosure made in subsequent year

Assessment can be reopened even after the expiry of four years from the end of the relevant A.Y. on the basis of the disclosure made in subsequent year which were not disclosed in the relevant A.Y. (A.Y. 2004-05)

Siemens Information Systems Ltd. v. A.CIT & Ors. (2012) 343 ITR 188 / 68 DTR 77 (Bom.)(HC)

S. 147 : Reassessment - Full and true disclosure - Notice after expiry of four years - As there is no allegation of failure on the part of assessee to state fully and truly all material facts reopening after four years held to be not sustainable [S. 148]

The assessment was completed on 30th October under section 143(3). The Assessment was on 16th August, 2001 on the ground that the assessee has claimed meling loss in excess of 7.24 percent. The assessee objected for reopening, which was rejected by the Assessing Officer. The assessee challenged the order by writ petition. The Court allowed the petition and held that there is no allegation in the reasons of failure on the part of the assessee to state fully and truly all material facts necessary for assessment and the assessment having made after verification of records, reopening after four years was not sustainable. (A.Y. 2004-05)

Shriram Foundry Ltd. v. Dy. CIT (2012) 70 DTR 201 / 250 CTR 116 / (2013) 350 ITR 115 (Bom.)(HC)

S. 147 : Reassessment - Full and true disclosure - Notice after expiry of four years - As there is no allegation in the reasons for failure to disclose material facts necessary for assessment reopening beyond four years was held to be not valid

The assessment was completed under section 143(3) on 14th December, 2007 accepting the melting loss at 7.75 percent. The notice for reopening was issued on the ground that in the similar line of business other assessee have claimed the melting loss at 5.5 percent. The objection of assessee was rejected by the Assessing Officer. The assessee challenged the reopening by writ petition. The Court allowed the writ petition and held that there is no allegation in the reasons which have been disclosed to the assessee that there was any failure on his part to fully and truly disclose material facts necessary for assessment and therefore reopening beyond four years was not valid. (A.Y. 2005-06)

Sound Casting (P) Ltd. v. Dy. CIT (2012) 70 DTR 204 / 250 CTR 119 (Bom.)(HC)

S. 147 : Reassessment - Full and true disclosure - Notice after expiry of four years - Reassessment is not permissible notwithstanding subsequent decision of Court or retrospective amendment [A.Y. 2004-05]

On the facts the Assessing Officer reopened the assessment on the ground that set off of brought forward unabsorbed depreciation loss was allowed against the income from other sources and capital gains, which is not in accordance with law as explained by special bench in the case of Times Guarantee Ltd. and while giving effect to the order of Tribunal no addition was made while computing the income under section 115JB on account of provision for diminution in the value of investment charged to P&L account as the law is amended by Finance Act, 2009 with retrospective effect from the A.Y. 2001-02. The Objection raised by the assessee was rejected by the Assessing Officer. The assessee filed the writ petition. The Court held that there being full and true disclosure by assessee reopening of assessment beyond four years was not permissible not withstanding subsequent decision of Court or retrospective amendment. (A.Y. 2004-05)

Voltas Ltd. v. ACIT (2012) 349 ITR 656 / 70 DTR 433 (Bom.)(HC)

S. 147 : Reassessment - Full and true disclosure - Notice after four years - Reassessment is not permissible not withstanding retrospective amendment of law

The assessment was completed under section 143(3) on 30th August, 2006 under the provisions of section 143(3) read with section 115JB. Reassessment notice was issued under section 148 on 8th

August 2011 for the A.Y. 2004-05 because of retrospective amendment of law which was introduced by Finance Act, 2009 with retrospective effect from 1st April, 2001 due to introduction of Explanation (1) (i) to section 115JB as regards diminution in the value of investment. The reassessment notice was challenged by way of writ petition. The Court held that reasons for reopening contain absolutely no reference to there being any failure on the part of the assessee to fully and truly disclose all material facts Assessing Officer may have reason to believe that income has escaped assessment, but that itself is not sufficient for reopening an assessment beyond the period of four years. There must be failure on the part of assessee to fully and truly disclose all material facts necessary for assessment, therefore reassessment was held to be not valid, notwithstanding retrospective amendment of law. (A.Y. 2004-05)

DIL Ltd. v. ACIT (2012) 343 ITR 296 / 70 DTR 429 / 205 Taxman 182 (Bom.)(HC)

S. 147 : Reassessment - Reason to believe - Reassessment on the presumption that provisions of section 115AD would stand attracted is not valid - Succeeding Assessing Officer cannot improve upon the reasons which were originally communicated to the assessee [S. 148]

The assessee company filed its return of income for the A.Y. 2006-07 on 31st Oct., 2006 declaring nil income. The assessee claimed that profits earned from the transactions in Indian securities are not liable to tax in India in view of Art. 7 of the India- Singapore treaty because the assessee company did not have PE in India. The assessment was reopened on the ground that no foreign companies are allowed to invest through stock exchange in India unless it is approved as FII by the regulatory authorities Viz- RBI, SEBI, etc. According to the Assessing Officer the gain earned on investment as FII is liable to be taxed under section 115AD. The reassessment notice was challenged before the Court, the Court held that the attention was drawn to the notice of Assessing Officer that the assessee is not an FII and that provisions of section 115AD would not be attracted. The Assessing Officer attempted to improve upon the reasons which were originally communicated to the assessee. Those reasons constitute the foundation of action initiated by the Assessing Officer for reopening of assessment. Those reasons cannot be supplemented or improved upon subsequently. The Court held that in the absence of any tangible material assessment could not be reopened under section 147, further succeeding Assessing Officer has clearly attempted to improve upon the reasons which were originally communicated to the assessee which was not permissible. (A.Y. 2006-07)

Indivest PTE Ltd. v. ADIT (2012) 250 CTR 15 / 206 Taxman 351 / 69 DTR 369 / (2012) Vol. 114 (4) Bom.L.R. 2080 / (2013) 350 ITR 120 (Bom.)(HC)

S. 147 : Reassessment - Deduction at source - Software - Change of opinion - Assessing Officer has applied his mind as regards applicability of section 9(1)(vii), hence reassessment held to be bad in law [S. 9(I)(vii), 195]

The assessee made payment towards software consultancy services to a foreign company, without deduction of tax at source. In the course of original assessment proceedings the assessee explained that payment made for consultancy services outside India were not chargeable under Act as per section 9(1)(vii), hence not liable for deduction of tax at source, which was accepted by the Assessing Officer. The Assessing Officer thereafter reopened the completed assessment on the ground that the assessee had neither any sale of software outside India nor earned any income from outside India and consumed all software in house and therefore consultancy charges paid to foreign company was to be disallowed. On writ petition challenging the reassessment, the Court held that the Assessing Officer during the original assessment proceedings had gone in to and examined applicability of section 9(1)(vii) and thereafter did not invoke section 9(1)(vii), therefore it being a change of opinion, reassessment is bad in law. The court also held that even otherwise since it was found that Assessing Officer had incorrectly recorded reasons by presuming that payments were made to Artech Software Information Systems LLC, where as the said transaction was in respect of software purchase from Micrografx, and assessee had given all details in respect of same, it could be said that the Assessing

Officer had proceeded on wrong factual basis also, therefore, reopening proceedings was to be quashed. (A.Y. 2003-04)
Artech Infoystems (P) Ltd. v. CIT (2012) 206 Taxman 432 (Delhi)(HC)

S. 147 : Reassessment - Reasons - Recorded - Reasons for reassessment was not furnished to the assessee before completion of assessment, held reassessment not valid
The Tribunal following the judgment of Bombay High Court in CIT v. Fomento Resorts and Hotels Ltd. ITA No. 71 of 2006 dated 27th November, 2006, has held that though the reopening of assessment was within three years from the end of relevant A.Y., since the reasons recorded for reopening of the assessment were not furnished to the assessee till date the completion of assessment, the reassessment order cannot be up held, moreover, special leave petition filed by revenue against the decision of this court in the case of CIT v. Fomento Resorts and Hotels Ltd., has been dismissed by Apex Court, vide order dated July 16, 2007. The Court dismissed the appeal of the revenue.
CIT v. Videsh Sanchar Nigam Ltd. (2012) 340 ITR 66 (Bom.)(HC)
Editorial:- Refer Tata International Ltd. v. Dy. CIT (2012) 52 SOT 465 (Mum.)(Trib.)

S. 147 : Reassessment - Full and true disclosure - Notice after expiry of four years - Assessee having not disclosed to the Assessing Officer the fact that it has filed an allegation against its secretary and some other misappropriation of funds during the period, reopening of assessment beyond four years held to be valid
The assessment was completed under section 143(3) on 22nd December, 2006. The reassessment notice was issued on 29th March, 2011. In the reasons recorded it has been stated that during the course of scrutiny assessment for A.Y. 2008-09, the Assessing Officer came to know of the fact that the assessee had lodged a first information report (FIR) on 16th March, 2006 against, then secretary of the Board of Control for Cricket in India and others, inter alia for misappropriation of funds. During the assessment proceedings for the A.Y. 2004-05 the assessee had not furnished any intimation to the Assessing Officer for alleged misappropriation of funds. As there was failure on the part of assessee to disclose all material facts necessary for assessment. The assessee challenged the notice by way of writ petition. The Court held that assessee having not disclosed to the Assessing Officer the fact that it has filed an FIR against its secretary and some others for misappropriation of funds during the period which covered the F.Y. relatable to the relevant A.Y., there was a failure on the part of the assessee to disclose fully and truly material facts necessary for assessment and the chargesheet which has been filed by economic Offences Wing of the CID pursuant to the investigation carried out by it constituted tangible material for the Assessing Officer to form the belief that reopening of the assessment has escaped beyond the period of four years from the end of relevant A.Y. was valid. (A.Y. 2004-05)
Board of Control for Cricket in India v. ACIT (2012) 71 DTR 376 / 208 Taxman 236 (Mag.)(Bom.)(HC)

S. 147 : Reassessment - Notice - Tangible material - Reopening in the absence of "fresh tangible material" is invalid, assessment was completed after considering the claim, reassessment on ground expenses wrongly allowed held to be not valid [S. 148]
For A.Y. 2002-03, the assessee filed a ROI declaring income of Rs. 14.99 crores. A revised ROI was then filed claiming 30% adhoc expenses (Rs. 6.31 crores) and offering income of Rs. 8.11 crores. When the Assessing Officer asked the assessee to substantiate the expenses, he withdrew the claim. The Assessing Officer passed section 143(3) assessment determining the income at Rs. 56.41 crores. The Assessing Officer then issued a section 148 notice (within 4 years) to reopen the assessment on the ground that the claim for expenses (which was withdrawn) had to be assessed as "unexplained expenditure" under section 69. The CIT(A) & Tribunal struck down the reassessment order on the ground that the material on the basis of which the assessment was sought to be reopened was always

available at the time of the original proceeding and there was no new material. On appeal by the department to the High Court, held dismissing the appeal:
The assessee had made a claim for 30% adhoc expenditure. This was withdrawn by the assessee when asked by the Assessing Officer to substantiate. The reopening on the basis that the said adhoc expenditure constituted "unexplained expenditure" under section 69 was based on the same material. There was no fresh tangible material before the Assessing Officer to reach a reasonable belief that the income liable to tax has escaped assessment. It is a settled position of law that review under the garb of reassessment is not permissible. (A.Y. 2002-03)
CIT v. Amitabh Bachchan (2012) 349 ITR 76 / 74 DTR 314 / 251 CTR 250 (Bom.)(HC)

S. 147 : Reassessment - Reason to believe - Information from Enforcement Directorate and Investigation along - Existence of material and rational belief - Prima facie belief regarding escapement of income of the assessee is relevant [S. 148]
The assessee filed the return of income for the A.Y. 2002-03 in the status of non-resident and declared property income and interest. The return was accepted under section 143(1). The notice under section 148 was issued thereafter. The assessee filed the return under protest and objected for reopening of assessment. As per the reasons recorded by the Assessing Officer, it was found that it was mainly based on the information received from the Enforcement Directorate and the Investigation Wing about transfer of commission monies from the company to certain beneficiaries for services rendered in connection with the finding of a buyer for the "Oil food programme". The jurisdiction to reopening was challenged before the Court. The Court held that, on the basis of information and documents received from the Enforcement Directorate and investigation Wing, Assessing Officer could have formed the prima facie belief regarding escapement of income of the assessee; finer questions as to business connection in India vis-à-vis commission said to be received by the assessee were not required to be examined at this stage, which could be examined during the reassessment proceedings. Accordingly, the jurisdiction of the Assessing Officer to issue notice under section 148 on 17th Feb., 2009 reopening of the assessment of the assessee on the ground that income chargeable to tax had escaped assessment is up held and petition was dismissed. (A.Y. 2002-03)
Aditya Khanna v. ACIT (2012) 72 DTR 1 / 208 Taxman 93 (Delhi)(HC)

S. 147 : Reassessment - Change of opinion - Same materials on record - Reassessment on the basis of same material facts held to be not valid
The assessee is engaged in manufacturing of irrigation projects. For the relevant A.Y. the assessee claimed deduction under section 80IA. The assessment was completed under section 143(3) after considering the explanation furnished by assessee. Thereafter the Assessing Officer issued notice under section 147 on the ground that the assessee was a contractor or supplier of irrigation products and could not be called a developer of any new industrial facility and thus the assessee has not fulfilled the condition of section 80IA(4). The assessee objected for reassessment, which was rejected by the assessing Officer. On writ the court quashed the notice issued under section 148 on the ground that in the absence of "any tangible material" to come to the conclusion that there was escapement of income from assessment, the Assessing Officer exceeded his authority to reopen the assessment merely on the basis of a "change of opinion" and accordingly the reassessment notice was quashed. (A.Y. 2006-07)
Parixit Industries (P) Ltd. v. ACIT (2012) 207 Taxman 140 / 71 DTR 9 / (2013) 352 ITR 349 (Guj.)(HC)
Editorial:- SLP of department was dismised. ACIT v. Parixit Industries (P) Ltd. [SLP CA CC No. 15455 of 2012 dated 14-9-2012 (2012) 210 Taxman 93 (SC)]

S. 147 : Reassessment - Full and true disclosure - Change of opinion - Reasons recorded do not disclose that there was failure or omission to disclose fully and truly all material facts, reassessment held to be in valid

In the course of original assessment proceedings the Assessing Officer has considered and allowed the non-compete fee payment as revenue expenditure. The audit objection was raised that the Assessing Officer had wrongly allowed / treated non-compete fee as revenue expenditure and that the same should have treated as capital expenditure. The Assessing Officer has reopened the assessment. The assessee challenged the reassessment proceedings. The Court held that in the original assessment proceedings, the Assessing Officer had considered and examined whether or not the non-compete fee payment was of capital or revenue nature, further assessee had disclosed fully and truly all material facts relevant assessment and there was no failure or mission to disclose fully and truly all material facts reopening was not therefore not sustainbale. (A.Y. 2003-04)

BLB Ltd. v. ACIT (2012) 343 ITR 129 / 72 DTR 194 / 254 CTR 615 (Delhi)(HC)

S. 147 : Reassessment - Full and true disclosure - Notice after expiry of four years - Failure of Assessing Officer to draw correct legal inferences at the time of original assessment from the said primary facts is not an error or omission on the part of assessee hence neither Explanation 1 nor Explanation 2 is applicable

The Assessing Officer in the original assessment proceedings had examined the deduction under section 80HHC, 80IB and allowed the claim. The Assessing Officer reopened the assessment on the ground that the deduction under section 80HHC was allowed without reducing the deduction claimed and allowed under section 80IB as required by section 80IA(9), which is also applicable to section 80IB. The Tribunal examined and went in to the question whether there was failure or omission on the part of the assessee in making full and true disclosure of material facts. The Tribunal held that there was no failure on the part of assessee to discloses full and true disclosure, accordingly quashed the reassessment proceedings. On appeal by the revenue the Court upheld the order and held that there being no failure on the part of the assessee in furnishing material or primary facts, which were available on record, reopening after four years was not sustainable. (A.Y. 2000-01)

CIT v. Purolator India Ltd. (2012) 343 ITR 155 / 72 DTR 189 / 254 CTR 610 (Delhi)(HC)

S. 147 : Reassessment - Full and true disclosure - Notice after expiry of four years - Reopening on the ground that the agreement was not filed is not justified

The assessment was completed under section 143(3). In the original assessment proceedings the Assessing Officer assessed the income from Department of Science and Technology as business income. The assessment was reopened on the ground that income should have been taxed as fees for technical services. For the A.Y. 1995-96 for the first time after examining the legal provisions held that the payment received from the department of Science and Technology Government of India were fees for technical services and not as business income. The reassessment proceedings initiated by the Assessing Officer was quashed on the ground that there was no failure or omission on the part of the assessee to disclose material facts. On appeal by the revenue, the Court held that Assessing Officer being aware of the nature and character of income, which was received by the assessee, reopening on the ground that the assessee had not filed a copy of agreement dated 5th May, 1988, entered between the assessee and the department of Science and technology, Government of India was not sustainable more so when its letter the assessee had referred to the agreement between the assessee and the Government of India and the nature and character of the obligation performed for which consideration was paid. (A.Y. 1990-01 to 1992-93)

CIT v. Cray Research India Ltd. (2012) 343 ITR 212 / 72 DTR 200 / 254 CTR 621 (Delhi)(HC)

S. 147 : Reassessment - Revised return - Surrender of income - Assessment under section 143(1) - Reassessment is invalid

Where the assessee had filed revised return which was processed under section 143(1) of the Act, it cannot be said that the additional income surrendered by the assessee in his revised return has escaped assessment giving rise to initiation of reassessment proceedings. (A.Y. 2001-02)
CIT v. Anjana Sabharwal (Smt) (2012) 71 DTR 313 (All.)(HC)

S. 147 : Reassessment - Change of opinion - Housing project - Appeal - Alternative remedy - Original assessment all queries were answered - Reassessment was quashed - Writ is maintainable though appeal is pending-.Objections were not heard -Reassessment was held to be invalid. [S. 80IB(10), Constitution of India - Art. 226]
Where during the original assessment proceedings the assessee had answered all the queries raised by the Assessing Officer about the claim made by it under section 80IB(10) of the Act and the claim was allowed by the Assessing Officer. Thereafter, reassessment proceedings initiated on the basis of the same material were liable to be quashed. Writ remedy provided to the assessee to challenge the notice if reassessment on the ground of non-existence of condition precedent for exercise of such power by the Assessing Officer cannot be taken away by reason if mere subsequent filing of the appeal under the Act against the reassessment order.Objections were not heard .Reassessment was held to be invalid.(A.Y.2005-06)
Vishwanth Engineers v. ACIT (2012) 72 DTR 113/(2013) 352 ITR 549(Guj.)(HC)

S. 147 : Reassessment - Reason to believe - Finding in subsequent year - On the basis of finding in subsequent year that three parties are fictitious - Reopening was sustainable [S. 148]
In the present case the original assessment was completed under section 143(3), notice was issued before expiry of four years, on the basis of assessment order of subsequent year. The Court held that reopening on the basis of findings in subsequent year i.e. A.Y. 2008-09, that the identity of the three parties from whom cash has been received is doubtful as they do not exist at the address given by the assessee and the TINs mentioned in respect of the parties are fictitious was sustainable. (A.Y. 2006-07)
Dewas Soya Ltd. v. Addl. CIT (2012) 349 ITR 676 / 72 DTR 393 (MP)(HC)

S. 147 : Reassessment - Beyond four years - Depreciation on capital expenditure - Application of income - There has to be vital link between the reasons and evidence, unless the Assessing Officer establishes that there was failure on the part of assessee to discloses, reassessment is bad in law [S. 148, Constitution of India - Art. 226]
The assessment of the assessee was completed under section 143(3). The notice for reopening of assessment under section 148 was issued beyond period of four years. One of the reason for reopening was the assessee claimed the depreciation on capital expenditure and also treated the capital expenditure as application of income under section 11(1)(a) of the Act. The assessee challenged the reassessment by way of Writ. The Court held that as the reopening of the assessment has taken place beyond period of four years, the jurisdictional requirement in such a case is that there must be a failure on the part of assessee to fully and truly disclose all material facts necessary for the assessment for that A.Y. On the facts there was full disclosure of facts before the Assessing Officer and the Assessing Officer has not established vital link between the reasons and evidence, the reassessment notice was quashed and writ petition was allowed. (A.Y. 2004-05)
Bombay Stock Exchange Ltd. v. Dy. DIT(E) (2012) 74 DTR 300 / (2012) Vol. 114(4) Bom. L.R. 2061 (Bom.)(HC)

S. 147 : Reassessment - Reason to believe - Depreciation - Reason to believe to be tested on the material as at the time of when reasons were recorded

Order of Tribunal deleting the addition on the basis of reopening of assessment held to be cryptic. It was held that the reason to believe to be tested on the material as at the time of when reasons were recorded. Matter remanded back to the Tribunal. (A.Y. 2001-02)
CIT v. Jagson International Ltd. (2012) 345 ITR 414 (Delhi)(HC)

S. 147 : Reassessment - Change of opinion - Investment in share - Trade - Assessing Officer accepting the transfer of share form stock-in-trade as investment, in reassessment change of stand as trade held to be not valid
In the original assessment proceedings the Assessing Officer accepted the stand of assessee treating the transfer of stock in trade to invests was assessable as short term capital gains. The assessment was reopened on the ground that the same is assessable as business income. The assessee challenged the said notice before High Court, the Court held that a change of opinion could not clothe the Assessing Officer with the jurisdiction to initiate the proceeding under section 147 of the Act. An error of judgment also did not confer such a jurisdiction on the Assessing Officer. Accordingly proceedings initiated under section 148 was quashed. (A.Y. 2005-06)
Ritu Investments P. Ltd. v. Dy. CIT (2012) 345 ITR 214 / 51 DTR 162 (Delhi)(HC)

S. 147 : Reassessment - Intimation - Tangible material - Intimation under section 143(1), cannot be reopened under section 147 in absence of "tangible material" [S. 80HHC, 143(1), 143(2), 148]
For A.Y. 2002-03, the Assessing Officer issued an Intimation under section 143(1) accepting the return. Subsequently, based on objections raised by the audit, he issued a section 148 notice to reopen the assessment. The Assessing Officer set out four issues in the recorded reasons and for two he stated that the reopening was to "verify" the expenditure. The assessee filed a Writ Petition to challenge the reopening inter alia on the ground that there was no reason to believe that income had escaped assessment. Held by the High Court:
Even in a case where only a section 143(1) intimation is passed, the power to reopen can be exercised only where there is "reason to believe that income has escaped assessment" and not merely to "scrutinize" the return or "verify" the expenditure. Further, even in case of reopening of an assessment which was previously accepted under section 143(1) without scrutiny, the Assessing Officer would have power to reopen the assessment, provided he had some tangible material on the basis of which he could form a reason to believe that income chargeable to tax had escaped assessment. Such reason to believe need not necessarily be a firm final decision of the Assessing Officer. This safeguard is necessary to prevent arbitrary exercise of powers under section 147 to circumvent the scrutiny proceedings which could not be framed in view of notice under section 143(2) having become time barred. On facts, in respect of two issues, the Assessing Officer reopened the assessment to verify the claims. For mere verification of the claim, power of reopening of assessment cannot be exercised. The Assessing Officer in the guise of power to reopen an assessment cannot seek to undertake a fishing or roving inquiry and seek to verify the claims as if it were a scrutiny assessment. (A.Y. 2002-03)
Inductotherm (I) P. Ltd. v. Dy. CIT (2012) 77 DTR 1/(2013) 356 ITR 481/217 Taxman 132 (Mag.)(Guj.)(HC)

S. 147 : Reassessment - Audit objection - Reopening of assessment based solely on audit department's objection is held to be void [S. 148]
For A.Y. 2006-07, the Assessing Officer passed an assessment order. The revenue audit raised an objection that the Assessing Officer had wrongly allowed the assessee's claim on several items. Based on this, the Assessing Officer reopened the assessment *within 4 years* from the end of the A.Y. The assessee challenged the reopening on the ground that (a) it was based on the audit objection and without independent application of the Assessing Officer's mind & (ii) all the facts were already on

record, there was no new material and it was a case of "change of opinion". Held upholding the challenge:
(i) The belief under section 147 that income has escaped assessment has to be the reasonable belief of the Assessing Officer himself and cannot be an opinion and / or belief of some other authority. The Assessing Officer cannot blindly follow the opinion of an audit authority for the purpose of arriving at a belief that income has escaped assessment. On facts, the recorded reasons are identical to the objection of the audit authority. The reasons do not rely upon any tangible material in the audit report but merely upon an opinion and the existing material already on record. This itself indicates that there was no independent application of mind by the Assessing Officer before he issued the section 148 notice [India & Eastern Newspaper Society v. CIT (1979) 119 ITR 996 (SC) followed].
(ii) Further, though the power to reopen an assessment within 4 years is very wide, yet there must be "tangible material" to justify the reopening and it cannot be based on a "review". Once all the material with regard to particular issue is before the Assessing Officer and he chooses not to deal with the same, it cannot be said that he had not applied his mind to all the material before him. A presumption can be raised that he applied his mind to all the facts involved in the assessment (Idea Cellular v Dy. CIT (2008) 301 ITR 407 (Bom.), CIT v. Kelvinator (2002) 256 ITR 1 (Delhi)(FB) & CIT v. Kelvinator (2010) 320 ITR 561 (SC) followed). (A.Y. 2006-07)
ICICI Home Finance Co. Ltd. v. ACIT (2012) Vol. 114 (5) Bom.LR. 2724 (Bom.)(HC)

S. 147 : Reassessment - Change of opinion - Claim not considered - If claim not considered by Assessing Officer, there is no "change of opinion" [S. 148]
For A.Y. 2002-03, the Assessing Officer issued a notice under section 148 to reopen the assessment (within 4 years) on the ground that the assessee had been wrongly allowed exemption under section 10(23G) on certain bonds that had been acquired out of surplus funds and not by way of loans & advances. The assessee filed a Writ Petition to challenge the reopening on the ground that the issue had been considered at the stage of the original assessment and that the reopening was based on a "change of opinion". Held by the High Court after a comprehensive review of the law on the subject:
(i) An assessment can be reopened within a period of four years if the Assessing Officer has some tangible material at his command on which he has reason to believe that income has escaped assessment. Reopening on a "change of opinion" is not possible. The term "opinion" means a "view, judgment or appraisal" formed in the mind about a particular matter. Consequently, if in the original assessment, the Assessing Officer did not examine the claim of the assessee, did not raise queries or elicit answers, it cannot be stated that merely because the Assessing Officer did not reject such a claim in the final order of assessment, he should be deemed to have expressed an opinion with respect to such a claim. As long as there is some tangible material to support the belief that income chargeable to tax has escaped assessment, reopening is permissible. Such tangible material need not be "new" or be alien to the record;
(ii) The assessee's argument that as the Full Bench judgement in CIT v. Kelivinator of India Ltd. (2002) 256 ITR 1 (Delhi)(FB) was approved by the Supreme Court, CIT v. Kelvinator of India Ltd. (2010) 320 ITR 561, the observations made by the Full Bench must be regarded as the ratio of the Supreme Court is not correct because the question before the Supreme Court was whether the concept of "change of opinion" stands obliterated with effect from 1.4.1989 or not. The Supreme Court did not hold that the tangible material must be that which did not form part of the original record of the assessment proceedings. The ratio of the decision of the Supreme Court is what the judgement lays down and not what the decisions of the High Court under challenge held. Further, it is doubtful whether even the Full Bench in Kelvinator meant to convey that a certain claim which has not been examined by the Assessing Officer in the original assessment, cannot be a subject matter of reopening on the basis of material already on record. Now, the Delhi High Court has itself referred the matter for reconsideration to another Full Bench in Usha International;

(iii) If the Assessing Officer notices the claim, raises queries and extracts a response from the assessee, the fact that he is silent in the assessment order does not mean that he has not applied his mind to the issue. The assessee has no control over the manner in which the assessment order is to be written. A reopening in this situation would be based on a "change of opinion" and not be permissible. The wide observations in Praful Chunilal Patel v. ACIT (1999) 236 ITR 832 (Guj.), cannot be understood to mean that even where a particular claim had been examined by the Assessing Officer in the original assessment, reopening is permissible because this would be counter to, CIT v. Kelvinator of India Ltd. (2010) 320 ITR 561. (A.Y. 1992-93)

Gujarat Power Corporation Ltd. v. ITO (2012) 75 DTR 20 / 210 Taxman 366 (Guj.)(HC)

S. 147 : Reassessment - Failure to disclose material facts - After four years - In There must be finding of failure to disclose material facts, reopening on basis of change of opinion is not justified [S. 9, 90]

For A.Y. 2003-04 the Assessing Officer reopened the assessment after 4 years from the end of the A.Y. on the ground that the assessee had not fully and truly disclosed the fact that it had a permanent establishment (PE) in I ndia and that it was subject to the higher rate of tax of 20% on the gross royalty. The assessee filed a Writ Petition pointing out that the Assessing Officer had reopened the assessment earlier on the same point and that he had passed an assessment order after being satisfied with the assessee's submissions that it had no PE. Held by the High Court quashing the reassessment proceedings:

Though in the recorded reasons, the Assessing Officer alleged that there was no full and true disclosure by the assessee, in the objections order, there is no finding, even prima facie, how the assessee failed to disclose fully and truly all material facts with regard to the allegation of the existence of the PE. It is evident that the question of the assessee having a PE in India had been gone into in the first round. Once that aspect of the matter had been gone into in the earlier round, it was not open to the Assessing Officer to reagitate it in the second round without any other / fresh material. No such other or fresh material has even been alleged in the reasons in the second round. Re-opening of assessments cannot be done merely on the basis of change of opinion. (A.Y. 2003-04)

Qualcomm Incorporated v. ADIT (2012) 210 Taxman 617 / (2013) 85 DTR 408 (Delhi)(HC)

S. 147 : Reassessment - Notice - Recorded reasons - After four years - Reasons for reopening not communicated, notice held to be invalid and quashed [S. 148]

The Assessing Officer issued the notice under section 148 after four years without disclosing the reasons and an opportunity to file an objections for reopening of reassessment. The assessee challenged the said notice by filing a writ petition. High Court allowed the writ petition and held that there was a complete violation of applicability of law by the Assessing Officer. He was required to communicate the reasons for reopening the assessment which he had failed to do. As there is violation of the governing principles of natural justice the order was quashed and set aside. (A.Y. 2004-05)

Agarwal Metals and Alloys v. ACIT (2012) 346 ITR 64 (Bom.)(HC)

S. 147 : Reassessment - (Bad debts) After four years - Reopening of assessment on ground deduction for bad debts erroneously allowed held to be not valid [S. 148]

The assessment was completed under section 143(3) the Assessing Officer has allowed the claim of loss on account of embezzlement of funds after enquiry and application of mind. The Assessing Officer reopened the assessment on the ground that the Assessing Officer allowed the loss on account of embezzlement as bad debts which is not permitted by law. The assessee challenged the reassessment notice by way of Writ. The Court held that there was no failure on the part of assessee to disclose material facts hence the reopening of assessment after four years on the ground that deduction for bad debts was erroneously allowed is not justified. (A.Y. 1996-97)

V. B. Investments v. Dy. CIT (2012) 346 ITR 193 / 75 DTR 228 (Guj.)(HC)

S. 147 : Reassessment - No failure to disclose material facts - after four years - Income from other sources - Reassessment to disallow the interest on borrowings for purchase of shares - As there was no failure on part of assessee reassessment held to be not valid [S. 57(iii), 148]

The original assessment was completed under section 143(3). The Assessing Officer sought to reopen the assessment after four years on the ground that on funds borrowed for purchasing of such shares interest would not be deductible under section 57(iii) of the Act. The assessee challenged the reassessment by way of writ. High Court allowed the petition and held that there was no failure by assessee to disclose material facts hence reassessment after four years held to be invalid. (A.Y. 1995-96)

Ashank D. Desai v. ACIT (2012) 346 ITR 326 (Guj.)(HC)

S. 147 : Reassessment - No failure to disclose material facts - After four years - Reopening of assessment on ground of preoperative expenses being capital in nature had been allowed as revenue, reassessment held to be invalid [S. 148]

Original assessment was completed under section 143(3) allowing the expenses as revenue in nature. The assessment was reopened on the ground that pre-operative expenses which are capital in nature has been allowed as revenue expenditure. The assessee challenged the reassessment proceeding by writ. The Court held that it is well settled legal position that for the purpose of reopening the assessment beyond four years from the end of the relevant A.Y., the reasons recorded should reflect that there is failure on the part of the assessee to disclose fully and truly all material facts. While disposing the objects the Assessing Officer stated that expenditure claimed as revenue expenditure in the computation of income but which was capital in nature unconsidered by the Assessing Officer during course of original assessment proceedings. The Court held that as there was no failure on the part of assessee the reopening after four years held to be in valid. (A.Y. 1996-97)

Ashok Jyot Oxygen Pvt. Ltd. v. H. N. Patel ITO (2012) 346 ITR 199 (Guj.)(HC)

S. 147 : Reassessment - No failure to disclose material facts - After four years - Interest against dividend income - Reassessment to disallow the interest on the ground that the interest was paid for earning dividend income held to be not valid [S. 57(iii), 148]

In the return of income the assessee has claimed the interest under section 57(iii) of the Act .In the course of original assessment proceedings the Assessing Officer made enquiries and allowed the deduction. The Assessing Officer issued the notice under section 148 proposing to reassessment on the ground that the interest was not paid for earning dividends but for acquiring controlling interest in company. The assessee challenged the reassessment proceedings by filing the writ petition. There was difference of opinion and the matter was referred to third Judge. The majority view was that reassessment after four years to disallow deduction on ground interest was not paid for earning dividend but for acquiring controlling interest in company cannot be said that there was failure on the part of assessee to disclose material facts, accordingly, the reassessment proceedings was quashed. (A.Y. 1995-96, 1996-97)

Ketan B. Mehta v. ACIT (2012) 346 ITR 254 / 77 DTR 258 / 253 CTR 329 (Guj.)(HC)

S. 147 : Reassessment - No failure to disclose material facts - After four years - Notice issued to disallow the interest paid to non-resident for failure to deduct tax at source held to be not valid [S. 40(a)(ia), 148]

The assessment was completed under section 143(3). The assessment was sought to be reopened after period of four years on the ground that since the assessee had paid usance interest to non-residents out of boundaries of India on purchase of ships, it was liable to deduct tax at source as per the provisions of section 40(a)(ia) read with Chapter XVII-B, failing which interest cannot be allowed as deduction in computation of income chargeable to tax under the head "Profits and gains from business or

profession". The assessee challenged the reassessment proceedings. The Court held that on persual of the reasons recorded shows that there is not even whisper therein to the effect that there is any failure on the part of the petitioner to disclose fully and truly all material facts necessary under consideration. On the facts the notice has been served after expiry of period of four A.Y. from the relevant A.Y., the assumption of jurisdiction by the Assessing Officer is without jurisdiction. Accordingly the reassessment proceedings was quashed. (A.Y. 1996-97)

Priya Blue Industries Ltd. v. Dy. CIT (2012) 346 ITR 204 (Guj.)(HC)

S. 147 : Reassessment - Another ground than what is recorded in the reasons - After four years - Export - Recalculation - Reassessment cannot be sustained under another ground not mentioned in notice [S. 80HHC, 148]

The assessment was completed under section 143(3). The Assessing Officer sought to reopen the assessment on the ground that wrong calculation of deduction under section 80HHC. The assessee raised the objections for the recorded reasons. The Assessing Officer disposed the objections, while disposing the application he also referred one more issue of deemed dividend. The second issue referred while disposing the objection was not part of original recorded reasons. The assessee challenged the reassessment proceedings by writ. The Court held that reassessment cannot be sustained under another ground which was not mentioned in notice hence bad in law. The Court also held that the reassessment after four years to recalculate special deduction under section 80HHC was not valid. Accordingly the petition was allowed and reassessment proceedings were quashed. (A.Y. 2004-05)

Dishman Pharmaceuticals and Chemicals Ltd. v. Dy. CIT (2012) 346 ITR 245 / 77 DTR 173 / 253 CTR 321 / 210 Taxman 149 (Guj.)(HC)

S. 147 : Reassessment - Tangible material - After four years - Off shore supply contract - Assessment reopened on the ground that section 44BBB refers to turnkey project and hence offshore supply contracts are subject to tax in India, reopening beyond four years held to be invalid [S. 44BBB, 148]

The assessment was completed under section 143(3). The Assessing Officer issued the notice under section 148 on the ground that section 44BBB, refers to turnkey project and hence off shore supply contracts are subject to tax in India. The assessee challenged the reopening of notice by way of writ petition. The Court held that reopening of assessment has to be based on some tangible material which leads to a reasonable belief that income has escaped assessment. In the present case, all material which was the basis of seeking to reopen the assessment was examined in the earlier assessment proceedings. As there was no tangible material for the Assessing Officer to form a reasonable belief that income had escaped assessment, reopening of assessment beyond period of four years held to be not valid hence issue of notice under section 148 was quashed. (A.Y. 2004-05)

Atomstroyexport a Joint Stock Co. v. Dy. DIT (2012) 210 Taxman 137 / 77 DTR 134 / (2012) Vol. 114 (5) Bom.L.R. 2472 (Bom.)(HC)

S. 147 : Reassessment - Reasons recorded - Within four years - Tangible material - Basis of order is completely different from the reasons recorded for reopening of assessment which is not permissible, reassessment held to be invalid

In the present case the reassessment was done within four years. The Tribunal held that the reassessment was bad in law. On appeal by the revenue the Court held that the recorded reasons for reopening the assessment furnished for reopening the assessment was non-fund income had been shown in fund based income so as to avail of higher deduction. However in the assessment order the disallowance was made that 20.1 percent out of gross expenses attributed to non-fund income was excessive and ought to be restricted only 10 percent, thus the basis of the order is completely different from the reasons recorded for reopening the assessment. The Court held that if after issuing notice

under section 148 he accepted the contention of the assessee and holding that income which he has initially formed a reason to believe has not escaped assessment. It is not open to him independently to assessee some other income. If he intended to do so a fresh notice under section 148 is necessary. Accordingly the order of Tribunal is up held and appeal of revenue was dismissed. (A.Y. 1996-97)
CIT v. ICICI Bank Ltd. (2012) 349 ITR 482 / 74 DTR 251 / (2013) 214 Taxman 44 (Mag.)(Bom.)(HC)

S. 147 : Reassessment - Objection - Recorded reasons - Order passed without considering objections held to be invalid [S. 148]
The assessee raised the objections after receipt of recorded reasons. The Assessing Officer did not hear the objections of the assessee nor did he pass a separate order on those objections. The Assessing Officer passed the order. The assessee challenged the said order by way of writ before the High Court. The High Court quashed the order and set aside and directed the Assessing Officer to pass a fresh order on the objections raised by the assessee to the proposed reassessment within the a period of four weeks. (A.Y. 2004-05)
Babo India Fianance Ltd. v. Dy.CIT (2012) 346 ITR 81 (Bom.)(HC)

S. 147 : Reassessment - Failure disclose material facts - After four years - Failure to disclose substantial interest and amount shown as loan from the company to be assessed as deemed dividend - Reassessment held to be justified [S. 2(22)(e), 148]
The assessment for the A.Y. 2003-04 was completed under section 143(3). During the A.Y. 2006-07 the Assessing Officer has come to know that certain advances were required to be treated as deemed dividend under section 2(22)(e). Upon perusal of accounts of the assessee was seen that the assessee had taken loan. The Assessing Officer recorded the reasons accordingly. The objections raised against the recorded reasons were disposed by the Assessing Officer. The assessee filed the writ petition for challenging the reassessment proceedings. The Court held that the assessee has not disclosed that it had a substantial interest in a company, it was found that it had 22.3 percent shareholding. From the return filed and documents annexed within return, nowhere it could be ascertained that what was holding of the assessee in SDBL. On the facts there was failure on the assessee to disclose the material facts hence the explanation to section 147 is being applicable, reassessment even after four years held to be valid, accordingly the petition was dismissed. (A.Y. 2003-04)
Dishman Pharmaceuticals and Chemicals Ltd. v. Dy. CIT (2012) 346 ITR 228 / 253 CTR 306 / 77 DTR 158 (Guj.)(HC)

S. 147 : Reassessment - Depreciation - Sale and lease back - Sale & lease back transactions are not "sham" transactions - Reassessment was held to be not valid [S. 32, 148]
The assessee ourchsed an ignifluid boiler from its sister concern. On the same day, it entered in to an agreement of lease of the boiler with its sister concern. The depreciation was allowed in the orginal assessment proceedings. Subsequently the Assessing Officer was of the view that the sale and lease back arrahngemnt as a camouflage and held that the assessee was not entitled to depreciation. The Commissioner(Appeals) up held the action of Assessing Officer. On appeal to the Tribunal the Tribunal held that the Revenue had not brought on record any material to come to the conclusion that the transaction was sham hence, reassessment proceedings were not valid. On appeal the Tribunal held that in the abosence of any material to pronounce on the genuiness of transaction, the mere fact that what had been purchased had been leased out to the vendor ot that the vendor had undertaken to pay the hire charges on behalf of the assessee to the hire purchase company, perse cpuld not lead to a conclusion that the transaction was sham. The Court held tht the reassessment proceedings were not valid. (A.Y. 1995-96 to 1997-98)
CIT v. High energy Batteries (India) Ltd. (2012) 348 ITR 574 / 74 DTR 9 / 208 Taxman 213 (Mad.)(HC)

S. 147 : Reassessment - Failure to disclose material facts - After four years - Investigation by Customs Authorities - Notice need not specify instances of failure - If failure can be inferred the reassessment held to be valid [S. 148]

The assessee is engaged in the business of imports and export and manufacture of diamonds. The assessment was completed under section 143(3). The assessment was based on the basis of show cause notice issued by the Joint Commissioner of Customs. The assessee challenged the reassessment proceedings. In the affidavit in reply the respondent stated that assessee had stolen the electricity to run its machinery, depreciation was claimed in respect of machinery given on lease. It was also brought to the notice of court that the assessee had paid penalty which was not shown in the statement. After considering the material as a whole the court held that for the purpose of invoking section 147 beyond four years, the Assessing Officer is required to record a two fold satisfaction. Firstly, that income has escaped assessment and secondly, that such escapement is on account of failure on the part of the assessee to disclose fully and truly all material facts. Neither sub section (2) of section 148 of the Act nor proviso to section 147, requires that Assessing Officer to expressly state in the reasons that income has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts. If, on the face the reasons recorded, it is apparent that failure to disclose is made out, merely because a specific expression does not find place therein, it cannot be said that the Assessing Officer has not recorded the satisfaction in this regard. Accordingly the Court dismissed the writ petition by observing that the Court is only required to examine whether there was prima facie some material on the basis of which the assessment could be reopened. The sufficiency or the correctness of the material cannot be considered. (A.Y. 2003-04)

I. P. Patel and Co. v. Dy. CIT (2012) 346 ITR 207 / 54 DTR 291 (Guj.)(HC)

S. 147 : Reassessment - Change of opinion - Within four years - There is no change of opinion if Assessing Officer does not specifically apply his mind [S. 148, Indian Evidence Act, 1872 - S. 114(e)]

The Full bench was constituted to consider the meaning of the expression "change of opinion" for the purpose of section 147 and whether, in the light of CIT v. Kelvinator of India Ltd. (2002) 256 ITR 1 (Delhi)(FB), as approved in CIT v. Rieta Biscuit Co. (P) Ltd. (2010) 320 ITR 521 (SC), in case where the assessee has furnished full and true particulars at the time of original assessment with reference to the income alleged to have escaped assessment, the Assessing Officer within four years from the end of the assessment year could be said to have formed an opinion and to have no jurisdiction to reopen the assessment even though he had not raised any query with respect to the issue. Full Bench by majority held that (i) the expression "change of opinion" postulates formation of opinion and then a change thereof. The question of change of opinion arises only when the Assessing Officer at the section 143(3) forms an opinion and accepts the assessee's stand. There is a difference between "change of opinion" and failure to "form an opinion" by the Majority;

(i) The expression "change of opinion" postulates formation of opinion and then a change thereof. The question of "change of opinion" arise only when the Assessing Officer at the section 143(3) stage forms an opinion and accepts the assessee's stand. There is a difference between "change of opinion" and failure to "form an opinion". However, for determining whether or not there is "change of opinion", the fact that the assessment order is silent is not relevant because the assessee has no control over the way the order is written. There may also be cases where though the Assessing Officer has not raised a query, the issue may be so apparent and obvious that to say that the Assessing Officer has not formed an opinion would be contrary and opposed to normal human conduct;

(ii) The observations in CIT v. Kelvinator of India Ltd. (2002) 256 ITR 1 (FB) that when an assessment order is passed under section 143(3), a presumption is raised under section 114(e) of the Indian Evidence Act that the order was passed after application of mind and that otherwise there would be a premium on the authority exercising quasi-judicial function to take benefit of its own

wrong does not mean that even if the Assessing Officer does not examine a particular issue and had not formed any opinion, it must be presumed that he must have formed an opinion. There cannot be deemed formation of opinion even when the particular issue is not examined. The observations were made only to reject the Revenue's contention that a non-speaking assessment order means a case of non-formation of opinion;

(iii) In affirming Kelvinator, the Supreme Court referred only to the principle of "change of opinion" and no comments were made on the presumption under section 114(e) of the Indian Evidence Act. The assessee's argument that the Full Bench verdict has merged in the judgement of the Supreme Court and cannot be reconsidered is not acceptable because there are no observations by the Supreme Court on the issue of whether there is deemed formation of opinion and it cannot be said that the High Court's reasoning is the ratio of the apex Court.

CIT v. Usha International Ltd. (2012) 348 ITR 485 / 210 Taxman 188 / 253 CTR 113 / 77 DTR 396 (FB)(Delhi)(HC)

S. 147 : Reassessment - Reason to believe - Assessment under section 143(1) - Reassessment upheld [S. 143(1)]

From the materials, it cannot be stated that the Assessing Officer had not recorded reasons before issuance of the notice. It cannot be contended that since notice under section 143(2) was not issued, assessment cannot be reopened. Return was accepted under section 143(1) and therefore it cannot be stated that the Assessing Officer formed any opinion with respect to any of the aspects arising in such return. Assessing Officer in guise of power to reopen an assessment, cannot seek to undertake a fishing or roving inquiry and seek to verify the claims as if it were a scrutiny assessment. However, with respect to other two grounds, the Assessing Officer had some materials at his command to form a belief that income chargeable to tax had escaped assessment. Reopening was therefore sustainable. (A.Y. 2002-03)

Inductotherm (I) P. Ltd. v. Dy. CIT (2012) 77 DTR 1 (Guj.)(HC)

S. 147 : Reassessment - Full and true disclosure - Addition on different issue [S. 2(22)(e), 80HHC]

Close perusal of the reasons recorded would immediately establish that, quite apart from no suggestion in the reasons regarding any attribution on the part of the assessee in fully and truly not disclosing material facts, all facts necessary for framing the assessment were very much before the Assessing Officer when the previously took the return of the assessee for scrutiny assessment. Further if the reopening of assessment fails, on account of non existence of reasons for such reopening, the revenue cannot either sustain such reopening or bring within the assessment proceedings any other head of escaped income not mentioned in the reasons for reopening. Reopening on the ground of wrong deduction under section 80HHC could not therefore be sustained on account of deemed dividend under section 2(22)(e). (A.Y. 2004-05)

Dishman Pharmaceuticals and Chemicals Ltd. v. Dy. CIT (2012) 346 ITR 245 / 77 DTR 173 / 253 CTR 321 (Guj.)(HC)

S. 147 : Reassessment - Shipping company - When the conditions of section 147/148 are satisfied, notice for reassessment can be issued even when orders are passed under section 172(4) or section 172(7) [S. 148, 172(2), 172(7)]

In terms of Circular No. 732 dated 20th Dec., 1995 the petitioner was issued an 'annual no objection certificate' and in terms thereof, the ships operated and owned by the petitioner were allowed to leave the ports. The certificate as itself was treated as valid and binding and in compliance with the section 172. It is after the ships had left the ports and after the end of A.Y. on 31st March, 2007, that the petitioner had filed an annual return on 18th June, 2007. It is difficult to accept the contention of the petitioner that provisions of section 147/148 cannot be invoked in the present case or in cases where

summary assessment is made under section 172(4). As in the present case, no objection certificate was issued in terms of Circular No. 732, dated 20th Dec., 1995 and no summary assessment order was passed. Only a prima facie or tentative view is taken, when an 'annual no objection certificate' is issued under the Circular No. 732, dated 20th Dec., 1995. No doubt, section 172 is a special and specific provision and is a complete code but the exception or special procedure carved out is confined and restricted to the stipulations and what is circumscribed and stated in sub sections. Section 172(1) states that notwithstanding other provisions of Act, tax shall be levied and recovered in the manner stated in the section. The said section does not postulate or mandate that section 147/148 or other provisions like sections 154, 263, etc. would not be applicable. There is no conflict between sections 147, 148 and 172. Provisions of sections 147 and 148 can apply even when an order under section 172(4) or section 172(7) has been passed. There can be escapement of income even when order under section 172(4) or section 172(7) is passed and therefore when conditions of section 147/148 are satisfied, notice for reassessment can be validity issued. (A.Y. 2007-08)

Emirates Shipping Line, FZE v. ADIT (2012) 349 ITR 493 / 77 DTR 329 / 211 Taxman 82 (Delhi)(HC)

S. 147 : Reassessment - Reason to believe - Shipping business - DTAA - India-UAE - Assessment cannot be reopened merely on the ground that it has claimed exemption from tax in India under Article 8 of the DTAA though no income tax is currently paid in UAE. [S. 90, Art. 4(1), 8]

Reason to believe does not mean 'reason to suspect'. There must be some prima facie opinion that income has escaped assessment. This material or information should not be wholly vague, indefinite or far fetched. It must have nexus or live link with the information of belief. In the instant case, Assessing Officer reopened the assessment of the assessee, a UAE based shipping company, on the ground that it has claimed exemption from tax in India under Art. 8 of the Indo-UAE DTAA even though no income tax is currently paid in UAE, is not justified. A company incorporated in UAE and carrying on shipping business in India is entitled to benefit of Art. 8 of the DTAA. Further, under Art. 4(1) as amended w.e.f. 1st April, 2008, the requirement of liability to tax has been done away with. Therefore, impugned notice under section 148 and the reassessment proceedings are quashed. (A.Y. 2007-08)

Emirates Shipping Line, FZE v. ADIT (2012) 349 ITR 493 / 77 DTR 329 / 211 Taxman 82 (Delhi)(HC)

S. 147 : Reassessment - Change of opinion - Exemption under section 54EC - Application of law or interpretation of a statute leading to a particular conclusion cannot lead to a conclusion that tax has escaped assessment hence reassessment was held to be not valid [S. 54EC]

The assessee sold a property to a builder for consideration and prior to execution of conveyance deed, the assessee invested the amount from consideration received in notified bonds from the earnest money and was granted deduction under section 54EC. Inspite of all the records and details submitted the Assessing Officer reopened the assessment denying the claim of deduction. It was held that application of law or interpretation of a statute leading to a particular conclusion cannot lead to a conclusion that tax has escaped assessment for this would then certainly amount to review of order which is permitted unless so specified in a statute. It was further held that initiation of proceedings under section 147 also proceeded on the view that there had been non-application of mind during original proceedings for assessment. This was unsustainable in law and fresh application of mind on the same set of facts amounted to change of opinion and did not warrant reopening. (A.Y. 2006-07)

Parveen P. Bharucha (Mrs) v. Dy. CIT (2012) 348 ITR 325 / (2013) 212 Taxman 166 / (2013) 82 DTR 374 / 256 CTR 346 (Bom.)(HC)

S. 147 : Reassessment - Notice - After four years - Incorrect decision by Assessing Officer after due application of mind does not confer Assessing Officer jurisdiction to reopen the assessment [S. 148]

An incorrect decision by Assessing Officer after exchange of correspondence, raising of questionnaire and satisfactory reasons received from assessee, does not confer Assessing Officer jurisdiction to reopen the assessment even after amendment of section 147 / 148. (A.Y. 2001-02)

Rosed Serviced Apartments Pvt. Ltd. v. Dy. CIT (2012) 348 ITR 452 / 56 DTR 353 (Delhi)(HC)

S. 147 : Reassessment - Non-disclosure of primary facts - Amendment in the Act retrospectively - After four years - Reassessment held to be not be not valid as there was no failure on the part of assessee to disclose all material facts [S. 80HHC, 148]

In the return of income the assessee claimed the deduction under section 80HHC. The assessment was completed under section 143(3) wherein Assessing Officer did not grant deduction in respect of DEPB licences. Commissioner(Appeals), partly allowed the appeal. Revenue went in appeal before the Tribunal. When the appeal of revenue was pending before the Tribunal the Assessing Officer issued the notice to reopen the assessment, to verify whether the or not assessee had fulfilled the conditions laid down by amended provisions of section 80HHC. The Assessee filed the writ petition challenging the issue of notice under section 148. Allowing the Writ petition the court held that, when the assessee filed its return of income for the A.Y. 2000-01, it could not have assumed that section 80HHC was going to be amended in the year 2005 and file its return accordingly. Under the circumstances, the contention put forth on behalf of the revenue that the assessee by not filing its return in terms of the amended provisions of section 80HHC had failed to disclose fully and truly all material facts deserves to be stated only to be rejected. When the amended provisions of section 80HHC were not in existence at the relevant time when the return came to be filed, no such failure can be attributed to the assessee. In the aforesaid premises, it is apparent that the basic requirement for reopening the assessment after the expiry of the period of four years from the end of the A.Y., namely, that there is escapement of income chargeable to tax by reason of failure on the part of the assessee to disclose fully and truly all material facts is not satisfied, thereby rendering the impugned notice under section 148, unsustainable. (A.Y. 2000-01)

Dishman Pharmaceuticals & Chemicals Ltd. v. Dy. CIT (2012) 210 Taxman 149 (Guj.)(HC)

S. 147 : Reassessment - Full and true disclosure - Notice after expiry of four years - The validity of the reasons has to be judged only on the basis of what was originally recorded under section 148(2) - There is no authority given by the section enabling the Assessing Officer to reopen the assessment on the ground that credit for TDS was wrongly allowed in the original assessment [S. 9(1)(vi), 148, 154, 155(14)]

In the Note No. 6 to the statement of total income filed along with the return of income on 30th Oct., 2003, not only has the petitioner drawn the attention of the Assessing Officer to the fact that in the A.Y. 1997-98 the Tribunal has held that its receipts were in the nature of "royalty" as defined in section 9(1)(vi), but the petitioner has also stated that it has not accepted the order of the Tribunal and has filed an appeal to the High Court and that notwithstanding the adverse order of the Tribunal, it is still keeping its claim alive. Thus, the material fact that t for an earlier A.Y. there was an adverse order of the Tribunal has been brought to the attention of the respondent in the return of income itself. As far as the legal aspect is concerned, there are several authorities to the effect that the reasons recorded prior to the issue of notice under section 148 cannot be improved upon and the gaps cannot be supplied later. The validity of the reasons has to be judged only on the basis of what was originally recorded under section 148(2). The Court accepted the submission of assessee that section 147 can be invoked only "if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any A.Y." and that there is no authority given by the section enabling the Assessing Officer to reopen the assessment on the ground that credit for TDS was wrongly allowed in

the original assessment. On the facts the credit for TDS was under section 155(14) read with section 154 Explanation, hence, the reopening of assessment beyond four years was held to be in valid. (A.Y. 2003-04)

Asia Satellite Telecommunications Co. Ltd. v. ADIT (2012) 253 CTR 150 / (2012) 77 DTR 121 / (2013) 215 Taxman 40 (Delhi)(HC)

S. 147 : Reassessment - Reason to believe - Absence of material or rational belief - Assessing Officer was not justified in reopening assessment on the ground that deduction under section 80IA was allowed in excess while the deduction was computed in the same manner as in earlier years [S. 80IA]

The Assessee disclosed all particulars in the original assessment proceedings. The Assessment was reopened on the ground that the excess deduction was allowed. The Court held that in the absence of any new material with Assessing Officer or failure on the part of assessee to make full and true disclosure, Assessing Officer was not justified in reopening assessment on the ground that deduction under section 80IA was allowed in excess while the deduction was computed in the same manner as in earlier years. The Court also observed that similar deduction under section 80I was allowed for the A.Y. 1996-97. Accordingly the appeal of assessee was allowed and decided in favour of assessee. (A.Y. 1997-98, 1998-99 & 2000-01)

Puri Brothers v. CIT (2012) 252 CTR 316 / 205 Taxman 163 / 75 DTR 117 (HP)(HC)

S. 147 : Reassessment - Notice - Change of opinion - Reopening on ground of irregular deduction under section 10B, held mere change of opinion, held not valid [S. 10B, 148]

During the course of assessment proceedings, the Assessing Officer has raised certain queries with regard to deductions, which were replied by the assessee and in the assessment order the Assessing Officer has dealt with the question of grant of deduction under section 10B and has allowed deduction. Reasons given for reopening the assessment and the notice issued under section 148 is nothing, but a change of opinion. Reopening was not therefore sustainable. (A.Y. 2007-08)

Metal Alloys Corporation v. ACIT (2012) 77 DTR 87 / (2013) 350 ITR 245/260 CTR 78 (Guj.)(HC)

S. 147 : Reassessment - Reason to believe - DVO report per se is not an information for the purposes of reopening assessment

DVO's report per se is not an information for the purposes of reopening assessment under section 147. Assessing Officer has to apply his mind on the information, if any, collected and must form a belief thereon for reopening the assessment. There has to be something more than the report of DVO for the belief of the Assessing Officer. (A.Y. 1997-98 to 2001-02)

CIT v. Vridnaban Real Estate (P) Ltd. (2012) 78 DTR 100 / 254 CTR 10 (All.)(HC)

S. 147 : Reassessment - Full and true disclosure - Explanation 2 - Notice after 4 years

Assessee had taken the position that since all its operations are carried out in Hong Kong and it did not have any office or branch or subsidiary in India nor did it receive any amount in India, it was not assessable to tax in India. Material fact that for an earlier assessment year there was an adverse order of the Tribunal has been brought to the attention of the Assessing Officer in the return of income itself, explanation 2 to section 147 was not attracted. No claim for the TDS of Rs. 2,11,16,426/- was made by the petitioner "in the return" nor was any credit given in the demand notice for any TDS. Order passed by the Assessing Officer on 27th June, 2006 is traceable to section 155(14) r.w.s. 154 and by claiming credit for TDS the assessee cannot be said to have furnished untrue or incorrect particulars of its income, nor can it be said that by allowing credit for the TDS the Assessing Officer has given excessive relief. Other assumption which has to be made for Expln. 2 to apply is that the relief was allowed to the assessee in the original assessment order, which would be an erroneous

assumption since no credit for TDS was allowed in the original assessment order. Further, the cases enumerated in the explanation should also be cases where income chargeable to tax had escaped assessment. It cannot be so construed as to rope in cases where credit for TDS, which is a credit given against the tax payable and is not any allowance or deduction or loss or relief against the income chargeable to tax was erroneously given reopening was not therefore sustainable. (A.Y. 2003-04)

Asia Satellite Telecommunications Co. Ltd. v. ADIT (2012) 253 CTR 150 / (2012) 77 DTR 121 / (2013) 215 Taxman 40 (Delhi)(HC)

S. 147 : Reassessment - Valuation of assets - Reference to valuation officer - Proviso to section 132A - Retrospective - Assessment includes reassessment - However proviso saves reassessment proceed under section 153A only - Reference to valuation officer was held to be invalid [S. 132A, 142A, 153A]

Reassessment for the years 1989-90 to 1992-93 were completed in the case of the assessee before Sept. 30, 2004. The Assessing Officer had appointed the valuation Officer for valuing assets and based on that made certain additions in the income of the assessee.

It was held that though assessment includes reassessment, none the less it is only the reassessment proceedings under section 153A that are saved and no other proceedings of reassessment. Section 142A of the Act, though retrospective would not apply to the facts of these cases. The deletion of additions was justified. Section 142A of the I.T. Act, 1961, inserted by the Finance (No. 2) Act, 2004, with effect from November 15, 1972, provides for estimate by the Valuation Officer in certain cases. The proviso thereto applies in respect of an assessment made on or before the 30th day of Sept., 2004, and where such assessment has become final and conclusive on or before that date, except in cases where a reassessment is required to be made in accordance with the provisions of section 153A. (A.Y. 1989-90 to 1992-93)

ACIT v. M. I. Builders P. Ltd. (2012) 349 ITR 276 (All.)(HC)

S. 147 : Reassessment - Reason to believe - Change of opinion - Within four years - Held to be not valid

It was only after detailed scrutiny that the Assessing Officer framed original assessment making no additions to the income disclosed by the assessee. Assessing Officer examined the claim thoroughly before passing the assessment order. Such scrutiny assessment cannot be reopened even within four years from the end of relevant A.Y. on the reasons recorded by the Assessing Officer. There was merely a change of opinion for which reopening was not sustainable. (A.Y. 2007-08)

Ashwamegh Co-op. Housing Society Ltd. v. Dy. CIT (2012) 79 DTR 449 / 254 CTR 362 / (2013) 214 Taxman 42 (Mag.)/ 353 ITR 413(Guj.)(HC)

S. 147 : Reassessment - Full and true disclosure - Change of opinion - There was no mentioning of lack of information - Reassessment was quashed

It is evident from the roznama, the requisitions by the TPO and the Assessing Officer and the petitioner's response thereto in the assessment proceedings for the year 2004-05 that the material had been furnished by the petitioner and considered by the Assessing Officer and the TPO. There is not a whisper as to the nature of the inadequate disclosure. Assessing Officer nowhere specifies even the nature of the information that was not furnished in the earlier proceedings. There is no mention of the disclosure of the nature of payments in the assessment proceedings for A.Y. 2007-08 which were absent in the proceedings for the relevant A.Y. 2004-05 basis of the notice was thus infounded on facts nor does he state that the absence of this unspecified lack of disclosure was not noticed by the Assessing Officer. There was thus merely a change of opinion and therefore impugned notice dated 28th March, 2011 and the impugned order dated 27th March, 2012 are quashed and set aside. (A.Y. 2004-05)

Rabo India Finance Ltd. v. Dy. CIT (2012) 346 ITR 528 / 79 DTR 316 / 211 Taxman 423 / (2013) 256 CTR 184 (Bom.)(HC)

S. 147 : Reassessment - Time limit for notice - Full and true disclosure - Excessive relief - Export - No disclaimer certificate was filed - Reassessment was held to be valid [S. 80HHC]

As per cl. (c)(iii) of Expln 2 to section 147, any excessive relief made under the Act is a fact liable to be considered for reopening the assessment. Admittedly, petitioner did not file 'disclaimer certificate' which is a mandatory requirement while claiming deduction under section 80HHC. Authority concerned proceeded with and finalised the matter as if it were assessee's own export On the other hand, the party to whom the petitioner supplied goods has been also allowed deduction under section 80HHC. As such, there cannot be any 'double benefit' under this head. Since the petitioner did not comply with the statutory requirement, it cannot be said that there was a full and true disclosure on the part of the petitioner. Though the mistake of granting deduction in the absence of disclaimer certificate is partly attributable to the Assessing Officer, reopening of assessment to correct the same is valid. (A.Y. 1989-90)

Veeteejay Exports (P) Ltd. v. Dy. CIT (2012) 79 DTR 110 (Ker.)(HC)

S. 147 : Reassessment - Intimation - Fresh material –Reason to believe- Even section 143(1) Intimation cannot be reopened under section 147 without "fresh material" [S.143 (1), 143(3)]

The assessee filed a ROI in which it claimed section 80HHC deduction of Rs. 13.35 crores. The Assessing Officer accepted the ROI under section 143(1). He thereafter reopened the assessment under section 147 on the ground that the sale proceeds of the quota was wrongly considered as export turnover and that it was business profits and 90% thereof had to be reduced under section 80HHC. The assessee challenged the reopening on the ground that as there was no "fresh material", the Assessing Officer had no jurisdiction to reopen the section 143(1) intimation. This was upheld by the Tribunal (order attached) by relying on CIT v. Kelvinator of India Ltd. (2010) 320 ITR 561 (SC). On appeal by the department to the High Court, held dismissing the appeal:

Section 147 permits an assessment to be reopened if there is "reason to believe". It makes no distinction between an order under section 143(3) or an Intimation under section 143(1). Accordingly, it is not permissible to adopt different standards while interpreting the words "reason to believe" vis-à-vis section 143(1) and section 143(3). The department's argument that the same rigorous standards which are applicable in the interpretation of the expression when it is applied to the reopening of a section 143(3) assessment cannot apply to a section 143(1) Intimation is not acceptable because it would place an assessee whose return is processed under section 143(1) in a more vulnerable position than an assessee in whose case there is a full-fledged s. scrutiny assessment under section 143(3). Whether the return is put to scrutiny or is accepted without demur is not a matter which is within the control of assessee. An interpretation which makes a distinction between the meaning and content of the expression "reason to believe" between a case where a section 143(3) assessment is made and one where an intimation under section 143(1) is made may lead to unintended mischief, be discriminatory & lead to absurd results. In Kelvinator 320 ITR 561 (SC) it was held that the term "reason to believe" means that there is "tangible material" and not merely a "change of opinion" and this principle will apply even to section 143(1) Intimations. On facts, the Assessing Officer reached the belief that there was escapement of income "on going through the ROI" filed by the assessee. This is nothing but a review of the earlier proceedings and an abuse of power by the Assessing Officer. There is no whisper in the reasons recorded of any tangible material which came to the possession of the Assessing Officer subsequent to the issue of the Intimation. It reflects an arbitrary exercise of the power conferred under section 147 [ACIT v. Rajesh Jhaveri Stock Brokers (2007) 291 ITR 500 (SC) distinguished]

CIT v. Orient Craft Ltd.(2013) 354 ITR 536/215 Taxman 28(Delhi)(HC)

S. 147 : Reassessment - Transferable development rights premium - Reassessment proceedings - The income cannot be less than the income originally assessed - Matter remanded to Tribunal to consider only expenses claimed to have been incurred by assessee [S. 148]

The assessee, a plot owners' society, received a sum of Rs. 12,98,742/- as premium for transferable development rights from its members. In the A.Y. 1999-2000, it offered the amount to tax and after deducting the expenditure incurred by it, computed the income chargeable to tax at Rs. 7,27,660/-. This was accepted without any addition or disallowance. However, during the course of reassessment proceedings, the assessee contended that the amount was not taxable on the principle of mutuality. The Assessing Officer rejected the contention and held that the expenses claimed were not related to the transfer fees and, hence, not allowable. Accordingly, he computed the income chargeable to tax at Rs. 13,00,740/-. The Commissioner(Appeals) held that once the assessee voluntarily offered the amount to tax, it was not open to the assessee to contend in the reassessment proceedings that the amount was not taxable on the principle of mutuality. He further held that the assessee had not been able to prove that the expenditure was incurred for earning the taxable income and, therefore, the expenditure claimed by the assessee was not allowable. The Tribunal held that the amount was not taxable on account of the principle of mutuality. However, it upheld the order of the Commissioner(Appeals) in disallowing the expenditure of Rs. 5,73,087/-. On appeal contending that the income assessed on reassessment cannot be less than the income originally assessed. The Court held that, the object and purpose of the reassessment is for the benefit of the Revenue and not for the benefit of the assessee and, therefore, in the reassessment proceedings, the assessee could not be permitted to convert the reassessment proceedings as his appeal or revision in disguise. Since the decision of the Tribunal was contrary to the decision of the Supreme Court, the decision of the Tribunal was set aside and the matter was restored to the file of the Tribunal for fresh decision in accordance with law. Since the amount received by the assessee had been voluntarily offered to tax, the question of considering the taxability of that amount by applying the principle of mutuality in the reassessment proceedings did not arise. It was only the expenditure claimed to have been incurred by the assessee which was disallowed in the reassessment that had to be considered by the Tribunal. (A.Y. 1999-2000)

CIT v. Jaihind Co-operative Housing Society Ltd. (2012) 349 ITR 537 (Bom.)(HC)

S. 147 : Reassessment - Specific information received that income escaped assessment - Tribunal finding Assessing Officer recorded reasons for reopening assessment - Finding of fact - Reassessment was held to be justified [S. 68, 148]

A specific information was received by the Assessing Officer through the office of the Commissioner that the assessee had received the amount of Rs. 1,60,000/- from three persons through bank accounts and, on the basis thereof he reopened the assessment under section 147 of the Income-tax Act, 1961. The Assessing Officer held that the provisions of section 68 were applicable. The Commissioner(Appeals) held that there was no nexus between the information received and the reasons recorded by the Assessing Officer and held the assessment void. The Tribunal upheld the reopening of assessment holding that the Assessing Officer had recorded detailed reasons to apply section 68 of the Act. On appeal:

Held, dismissing the appeal, that the officer did take into consideration the relevant materials while forming his prima facie opinion that reassessment proceedings were warranted. There was no substantial question of law. Appeal of assessee was dismissed. (A.Y. 2001-02)

Contel Medicare Systems P. Ltd. v. CIT (2012) 349 ITR 649 (Delhi)(HC)

Edirorial:- Order of the Appellate Tribunal in ITO v. Contel Medicare Systems P. Ltd. (2012)] 20 ITR 701 (Trib.)(Delhi) affirmed.

S. 147 : Reassessment - Notice - Validity - No change of opinion - Assessment completed under section 143(1) - Reassessment held to be valid [S. 143(1), 148, 272BB]

Assessing Officer initiated reassessment proceedings against assesses under sections 147 and 148. After completion of reassessment proceedings, assessee challenged validity of proceedings under section 148 and consequential order passed under section 143(3) in absence of proper service of notice. In CIT v. Panchvati Motors (P.) Ltd., (2011) 200 Taxman 136 (P&H.), it was held that where an assessee appears in any proceedings or cooperates in any enquiry relating to assessment or reassessment proceedings, it shall be presumed that assessee has been validly served and it shall not be open to assessee to object that notice was not served upon him or was not served in time or was served upon him in an improper manner; an exception to aforesaid presumption has been made in a case where such objection has been raised before completion of assessment or reassessment. Objection raised by assessee in instant case did not give any valid justification for challenging reassessment proceedings on that ground. Assessee also objected reassessment proceedings contending that Assessing Officer had no material to take recourse to reassessment proceedings and same was based on imagination, suspicion and change of opinion. Contention of assessee was repelled by Tribunal contending that in summary scheme, at time of processing return under section 143(1), there is no formation of opinion and, hence, question of change of opinion does not arise. The court held that since assessee was unable to demonstrate that aforesaid conclusion of Tribunal was perverse or against law in any manner, objections as raised by assessee did not arise from order of Tribunal for consideration. Appeal of revenue was dismissed. (A.Y. 2000-01)

Om Sons International v. CIT (2012) 211 Taxman 195 / (2011) 244 CTR 110 / 60 DTR 393 (Mag.)(P&H)(HC)

S. 147 : Reassessment - Block assessment - Non disclosure of primary facts - Matter which was subject matter of block assessment cannot be reopened once again, hence reassessment was cancelled [S. 148, 158BC]

A search was conducted in the case of assessee, a partnership firm, in course of which certain gold ornaments were seized. Assessee claimed that said ornaments belonged to its customers. Assessing Officer rejected assessee's contention and included value of seized ornaments in assessee's taxable income while making block assessment. Commissioner(Appeals) as well as Tribunal deleted addition made by Assessing Officer. Assessing Officer thereupon initiated reassessment proceedings taking a view that value of ornaments seized belonging to assessee escaped assessment. The Assessee filed the writ petition against the notice under section 148. The Court held that when value of gold ornaments which assessee claimed to be belonging to its customers was subject-matter of block assessment, same could not be made subject-matter of regular assessment under Chapter XIV of Act. Therefore, reopening of assessment in relation to a matter which was subject-matter of block assessment was evidently without jurisdiction. Even otherwise, once issue had already been decided by appellate authority, it was not open for Assessing Officer to seek to reopen assessment on same grounds as this would tantamount to Assessing Officer sitting in appeal over order of Commissioner(Appeals), in view of above, impugned reassessment proceedings deserved to be quashed. The Writ petition was allowed. (A.Y. 1999-2000)

Prakash Jewellers v. ACIT (2012) 211 Taxman 436 / (2013) 89 DTR 375/261 CTR 195 (Guj.)(HC)

S. 147 : Reassessment - Non-disclosure of primary facts - Beyond four years - Contarctor - Housing project - Reassessment was held to be invalid [S. 80IB(10)]

The petitioner was a domestic private limited company engaged in business of construction of residential/commercial complexes. Petitioner's assessment was completed under section 143(3) disallowing deduction under section 80IB(10). The Tribunal allowed the assessees claim and revenues appeal is pending before High Court. In the mean time the Assessing Officer reopened the assessment after expiry of four years. Reason for reopening assessment was that the assessee had sold undivided share of land through a regular sale deed and the building component had been transferred

by a construction agreement. It had been further stated that from the contents of the agreement it was gathered that the assessee operates only as a contractor and not as a builder. Therefore, in the light of the Explanation introduced to sub-section (10) of section 80IB with retrospective effect, from 1-4-2001, the assessee was not eligible to claim deduction under section 80IB(10). The court held that in absence of failure on part of petitioner to disclose fully and truly all material facts necessary for assessment, assumption of jurisdiction under section 147, after expiry of four years from end of relevant A.Y., was illegal and invalid. Accordingly the writ petition of assessee was allowed. (A.Y. 2006-07)

Doshi Housing Ltd. v. ACIT (2012) 211 Taxman 46 (Mag.)(Mad.)(HC)

S. 147 : Reassessment - Accrual of Mesne profits - Reopening held to be not justified [S. 5]

The assessee filed a civil suit for eviction of its tenant which was decreed in 1998 and an amount was awarded as mesne profit towards arrears of rent.

The assessee disclosed arrears of rent received in the year in which the suit filed was decreed. The Assessing Officer reopened the assessment for the A.Y. 1992-93 to 1998-99 and it was completed on the basis of enhanced annual letting value. The Commissioner(Appeals) held that the action of Assessing Officer in adding the arrears of rent as the assessee's income from house property on enhanced annual value was not justified. He upheld the assumption of jurisdiction to re-assess the income. The Tribunal decided in favour of the assessee. On appeal the High Court held that Assessee disclosed arrears of rent received in year in which suit filed by it was decreed. Till time of passing of decree in civil suit, right of assessee to receive arrears of rent was merely a contingent inchoate right, therefore reopening of assessment for years in which mesne profits fell due was not justified on ground that there was non-disclosure of material facts. Arrears of rent received by assessee as mesne profits could be brought to tax only during year of receipt and not in previous years in which they fell due. Appeal of revenue was dismissed. (A.Y. 1992-93 to 1998-99)

CIT v. Uberoi Sons (Machines) Ltd. (2012) 211 Taxman 123 (Delhi)(HC)

S. 147 : Reassessment - Change of opinion - Tangible material - Reassessment held to be not valid

The assessee filed its return of income declaring a total income of Rs. 2.81 crore under section 115JB. The return was selected for scrutiny. It was noted that the assessee had claimed exemption under section 10(23G) in respect of interest it had earned from investment in bonds of GIPCL and SSNNL and in respect of capital gains it had earned from sale of shares of GPEC. In support of such claim assessee filed a statement in the form of 'notes'. Assessing Officer raised several queries and called for explanation of the assessee on various issues. Assessing Officer also asked the assessee to substantiate the claim of exemption under section 10(23G) and in response thereto, the assessee furnished its justification. Assessing Officer after examining the investments so made and claim of exemption in relation thereto, made a disallowance of expenditure incurred by the assessee for earning such tax free interest. Assessing Officer, however, did not disallow the exemption on the interest *per se.* Finally, the assessment order was framed under section 143(3) for a total income of Rs. 2.31 crore under section 115JB. Later on, however, the Assessing Officer issued a notice under section 148 seeking to reopen such assessment on ground that assessee had been wrongfully granted exemption under section 10(23G). As per the Assessing Officer, investments in question were made out of surplus money and there were no loans or advances which were given by the assessee to the concerns in question, as required by the provisions of section 10(23G). Objections raised by assessee against reopening of assessment were rejected. Being aggrieved by the same, the assessee preferred instant petition challenging the notice issued under section 148. On writ the court held that mere fact that certain material, which is otherwise tangible and enables Assessing Officer to form a belief that income chargeable to tax has escaped assessment, had formed part of original assessment, per se, would not bar Assessing Officer from reopening assessment on basis of such material. however, in a

situation where Assessing Officer during scrutiny assessment, notices a claim of exemption made by assessee and having entertained prima facie doubts raises queries, asks assessee to satisfy him with respect to such a claim and, thereafter, does not make any addition in final order of assessment, he can be stated to have formed an opinion irrespective of as to whether or not in final order, he gives his reasons for not making addition. If Assessing Officer reopens such an assessment it would be said to be based on mere change of opinion .Reassessment was quashed. (A.Y. 2002-03)

Gujarat Power Corpn. Ltd. v. ACIT (2013) 350 ITR 266 / (2012) 77 DTR 89 / 211 Taxman 63 (Mag.)/ 260 CTR 80(Guj.)(HC)

S. 147 : Reassessment - Non-disclosure of primary facts - Beyond four years - Royalty claim - Reassessment held to be invalid

Assessment originally completed under section 143(3) was re-opened after expiry of four years from relevant A.Y. to disallow royalty claim allowed earlier. Question of royalty was specifically considered in original assessment proceedings and in original assessment assessee had furnished full details and particulars relating to royalty payment. The Court held that it was a case of change of opinion and there was also no non-disclosure of primary facts by assessee .Accordingly the reassessment was invalid. (A.Y. 2005-06)

Munjal Showa Ltd. v. CIT (2012) 211 Taxman 61 (Mag.)(Delhi)(HC)

S. 147 : Reassessment - Change of opinion - Decision based on judgments - Reassessment is bad in law

The Assessing Officer had taken decision in the original assessment by considering the judgments that deductions under section 80HHC and 80IA are to be separately computed. The Tribunal held that, if there is a decision in favour of assessee then the same is to be applied and thus the Assessing Officer has taken one possible view. The Tribunal has held that the concept of 'change of opinion' must be treated as an in built test to check the abuse of power. On the facts there is no tangible material with Assessing Officer for the purpose of initiating reassessment, hence the reopening of assessment is bad in law. (A.Y. 2003-04)

ACIT v. Hycron India (2012) 65 DTR 97 / 143 TTJ 226 (Jodh.)(Trib.)

S. 147 : Reassessment - Reasons - Irrelevant and non-existing reasons - Reassessment is held invalid

In the reasons recorded for reopening of assessment the Assessing Officer received information from the Dy. Director of IT (Inv.) and on the basis of a statement of the bank manger, that assessee purchased demand draft in cash but it was found that no such demand draft was issued in favour of assessee. The Tribunal held that the Assessing Officer proceeded for reopening of the assessment on non-existent and factually incorrect reasons and had not applied independent mind and did not verify the information received from the Dy. Director of IT (Inv.), therefore reassessment was invalid and unjustified. (A.Y. 1993-94)

Mahadev Trading Co. v. ITO (2012) 135 ITD 1 / 65 DTR 140 / 143 TTJ 492 / 17 ITR 332 (Ahd.)(Trib.)

S. 147 : Reassessment - Recording of reasons - After issue of notice - Full and true disclosure - Notice after expiry of four years - Eligible exemption - Reassessment held valid [S. 11, 148]

Department representative submitted documentary evidence in the form of internal correspondence to demonstrate that the reasons recorded by the Assessing Officer for reopening the assessment existed prior to the issue of notice under section 148, hence the notice was held to be valid. Assessee mentioned "no" against the "amount eligible for exemption" under section 11(1)(d) in the report, in the return it claimed deduction of Rs. 15,83,100/- as eligible for exemption under section 11(1)(d),

there was failure on the part of the assessee to disclose fully and truly basic facts required for making the assessment and the same constituted valid reason that escaped assessment (A.Y. 1999-2000)
Singhad Technical Educational Society v. ACIT (2012) 143 TTJ 352 / (2011) 57 DTR 256 (Pune)(Trib.)

S. 147 : Reassessmnet - Intimation - Assessment under section 143(1), cannot be reopening in absence of "new material"[S. 143(1), 148]
The Assessing Officer has accepted the ROI filed by the assessee under section 143(1). He thereafter issued a notice under section 148 on the ground that the assessee had claimed a deduction for ERP software and that although only 20% of the said expenses was debited to the P&L A/c, the entire amount was claimed as a deduction. The assessee claimed that the reopening was not valid as there was no "new material" in the Assessing Officer's possession. Tribunal held upholding the plea:
Though the assessment was originally under section 143(1), it is clearly evident from the recorded reasons that there was no new material coming to the possession of the Assessing Officer on the basis of which the section 143(1) assessment was reopened. In Telco Dadaji Dhackjee Ltd. v. Dy. CIT [ITA No. 4613/M/2005 dt. 12-5-2010 (Mum.)(Trib.)(Unreported)], the Third Member held, after considering ACIT v. Rajesh Jhaveri Stock Brokers P. Ltd. (2007) 291 ITR 500 (SC) & CIT v. Kelvinator of India Ltd. (2010) 320 ITR 561 (SC), that a section 143(1) assessment could not be reopened under section 147 without there being any new material coming to the possession of the Assessing Officer. As the Assessing Officer had reopened the section 143(1) assessment on the basis of the material which was already on record, the reopening was not valid.(A.Y. 2001-02) (ITA no 2230 & 2476 /Mum/2010 dt 7-10-2011)
HV Transmissions Ltd. v. ITO (2012) BCAJ P. 24 Vol. 43-B Part 6 March 2012 (Mum.)(Trib.) www.itatonline.org

S. 147 : Reassessment - Recording of reasons - Reasons recorded not supplied to the assessee within reasonable time, Tribunal remanded the matter to the Assessing Officer - Validity of Re-assessment challenged - Wide enough to cover entire issue relating to reassessment
On the facts of the case the Tribunal found that the Assessing Officer has not supplied the reasons recorded within a reasonable time. Even after several hearings the reasons recorded were not disclosed to the Assessee. The Tribunal set a side the order and remanded the matter back to the Assessing Officer for readjudication after supplying the copy of recorded reasons. The Tribunal also held that the ground of appeal contesting the validity of reassessment proceedings is wide enough to challenge the entire proceeding initiated by the Assessing Officer including the non supply of reasons recorded. (A.Y. 2005-06)
Kaushalendra Pratap Singh v. ITO (2011) 133 ITD 111 / (2012) 144 TTJ 384 / 67 DTR 267 (TM)(Kol.)(Trib.)

S. 147 : Reassesment - Within four years - Assessment for subsequent years can be the basis for issue of notice for earlier years - Assessment annulled for delay in issue of notice, reassessment notice held to be valid
For the A.Y. 2001-02, the assessment was completed under section 143(3) treating the income from organizing exhibitions as business income. The Commissioner(Appeals), annulled the assessment order on the ground that the notice under section 143(2) was served after 12 months from the end of the month in which the return of income was furnished. The assessment for the A.Y. 1997-98 which was completed under section 143(1) was reopened on the basis of assessment for the A.Y. 2001-02 and the assessment for the A.Y. 2001-02 was re-opened. In appeal the Commissioner(Appeals), allowed the appeal of assessee. On further appeal by revenue to Tribunal, the Tribunal up held the reassessment on the ground that information and material gathered, during the course of assessment proceedings and assessment of exhibition income for the A.Y. 2001-02, under section 143(3),

constituted tangible material for coming to the conclusion that income assessable to tax had escaped assessment. Even otherwise, the case of reopening for these two years fell under the Explanation 2(b) to section 147, which creates a deeming fiction. For the A.Y. 1997-98, there was no assessment but only the return was processed under section 143(1). Departmental appeal was allowed. (A.Y. 199-98, 2001-02)

ADIT v. India ITME Society (2012) 14 ITR 519 / 67 DTR 217 / 144 TTJ 427 (Mum.)(Trib.)

S. 147 : Reassessment - Reason to believe - Subsequent Supreme Court decision - Reassessment based on subsequent decision of Supreme Court is valid in law

In the original assessment proceedings the Assessing Officer has allowed the exemption under section 10(29) after application of mind. There after the reassessment order was passed, both the assessee and revenue took the matter before the High Court. High Court remitted the matter back to decide on the issue of reopening of assessment. The Tribunal following the decision of the Allahabad High Court in Kartikeya International v. CIT (2010) 329 ITR 539 (All.)(HC), held that the theory of change of opinion is not applicable to the facts of the assessee as, the Assessing Officer has implementing the law of land as declared by the Supreme Court, hence the reopening of assessment held to be valid. (A.Y. 1995-96, 1996-97)

ACIT v. Central Warehousing Corporation (2012) 144 TTJ 764 / 67 DTR 356 (Delhi)(Trib.)
Central Warehousing Corporation v. ACIT (2012) 144 TTJ 764 / 67 DTR 356 (Delhi)(Trib.)

S. 147 : Reassessment - Change of opinion - Reopening of assessment on mere change of opinion on set of facts available at the time of completion of original assessment is held to be not valid

No reassessment to be initiated in the case where Assessing Officer after due application of mind has decided a particular issue in a particular manner in the original assessment unless there are any fresh material coming to his notice after passing assessment order. Thus, change of opinion by the Assessing Officer on same facts of which were there at the time of completing the original assessment action of Assessing Officer was held to impermissible. (A.Y. 2004-05)

International Global Networks BV v. DDIT (IT) (2012) 50 SOT 433 (Mum.)(Trib.)

S. 147 : Reassessment - Non-filing of ROI - In absence of any tangible material to show that the income had exceeded the maximum amount not chargeable to tax - Reassessment not justified

In the absence of any tangible material to show that the assessee's income in the A.Y. 1999-2000 and 2000-01 had exceeded the maximum amount which is not chargeable to tax, Assessing Officer was not justified in initiating reassessment proceeding under section 147 merely for the reason that the assessee has not filed its return for the said A.Y.; there was no relevant or tangible material on the basis of which the Assessing Officer could have formed requisite belief that income had escaped assessment. (A.Y. 1999-2000, 2000-01)

Cebon India Ltd. v. ACIT (2012) 145 TTJ 475 / 67 DTR 86 (Delhi)(Trib.)

S. 147 : Reassessment - Reason to believe - Non-submission of schedules to the balance sheet along with its income and expenditure account and balance sheet, does not form reasonable belief for reassessment

The fact that the assessee, a charitable trust, has not submitted the schedules to the balance sheet alongwith its income and expenditure account and balance sheet or that it earned substantial rental income or that it earned income from sale of books and a printing press or that two societies are donating a fraction of their profits to the corpus of the assessee-trust did not constitute reason to believe that some taxable income had escaped assessment, moreso and therefore, initiation of reassessment proceedings as well as the assessment proceedings made under section 147 r.w.s. 143(3) in furtherance thereto were not valid. (A.Y. 1999-2000)

Bharati Vidyapeeth v. ACIT (2012) 146 TTJ 238 / 70 DTR 375 (Pune)(Trib.)

ACIT v. Bharati Vidyapeeth (2012) 146 TTJ 238 / 70 DTR 375 (Pune)(Trib.)

S. 147 : Reassessment - Reason to believe - Assessing Officer - Reasons to be formed only by Jurisdictional Assessing Officer and not any other Assessing Officer and issuance of notice is mandatory [S. 148, 292BB]

The basic requirement of section 147 is that the assessing officer must have a reason to believe that any income chargeable to tax has escaped assessment and such belief must be belief of jurisdictional assessing officer and not any other assessing officer or authority or department. Therefore, the jurisdiction of Assessing Officer to reopen an assessment under section 147 depends upon issuance of a valid notice and in absence of the same entire proceedings taken by him would become void for want of jurisdiction. On plain reading of section 292BB it is clear that the said section is in respect of certain procedural lapses in respect of service of notice, but in the case under consideration the question is of acquisition of jurisdiction which is a mandatory requireemnt of Act. (A.Y. 2006-07)

ACIT v. Resham Petrotech Ltd. (2012) 136 ITD 185 / 73 DTR 138 / 147 TTJ 730 (Ahd.)(Trib.)

S. 147 : Reassessment - Objection by audit party - Original assessment order framed in consonance with view in preceding and succeeding years, held action of Assessing Officer not justified as reassessment merely on basis of change of opinion as no independent application of mind by Assessing Officer

The assessee filed return of income declaring LTCG and business income. The Assessing Officer completed the assessment under section 143(3). Subsequently, the Assessing Officer reopened the assessment on the basis of objection of Audit party within period of four years. It was held that the action of reopening the assessment was not justified as the Assessing Officer nowhere in the reasons recorded mentioned that the income escaped assessment and that the same was done merely on the objection of audit party without independent application of mind by the Assessing Officer. Further, in the view by the Assessing Officer in the original assessment order was taken in consonance of view taken in preceding and succeeding years and that the action of Assessing Officer of reassessment was merely on the basis of mere change of opinion. (A.Y. 2003-04)

GMR Holdings P. Ltd. v. Dy. CIT (2012) 134 ITD 668 / 16 ITR 457 / 149 TTJ 338 / 75 DTR 439 (Bang.)(Trib.)

S. 147 : Reassessment - Non supply of recorded reasons - Order bad in law - Non-supply of recorded reasons before passing reassessment order renders the reopening void - Subsequent supply does not validate reassessment order [S. 143(3), 148]

After completing the section 143(3) assessment, the Assessing Officer received information from the Volcker Committee report that the assessee had paid "illegal" commission for supply of goods to Iraq under the "Oil for Food Programme" of the UN. The Assessing Officer issued a section 148 notice to disallow the commission and supplied the assessee with only the "gist" of the recorded reasons. The complete recorded reasons were furnished only after the passing of the reassessment order. In the reassessment order, the Assessing Officer disallowed the commission. The CIT(A) upheld the reassessment. On appeal by the assessee to the Tribunal, Held allowing the appeal:

As per GKN Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19 (SC) and the rules of natural justice, the Assessing Officer was bound to furnish reasons within a reasonable time so that the assessee could file objections against the same. The adherence to this procedure is a necessity because at the preliminary stage itself, the Assessing Officer may be satisfied with the explanation of the assessee. A reassessment completed without furnishing the reasons actually recorded by the Assessing Officer for reopening of assessment is not sustainable in law. The subsequent supply of the reasons would not make good of the illegality suffered at the stage of reopening of the assessment. On facts, though the assessee asked for the recorded reasons, the same was supplied to him only after the passing of the reassessment order. This failure on the part of the Assessing Officer renders the reassessment order

invalid [CIT v. Fomento Resorts & Hotesl Ltd. ITA No. 71 of 2006 dt. 27-11-2006 and CIT v. Videsh Sanchar Nigam Ltd. (2012) 340 ITR 66 (Bom.) (SLP dismissed) followed (included in file)]. (A.Y. 2001-02, 2002-03)

Tata International Ltd. v. Dy. CIT (2012) 52 SOT 465 (Mum.)(Trib.)

S. 147 : Reassessment - Issue of notice - Mandatory - Assessee submitted return before Assessing Officer in response to notice under section 148 hence the notice under section 143(2) to be issued before passing assessment order [S. 143(2), 148]

The Third member bench held that where there was a return before Assessing Officer in response to notice under section 148 and he had proceeded from figures of such return to complete assessment, in such a case, he should have issued notice under section 143(2) before assessing order under section 143(3) read with section 147. (A.Y. 2000-01)

V. R. Sreekumar v. ITO (2012) 136 ITD 257 / 74 DTR 210 / 147 TTJ 699 (TM)(Cochin)(Trib.)

S. 147 : Reassessment - Intimation - New material - Non-compete fee - Depreciation - Assessment under section 143(1) cannot be reopened under section 147 in absence of "new material" [S. 143(1)]

The assessee filed a ROI in which it claimed deduction for non-compete fees and depreciation on leased premises which was accepted by the Assessing Officer vide Intimation under section 143(1). Thereafter, he issued a notice under section 148 seeking to reopen the assessment on the ground that the expenses were not allowable. The assessee challenged the reopening on the ground that (a) the Assessing Officer had not given a copy of the recorded reasons and (b) there was no fresh material to justify the reopening. Before the Tribunal, though the division bench agreed that there was no new material, the AM held that in the case of a section 143(1) intimation, new material was not required while the JM took the contrary view. On a reference to the Third Member held by the Third Member:

(i) If the recorded reasons are not furnished to the assessee, it is fatal to the validity of the section 148 notice issued for reopening the assessment [CIT v. Videsh Sanchar Nigam (2012) 340 ITR 66 (Bom.) (SLP dismissed) followed];

(ii) The law laid down by the Supreme Court in CIT v. Kelvinator of India Ltd. (2010) 320 ITR 561 does not cover only a case where a section 143(3) assessment is passed but also covers a case where only a section 143(1) intimation is passed. The Supreme Court interpreted the words "reason to believe" and held that the Assessing Officer did not have the power to review. While in that case of a section 143(1) intimation, the assessee cannot challenge the reopening on the ground of "change of opinion", he can challenge it on the ground that there were no "reasons to believe" that income had escaped assessment or that the said reasons did not have a live link with the formation of the belief. Even in the case of a section 143(1) intimation, the Assessing Officer must have "tangible material" that income has escaped assessment. On facts, there was no "tangible material" to support the belief that non-compete fees and depreciation had resulted in escapement of income chargeable to tax [ACIT v. Rajesh Jhaveri Stock Brokers (P) Ltd. (2007) 291 ITR 500 (SC) distinguished). (A.Y. 1998-99)(ITA no 4613/Mum/2005 , dt 29-06-2012)5

Telco Dadajee Dhackjee Ltd. v. Dy. CIT (TM)(Mum.)(Trib.) www.itatonline.org

S. 147 : Reassessment - Intimation - Reason to believe - Material available on record along with the return filed constituted sufficient material in the hands of the Assessing Officer to form a reason to belive and reassessment was held to be valid [S. 143(1), 148]

The assessee assigned the contract to subsidiary, the return was processed under section 143(1), marterial available on record along with the return filed constituted sufficient material in the hands of the Assessing Officer to form a reason to belive and reassessment was held to be valid. (A.Y. 2003-04)

Van Oord ACZ Marine Contractors BV v. ADIT (2012) 52 SOT 423 / 75 DTR 72 / 149 TTJ 124 / 17 ITR 103 / 75 DTR 72 (Chennai)(Trib.)

S. 147 : Reassessment - After expiry of 4 years - Intangible materials - No material in possession to conclude that there was escapement of income, hence reassessment proceedings to be quashed

Instant case, was a simple case of change of opinion without there being any intangible material in the possession of the Assessing Officer for coming to the conclusion that the there was an escapement of income. Therefore, Assessing Officer not justified in initiating reassessment proceedings and thus liable to be quashed. (A.Y. 2003-04)

Prudential Assurance Co. Ltd. v. ACIT (2013) 152 TTJ 188 / 82 DTR 199 / (2012) 18 ITR 186 / 51 SOT 132 (Mum.)(Trib.)

S. 147 : Reassessment - Absence of service of notice under section 148 on power of attorney holder of NRIs [S. 148]

In response to the notice by ITO, Jalandhar, J, the power of attorney holder of the NRI assessee, had filed the return which has not been treated as invalid. Further, that ITO issued a letter to 'J' seeking clarification regarding non-declaration of capital gain arising on the acquisition of assessee's land situated at Village Noorpur Dona in District Kapurthala. Thus, it cannot be presumed that the department did not have any knowledge that 'J' is the power of attorney holder of 'JS' and other two NRI assessees. As regards the notice under section 131(1A) issued by the ADIT, there is no service record of the same with the Department so as to prove that the said notice has actually been served on JS and other assessees at Village Noorpur Dona. Thus, this does not support the Revenue's case. However, notice under section 148 then issued by ITO, Kapurthala, in the name of assessee. Notice server of the department has given a report that JS does not reside at the given address of Village Noorpur Dona. Reports of the Sarpanch and the Municipal Corporation of Kapurthala also state that JS and other assessees do not live in Village Noorpur Dona / Mansoorval Dona. As regards the affixation of the impugned notice at Janjghar / Dharamshala in village Noorpur Dona, the said address is not the last known address of the assessees. Copies of the said notices and assessment orders were obtained by inspection after the assessments were made. Thus, the arguments of the Departmental Representative that the notices and orders have been served upon the assessees at Village Noorpur land at Village Noorpur Dona belonging to all the three assessees pursuant to a verbal agreement with J and the payment therefore is made to J in cash after six months. Thus the impugned notices under section 148 should have been served upon J, power of attorney holder of NRI assessee, to whom other notices had been issued by the Department. Department not having served the notices on J the notices issued on JS and other assessees at Village Noorpur Dona / Mansoorval Dona are bad in law. Hence, assessments made pursuant thereto are quashed. (A.Y. 1999-2000)

Jasbir Singh v. ITO (2012) 76 DTR 36 / 149 TTJ 81 (Amritsar)(Trib.)

S. 147 : Reassessment - Reasons recorded - Precise and definite information received, reassessment was justified

In the instant case, assessing officer completed assessment of assessee. Subsequently, he received information about receipt of accommodation entries by assessee aggregating to Rs. 14.45 lakhs from entry providers and, accordingly, re-opened assessment for taxing same. It was held that since a precise and definite information was received by Assessing Officer regarding receipt of accommodation entries and after comparing information, with information available in return of assessee, he recorded definite reasons in clear terms that income escaped assessment and hence re-opening was justified. (A.Y. 2002-03)

ITO v. Mukut Finvest & Properties (P.) Ltd. (2012) 138 ITD 166 / (2013) 153 TTJ 309 (Delhi)(Trib.)

S. 147 : Reassessment – DTAA-India-USA- Assessment under section 143(1) - New material - Assessment under section 143(1), cannot be reopened under section 147 in absence of "new material" [S.90, 143(1), 148. Art 8,11]

The assessee filed a ROI in which it claimed exemption under Article 8 of the DTAA ("airline profits") even in respect of interest earned on fixed deposits. The Assessing Officer accepted the ROI under section 143(1). Subsequently, he issued a notice under section 148 seeking to make a reassessment and bring the interest to tax. The assessee claimed that as there was no new material that had come to the possession of the Assessing Officer, the reassessment proceedings were not valid. The Assessing Officer & CIT(A) relied on CIT v. Rajesh Jhaveri Stock Brokers P. Ltd. (2007) 291 ITR 500 (SC) and rejected the claim. On appeal by the assessee to the Tribunal, held allowing the appeal:

The assessee had made a clear disclosure in the ROI that it was claiming exemption under Article 11 for the interest income. This was accepted under section 143(1). The assessment was sought to be reopened without there being any new material on record. In Telco Dadajee Dhackjee it was held by the Third Member that even in a case where only an intimation had been issued under section 143(1)(a), it is essential that the Assessing Officer should have before him tangible material justifying his reason to believe that income had escaped assessment. In the absence of such tangible material, the reassessment proceedings are invalid. Though in Praful Chunilal Patel (1999) 236 ITR 832 (Guj.), it was held that there is no necessity for the Assessing Officer to have fresh facts coming to his notice subsequent to the original assessment to justify the reopening this view has not been subscribed to by the Full Bench in CIT v. Kelvinator of India Ltd. (2002) 256 ITR 1 (Delhi) which has been affirmed by the Supreme Court [CIT v. Kelvinator of India Ltd. (2010) 320 ITR 561 (SC)]. (A.Y. 2001-02)

Delta Air Lines Inc v. ITO (2013) 81 DTR 190/153 TTJ 506/59 SOT 46 (Mum.)(Trib.)

S. 147 : Reassessment - Reason to believe - Not valid when Assessing Officer wants to examine or verify particulars of return with a view to ensure that assessee has not understated its income

Proceedings for reassessment can be initiated only when Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment and not where he simply wants to examine or verify particulars of return with a view to ensure that assessee has not understated its income. When initiation of reassessment proceeding is sustainable on any of several reasons recorded by Assessing Officer, same shall be valid. (A.Y. 1996-97)

Dy. DIT (IT) v. Societe International De Telecommunication (2012) 139 ITD 328(2013) /23 ITR 714/153 TTJ 55 (Mum.)(Trib.)

S. 147 : Reassessment - Change of opinion - Notice - Objection not raised before the Assessing Officer hence objection was held to be not valid [S. 148]

The Tribunal held that on the facts the assessee has failed to demonstrate that during original assessment proceedings under section 143(3), a considered view was taken by Assessing Officer, question of forming an opinion will not arise and hence, question of change of opinion also will not arise and, thus, re-opening is to be upheld. As regards objections to the notice, where assessee had appeared during reassessment proceedings in response to notice / letter and cooperated in assessment proceedings, it would be deemed that notice had been duly served upon assessee in time in accordance with provisions of Act, and therefore, assessee could not take any objection in any proceedings or enquiry that no notice was given as assessee had not raised such objection before completion of said reassessment proceedings, hence cannot object now accordingly the reassessment was held to be justified. (A.Y. 2005-06, 2007-08)

Hindustan Thompson Associates (P.) Ltd. v. ACIT (2012) 53 SOT 389 (Mum.)(Trib.)

S. 147 : Reassessment - Roving enquiry - Assessing Officer cannot reopen assessment merely on basis of roving enquiry

Assessing Officer reopened the assessment on ground that assessee-society utilized Rs. 13.69 crores on acquisition of certain overseas equipment etc. as per report of Comptroller and Auditor General (Civil) for Govt. of Andhra Pradesh while a cross verification of return shows that total assets amounted to Rs. 4.14 lakhs only. However, no addition was made with respect to purchase of equipments. When initial reason given for reopening did not survive anymore and Assessing Officer could not go beyond reasons given by him for reopening. (A .Y. 2004-05)

Dy. CIT v. Andhra Pradesh Right to Sight Society (2012) 53 SOT 480 (Hyd.)(Trib.)

S. 147 : Reassessment - Non-disclosure of primary facts - Notice [S. 148]

Assessing Officer reopened assessment on ground that hire charges paid by assessee to foreign shipping companies had been made without deducting TDS and same had to be disallowed. Since, Assessing Officer had valid reasons to believe that income chargeable to tax had escaped reassessment was valid. Notice issued within time but served after expiry of time limitation, is a valid notice (A.Y. 2002-03 to 2004-05 and 2006-07)

Poompuhar Shipping Corporation Ltd. v. ADIT (IT) (2012) 53 SOT 451/(2013) 155 TTJ 81(UO)(Chennai)(Trib.)

S. 147 : Reassessment - Recorded reasons - Non-supply of recorded reasons before passing reassessment order renders the reopening void - Subsequent supply does not validate reassessment order

The Assessing Officer issued a notice under section 147 to reopen the assessment. Though the assessee filed a ROI and requested for a copy of the recorded reasons, the same were not furnished to it. The Assessing Officer passed a reassessment order and thereafter supplied the assessee with a copy of the recorded reasons. In appeal before the Tribunal, the assessee claimed that as the recorded reasons had not been furnished to it before passing the reassessment order, the reassessment order was void. Held by the Tribunal allowing the appeal:

In GKN Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19 (SC) it was held that the Assessing Officer is bound to furnish the reasons recorded for reopening the assessment within a reasonable time so that the assessee can file its objections thereto. Even as per the rules of natural justice, the assessee is entitled to know the basis on which the Assessing Officer has formed an opinion that income has escaped assessment. There is no justifiable reason for the Assessing Officer to deprive the assessee of the recorded reasons. If the reasons are not furnished to the assessee during the assessment proceedings, then the subsequent furnishing of the reasons after completion of assessment proceedings serves no purpose and amounts to the assessee being denied its right to raise objections to the validity of the reopening proceedings. A reassessment order passed without furnishing the recorded reasons is not sustainable in law. The furnishing of reasons after completion of assessment does not make good the defect / invalidity with which the initiation of proceedings under section 147/148 is tainted [K. V. Venkataswamy Reddy (Bang.) (attached), Tata International Ltd. (Mum.)(Trib.) & CIT v. Videsh Sanchar Nigam Ltd. (2012) 340 ITR 66 (Bom.) (SLP dismissed) followed] (A.Y. 2005-06)

Synopsys International Limited v. Dy. DIT (Bang.)(Trib.) www.itatonline.org

S. 147 : Reassessment - Non-disclosure of primary facts - Intimation - Depreciable assets Reassessment valid [S. 50, 54EC, 143(1)]

Assessee filed its return which was processed under section 143(1). Subsequently, Assessing Officer noticed that assessee had returned long-term capital gains on sale of depreciable asset by applying the cost inflation index method and claimed exemption under section 54EC. Since sale of depreciable asset actually resulted in short term capital gain as per provisions of section 50 and exemption under

section 54EC was not available in such a case, Assessing Officer took a view that amount of short term capital gain escaped assessment. He thus initiated reassessment proceedings. Reopening was justified. Even otherwise, since initial processing of return was done under section 143(1) which could not be said to be an assessment order passed, it could not be concluded that reopening was based on mere change of opinion. (A.Y. 2002-03)

Raj Woolen Industries v. ACIT (2012) 54 SOT 117 (URO) / (2011) 7 ITR 339 (Delhi)(Trib.)

S. 147 : Reassessment - Income escaping assessment - Non-disclosure of primary facts - Reassessment held to be justified

During course of assessment proceedings for A.Y. 2004-05, Assessing Officer came to notice that assessee had received certain payments in A.Y. 2000-01 to 2002-03 from one UAE concerned on account of advertisement and business promotions and had made certain expenditure against those receipts under various heads and all these entries were not routed through Profit and loss account. Certain donations were also debited which according to Assessing Officer were not allowable as business expenditure. As no written agreement between assessee and said concern was made available for receiving that money and making expenditure Assessing Officer had formed a belief that income chargeable to tax has escaped in hands of assessee in said years. He accordingly, re-opened assessment for said years and made addition. The Tribunal held that re-opening was justified. (A.Y. 2000-01 to 2002-03 & 2005-06)

S.H.A.M.K. International (P.) Ltd. v. ITO (2012) 54 SOT 120 (URO)(Mum.)(Trib.)

S. 147 : Reassessment - Book profit - Non-disclosure of primary facts - Bad and doubtful debts - Amendment with retrospective effects - Reassessment held to be invalid [S. 115JB, 148]

The assessee filed its return and assessment was completed under section 143(3) on book profits. It was submitted that a notice under section 143(2) was issued and the Assessing Officer examined the issue of provision for bad and doubtful debts and held that said provision should have to be added back while computing book profit under section 115JB and deduction was accordingly allowed. Thereafter the Assessing Officer issued a notice under section 148, on the ground that as per amendment made to Explanation to section 115JB by the Finance (No. 2) Act, 2009 on 31-3-2008, provision for debts should be added back in computing book profit under section 115JB. The assessee challenged the validity of said notice before the Commissioner(Appeals). But he confirmed the said order. On second appeal, the assessee submitted that notice of reassessment was issued on 31-3-2008 and the amendment to Explanation 1 to section 115JB was brought by the Finance (No. 2) Act, 2009 with retrospective effect from 1-4-2001 after the notice was issued by the Assessing Officer seeking to reopen the assessment and that validity of the notice of the Assessing Officer seeking to reopen the assessment would have to be determined on the basis of law as it prevailed on the date of notice. The assessee contended that the order of the Assessing Officer with reference to computation of book profit under section 115JB was at least a probable view and as a matter of fact, the correct view to take in view of the decision of the Supreme Court in the case of CIT v. HCL Comnet Systems & Services Ltd. (2008) 305 ITR 409 / 174 Taxman 118, and in the circumstances, there was no warrant for reopening the assessment in exercise of the power conferred under section 147 and as such the Assessing Officer could not reopen the reassessment on the basis of the said Explanation. The Tribunal held that since on date of issue of notice for reassessment under section 148 i.e., on 31-3-2008, there was no fresh material available with Assessing Officer to issue such a notice, initiation of reassessment was bad in law. (A.Y. 2003-04)

Saint Gobain Glass India Ltd. v. ACIT (2012) 54 SOT 115 (URO)(Chennai)(Trib.)

S. 147 : Reassessment - Block assessment - Reassessment of block assessment is not permitted by law - Action of Assessing Officer held to be invalid [S. 132A, 148, 158BA, 158BH]

Provisions of section 158BA(1) have to be read in conjunction with section 158BH. On a harmonious reading of both these sections it becomes clear that only where a provision is not made in Chapter XIV-B, the other provisions of the Act are applicable. Clause (f) of sub-section (1) of section 158BB provides for reducing the aggregate total income computed for the block period by the aggregate of the total income in case where assessment of undisclosed income has been made earlier under cl. (c) of section 158BC. When this provision is read with section 158BC, particularly the first proviso thereunder it becomes clear that the legislature does not intend to reopen a block assessment. Section 158BC itself indicates that where the legislature wanted to incorporate other provisions of the Act a specific mention has been made e.g. sections 142, 143, 144 and 145. On the other hand, the first proviso under cl. (a) of section 158BC stipulates that no notice under section 148 is required to be issued for the purpose of proceeding under Chapter XIV-B. These provisions are inherent indicators to show that section 158BH has limited application. That apart, escapement of undisclosed income cannot be envisaged once a search has taken place and material is recovered which has led to assessment of undisclosed income. To contend that undisclosed income has escaped assessment despite an assessment having been framed under Chapter XIV-B by adopting the special procedure prescribed by the said chapter is to contend what is inherently not possible. Further, section 158BB provides for computation of undisclosed income of the block period not only on the basis of requisition of books of account or other documents but also on the basis of evidence found as a result of search and such other materials or information as are available with the Assessing Officer. Thus, even assuming for the sake of argument that some income has not been disclosed in the return filed under section 158BC the Assessing Officer is bound to assess all undisclosed income after processing the entire material available with him. Assessing Officer cannot be heard to say that undisclosed income has escaped assessment because he filed to apply his mind to the material available on record, there being no lack of disclosure. In the instant case, Assessing Officer initiated proceedings under section 147 by issuing notice under section 148 on the basis of material requisitioned under section 132A from police for A.Y. 1999-2000 which is a part of the block period. Action of the Assessing Officer not valid such material is subject only to block assessment. Impugned assessment rightly quashed by CIT(A). (A.Y. 1999-2000)

ACIT v. Vidit Kumar Agarwal (2013) 55 SOT 48 (URO) / (2012) 80 DTR 48 / 150 TTJ 640 (Agra)(Trib.)

S. 147 : Reassessment - Non-disclosure of primary facts - Beyond four years - Held invalid

For relevant assessment, assessment of assessee-company was completed under section 143(3). Subsequently, after expiry of four years from end of relevant assessment year, a notice under section 148 was issued for re-opening of assessment. Assessee had not given complete information relating to payment of commission and interest to branches which resulted in inaccurate computation of assessee's business income. Where, there was no failure on part of assessee to disclose all material facts necessary for assessment, having regard to first proviso to section 147, Assessing Officer could not initiate reassessment proceedings after expiry of four years from end of relevant A.Y. (A.Y. 1993-94 & 1997-98)

Calyon Bank v. Dy. DIT (2012) 54 SOT 111 (Mum.)(Trib.)

S. 147 : Reassessment - Deduction - Manufacture - Reassessment held to be justified [S. 80IB(5)]

Assessee-company was deriving income from extraction of mineral ores. It filed return claiming deduction under section 80-IB(5). Assessment was completed wherein assessee’s claim was allowed. Subsequently, Assessing Officer noted that assessee was not engaged in manufacture of any new product or article. He thus taking a view that deduction under section 80IB was wrongly allowed, initiated reassessment proceedings. Assessee objected to initiation of reassessment proceedings on ground that same was based on mere change of opinion. Tribunal held that on facts, re-opening of

assessment fell under purview of clause (b) of Explanation 2 to proviso 2 to section 147 and thus, objection raised by assessee was to be set aside and reassessment held to be valid. (A.Y. 2006-07)
Imerys Ceramics (India) (P.) Ltd. v. ACIT (2012) 54 SOT 84 (URO)(Hyd.)(Trib.)

S. 147 : Reassessment - Change of opinion - Export - Deduction under section 80HHC allowed after scrutiny, reassessment proceedings on ground that deduction was excessive is not valid [S. 80HHC]
The assessee-company, engaged in manufacture of bulk drugs and intermediates, filed its return declaring total income after claiming deduction under section 80HHC of the Income-tax Act, 1961. The case was selected for scrutiny and by an order under section 143(3) dated December 22, 2006 the income was assessed after allowing deduction under section 80HHC. Reassessment proceedings were taken on the ground that the assessee had not reduced 90 per cent of the commission on exports received from the profits of the business while working out the special deduction under section 80HHC. The Assessing Officer worked out the admissible deduction under section 80HHC. The Commissioner(Appeals) held that the reopening was invalid. On appeal to the Tribunal held that the reopening is due to change of opinion hence not valid. (A.Y. 2004-05)
Dy. CIT v. Lee Pharma P. Ltd. (2012) 20 ITR 499 (Hyd.)(Trib.)

S. 147 : Reassessment - Notice - Absence of notice under section 143(2) reassessment made by the Assessing Officer under section 143(3) r.w.s. 147 without issuing notice under section 143(2) is invalid [S. 143(2)]
Assessee filed additional grounds before the Tribunal stating that, no mandatory notice under section 143(2) was issued. The Tribunal admitted the additional ground and following the Judgment of Bombay High Court in CIT v. Arun Somaiya ITA No. 994 of 2008 dated 9th September, 2008 the Tribunal held that reassessment made by the Assessing Officer without issuing mandatory notice under section 143(2) is in valid. Appeal of assessee was allowed. (A.Y. 2003-04)
Ramesh Abaji Walavalkar v. Addl. CIT (2012) 80 DTR 319 / (2013) 54 SOT 15 (URO) / 150 TTJ 725 (Mum.)(Trib.)

S. 147 : Reassessment - Reason to believe - Information received from CIT and opinion formed by the Assessing Officer, reassessment held to be valid
There is no condition in section 147 that a notice under section 148 can be issued only when some information flows from an external source. Assessing Officer having formed his independent opinion as regards escapement of income by analysing the information transmitted by the CIT, it cannot be said that the notice under section 148 was issued under the direction of CIT. Reassessment held to be valid. (A.Y. 2002-03, 2003-04)
Delhi Industries & Enterprises v. ACIT (2012) 80 DTR 252 / 150 TTJ 756 (Delhi)(Trib.)

S. 147 : Reassessment - Change of opinion - Capital gain - Interest paid on loan - Absence of new material - Reassessment held to be invalid [S.24, 45(4), 143(3), 148]
The assessment was completed under section 143(3). The Assessing Officer has recorded two reasons for reopening of assessment viz. Capital gain was required to be computed under section 45(4) on dissolution of assessee firm on 30th September, 2003 and assessee has claimed excess deduction under section 24 in respect of interest paid. Both these issues were before the Assessing Officer when he made the scrutiny assessments. Though no discussion on these issues is discernible, it is to be construed that these issues must have been looked in to. No new information came in the possession of the Assessing Officer after the scrutiny assessments for the relevant A.Y. The Assessing Officer has reopened the assessments on the basis of those very information upon which he could have passed more detailed order under section 143(3) in the first round. The Tribunal held that reassessment was

based on change of opinion and hence, it is not sustainable. Reassessment held to be bad in law. (A.Y. 2004-05, 2005-06)
Delhi Industries & Enterprises v. ACIT (2012) 80 DTR 252 / 150 TTJ 756 (Delhi)(Trib.)

S. 147 : Reassessment - Additional depreciation - Reassessment held to be valid
Assessee manufacturing curds and ghee. Additional depreciation granted on machinery used for standardisation and pasteurisation of milk. Machinery not required for assessee's business. Reassessment to withdraw additional depreciation held to be valid. (A.Y.2005-06)
Creamline Dairy Products Ltd. v. Dy. CIT (2012) 139 ITD 510 / 20 ITR 510 (Hyd.)(Trib.)

S. 147 : Reassessment - Full and true disclosure - Change of opinion - Beyond four years - Deduction of claim under section 80IB on DEPB claim cannot be withdrawn [S. 80IB]
Assessing Officer having allowed assessee's claim for deduction under section 80IB on account of sale of DEPB licence while framing the assessment under section 143(3) after considering the submissions of the assessee and examining the issue in detail by taking the view in consonance with the judgment of the jurisdictional High Court, reopening of the assessment by the Assessing Officer beyond four years on the ground that excessive deduction under section 80IB has been allowed was based on change of opinion and, therefore, the reassessment is not valid. (A.Y. 2003-04)
Bothra International v. ITO (2012) 80 DTR 332 / (2013) 151 TTJ 28 (Jodh.)(Trib.)

S. 148 : Reassessment - Rectification - Vague notice - Notice was set aside [S. 154]
The Assessing Officer has not even indicated as to what basis he has allowed excess set off hence the notice under section 154 was held not maintainable. The second notice which was issued under section 148 was on the basis of notice under section 154. The Apex Court held that the High Court was justified in setting aside both notices. Accordingly the civil appeal filed by the department was dismissed.
Addl. CIT v. Shreyas Gramin Bank (2012) 210 Taxman 276 (SC)

S. 148 : Reassessment - Cost on department - Undesirable haste in passing assessment order results in miscarriage of justice - Awarded cost on department - Reassessment order was quashed
The Assessing Officer issued a reopening notice under section 148 and furnished the recorded reasons pursuant to which the assessee submitted its objections as required by GKN Driveshafts (India) Ltd. v. ITO (2003) 259 ITR 19 (SC). The objections were filed on 26.10.2010 and were disposed of vide order dated 2.11.2010 by a non-speaking and cryptic order. Thereafter, without issuing any further notice or hearing the assessee, the Assessing Officer passed an assessment order dated 19.11.2010 even though the limitation period for passing the order was to expire on 31.12.2010. The assessee filed a Writ Petition to challenge the reopening. Held by the High Court quashing the reassessment order and passing strictures:
Though, pursuant to GKN Driveshaft, the Assessing Officer was under an obligation to dispose of the objections to the reopening by passing a speaking order, he passed a non-speaking and cryptic order. Further, though the Assessing Officer had sufficient time to complete the assessment, he had proceeded with the reassessment proceedings with undesirable haste and hurry, in violation of principles of natural justice and contrary to the procedure mandated and this had resulted in a miscarriage of justice. The fact that the assessee had an alternative remedy of filing an appeal (which it had exercised) was no bar to the exercise of writ jurisdiction. The concerned CIT should examine the reassessment file in the present case and take appropriate action if warranted. The department to pay cost of Rs. 10,000/- to the assessee. (A.Y. 2003-04)
Sak Industries Pvt. Ltd. v. Dy. CIT (2012) 71 DTR 98 (Delhi)(HC)

S. 148 : Reassessment - Notice - No reassessment as assessee made full disclosure and the Assessing Officer considered and examined the claim at the time of original assessment

Where at the time of original assessment, the assessee furnished full and true information germane to the facts of the case and the claim of the assessee as regards the deduction of Section 80IA was specifically considered and examined by the Assessing Officer, the Assessing Officer could not reopen the assessment. It was held that the assessee had not failed or did not omit to disclose material facts. (A.Y. 2000-01)

RRB Consultants and Engineers P. Ltd. v Dy. CIT (2012) 342 ITR 127 / 74 DTR 78 (Delhi)(HC)

S. 148 : Reassessment - Notice - Validity of service of notice - Failure to mention the words "principal officer" and the specific words "private limited" is not fatal, orders cannot be vitiated on the said ground of mistake, defect or omission in summons or notice [S. 147,292B]

In the course of appeal before the Commissioner(Appeals) the assessee challenged that the notice issued under section 148 is bad in law as the words "private limited" were missing in the notice. After calling the remand report the Commissioner held that the order is bad in law. In an appeal by revenue the Tribunal held that section 292B would not come to the aid of the revenue as the requirement to serve the notice was a jurisdictional issue hence the confirmed the order of Commissioner(Appeals). On appeal to high Court by revenue the court held that the test to be applied is whether the party receiving the notice would be in doubt whether the said notice is meant for him or not. If the recipient of notice was not in doubt that it was meant for him, the misdescription is not fatal. Thus failure to mention the words ''principal officer" on the notices is not fatal. The Court held that section 292B has a salutary purpose and ensures that technical objections, without substance and when there is effective compliance or compliances with intent and purpose, do not come in a way or affect the validity of the assessment proceedings. Accordingly the High Court decided the issue in favour of revenue. (A.Y. 1989-90 & 1992-93 to 1995-96)

CIT v. Jagat Novel Exhibitors (P) Ltd. (2012) 67 DTR 289 / 248 CTR 217 / 207 Taxman 243/356 ITR 559(Delhi)(HC)

S. 148 : Reassessment - Notice - Jurisdiction - Assessment in Kolkata - Reassessment notice in Delhi, such reassessment is held to be without jurisdiction [S. 127]

Assessment having been made by Assessing Officer in Kolkata, in the absence of any order under section 127 transferring the case, reassessment notice issued by Assessing Officer at Delhi and all subsequent proceedings based on said notice are without jurisdiction. (A.Y. 1999-2000)

Smriti Kedia (Smt.) v. UOI (2012) 71 DTR 245 / 250 CTR 221 / (2011) 339 ITR 37 (Cal.)(HC)

S. 148 : Reassessment - Notice - After expiry of four years - Material and information provided by Investigation Wing to the Assessing Officer on basis on which reasons recorded and assessment reopened, Issue of notice held to be valid

Material and information provided by Investigation Wing to the Assessing Officer, on the basis of which he recorded reasons and reopened the assessment, throw considerable doubt on the veracity, correctness, completeness and truth of particulars furnished by the assessee at the time of the original assessment and therefore notice issued by Assessing Officer under Section 148 was valid. (A.Y. 2004-05)

Money Growth Investment & Consultants (P) Ltd. v. ITO (2012) 71 DTR 317 (Delhi)(HC)

S. 148 : Reassessment - Failure to disclose all material facts - Notice after four years - Reassessment notice was quashed on the ground that as failure to disclose all material facts was not set out in reasons

The assessment of the assessee was completed, under section 143(3) on December 10, 2008. The Assessing Officer allowed deduction under section 10A treating the business activity of the assessee

is manufacturing of Jewellery in a special economic zone. The Assessing Officer, reopened assessment on the basis of assessment order for the A.Y. 2007-08. In appeal the Commissioner(Appeals) has allowed the claim under section 10A of the Income-tax Act after proposing to sought the reassessment for the assessment year 2005-06. The Court held that in the recorded reasons it has not been stated that there was failure to disclose all material facts. Accordingly the court quashed the notice issued under section 148. (A.Y. 2005-06)

Sitara Diamond Pvt. Ltd. v. Dy. CIT (2012) 345 ITR 91 / 68 DTR 74 (Bom.)(HC)

S. 148 : Reassessment - Notice - Jurisdiction - No universal proposition that notice can never be served when time for issue of notice under section 143(2) has not expired [S. 143(2), 147]

The assessee filed its return of income for the A.Y. 2009-10 under section 139(4) of the Act on October 6, 2010. The Assessing Officer issued notice for reassessment under section 148 on July 5, 2011. In a writ petition the assessee challenged the notice on the ground that the return of income could have been taken up for scrutiny by issue of notice under section 143(2) of the Act and that the Assessing Officer cannot issue reassessment notice under section 148 of the Act, during the period when the Assessing Officer could have issued notice under section 143(2) of the Act. On the facts of the case the court held that the assessee deliberately keeping matter pending and continuing to appear and neither protesting nor objecting. The Assessing Officer is not prevented nor barred from recording in writing and issuing fresh notice under section 148. Undertaking by department to withdraw notice with liberty to issue fresh notice. The Court also observed that there is no universal proposition that notice can never be served when time for issue of notice under section 143(2) has not expired. (A.Y. 2009-10)

Acorus Unitech Wireless P. Ltd. and another v. Dy. CIT (2012) 345 ITR 228 / 210 Taxman 155 (Delhi)(HC)

S. 148 : Reassessment - Notice - Time limit - Notice issued on 30-3-2009 amended provisions of section 149 would apply hence the impugned notice was held to be time barred - Time period / limitation period in the Act on date of issue of notice would apply [S. 147, 149]

The assessee filed the return of income for the A.Y. 1998-99 on 20-11-1998. The assessment for the A.Y. was passed under section 143(3) on 28-2-2001. The reassessment notice under section 148 was issued on 30-3-2009 i.e. after the expiry of nine years from the A.Y. in which the return of income for the A.Y. 1998-99 was filed. The assessee challenged the validity of notice under section 148 contending that same was barred by limitation Revenue contended that limitation period prescribed on first day of assessment year would determine time period for issue of notice under section 147/148 and thus amendment made in section 149 by Finance Act, 2001 with effect from 1-6-2001, restricting time period for issuance of notice under section 148 to six years was not applicable. The Court held that the issue involved is procedural, hence time period in which assessment or reassessment proceedings could be initiated and therefore, time period of limitation period as prescribed in Act on the date of issue of notice would apply. On the facts notice under section 148 was issued on 30-3-2009, amended provisions of section 149 would apply and consequently, the notice was quashed being barred by limitation. (A.Y. 1998-99)

C. B. Richrds Ellis Mauritius Ltd. v. ACIT (2012) 208 Taxman 322 / 73 DTR 95 (Delhi)(HC)

S. 148 : Reassessment - Notice - Status of assessee - Matter remanded - Notice to be issued in appropriate status in which income to be assessed

The notice was issued to the assessee in the status of association of persons, comprising 3 persons. Pursuant to the notice issued to the assessee an assessment was completed in respect of the assessee as an association of persons comprising 3 persons. The Commissioner(Appeals) modified the status from association of persons to body of individuals comprising two persons. This was upheld by the Tribunal. On appeal by assessee it was held that if the status of the assessee was required to be

modified, the only option available was to assess the income in the appropriate status, if permitted by law, by issuing a notice to the assessee in that particulars status. For modifying the status of the association of persons consisting of three persons to a body of individuals consisting of two persons, the Commissioner(Appeals) could not have acted on his own. The only option available to him was to set aside the assessment proceedings and remand the matter back to the Assessing Officer giving him the liberty of issuing a notice to the assessee in the status of a body of individuals comprising two persons, if it was otherwise permissible in law and after obtaining the approval of the Board, if necessary. The order passed by the Commissioner(Appeals) which was upheld by the Tribunal whereby the status of the assessee was "merely" modified from association of persons to body of individuals was not sustainable. The assessment proceedings were required to be set aside and liberty was granted to the Revenue to issue a fresh notice to the assessee according to law. (A.Y. 1972-73)
Gutta Anjaneyulu & Co. v. CIT (2012) 347 ITR 135 / 69 DTR 181 / 249 CTR 106 (AP)(HC)

S. 148 : Reassessment - Notice - Composite notice for four years - Assessing Officer is oblieged to issue separate notrice for each A.Y., entire reassessment proceedings was held to be invalid
Each A.Y. is taken to be an independent unit of assessment and the provisions of Act apply separately. Even where there has been escapement of income, the Assessing Officer is obliged to issue separate notice for each assessment year. Entire reassessment proceedings are wholly without jurisdiction. (A.Y. 1996-97)
Mohd. Ayub v. ITO (2012) 346 ITR 30 / 78 DTR 79 / 254 CTR 314 (All.)(HC)

S. 148 : Reassessment - Notice - Issue subject matter of order of settlement commission - Reassessment was quashed [S. 80IB(10), 245I]
Order of settlement is conclusive as expressly stated in section 245I contention that it is conclusive only with regard to matters stated in the order of settlement and in respect of mattes not stated therein, the Assessing Officer has the power to reopen the assessment is not sustainable. Moment the application of the assessee was allowed to be proceeded with by the ITSC till the final order of the settlement was passed on 17th March, 2008, it was the ITSC which had exclusive jurisdiction in relation to the assessee's case. Therefore, all matters which could be examined by the Assessing Officer could be examined by the ITSC in these proceedings, including the assessee's claim for deduction under section 80IB(10). If the contention of the Revenue is accepted, not only will the finality of the order of settlement be disturbed, but it will also result in different orders relating to the same A.Y. and relating to the same assessee being allowed to stand. Such a result, which is likely to create chaos and confusion in the tax administration could not have been intended. Order of the ITSC can be reopened only in cases of fraud and misrepresentation and in no other case. Moreover, it is difficult to say that the deduction under section 80IB(10) was not a matter covered by the order of the ITSC. Assessing Officer had no jurisdiction to reopen the assessment for the A.Y. 2006-07 by issuing a notice under section 148 on the ground that the deduction under section 80IB(10) was wrongly allowed. (A.Y. 2000-01 to 2006-07)
Omaxe Ltd. v. ACIT (2012) 79 DTR 83 / 254 CTR 370 / 209 Taxman 443 (Delhi)(HC)

S. 148 : Reassessment - Notice - Transfer of case - Territorial jurisdiction of Assessing Officer - Transfer case before issue of notice, notice was held to be invalid [S. 120, 127]
The ACIT had no jurisdiction over the assessee on the date of issuance of notice on March 29, 2004, as the jurisdiction over the assessee was transferred to the Additional Commissioner, Lucknow, by order dated August 1, 2001, passed under section 120 of the I. T. Act. 1961 by the Chief Commissioner, Lucknow. The Tribunal had rightly held that the issuance of notice under section 148(1) of the Act by the ACIT, Lucknow, was without jurisdiction. Appeal of revenue was dismissed. (A.Y. 1997-98)
CIT v. M. I. Builders P. Ltd. (2012) 349 ITR 271 (All.)(HC)

S. 148 : Reassessment - Notice - Validity - Non Resident - Deduction of tax at source - Certificate under section 197(1) issued - No return filed - Held notice valid [S. 195, 197]

The petitioner was awarded four contracts encompassing onshore supply, onshore services and offshore supply, by PGCIL. PGCIL moved an application under section 195 of the Act with regard to the payments to the petitioner. Orders were passed only in respect of the payments made to the petitioner on the offshore contract and onshore services contract at 10 per cent on gross basis in respect of the payment made for training charges and 10 per cent on gross basis in respect of the payment made for maintenance and service charges respectively and on other payments, deduction was to be made at nil rate. The Revenue had been issuing certificates under section 197(1) for tax deduction at source. The petitioner received notice dated May 19, 2008, issued under section 148 of the Act alleging that the income of the petitioner for the A.Y. 2005-06 had escaped assessment. On writ petitions to quash the notice it was held, that no return had been filed. It was clear from the order that the order was interim in nature and in fact, the order could not have been anything else but interim in character as the scope of section 197 is limited. Explanation 2(a) to section 147 clearly takes care of the situation where no return has been filed. On a conjoint reading of sections 195 and 197 it is clear that if any opinion is expressed at the time of grant of certificate it is tentative or provisional or interim in nature and the order would not bar the Assessing Officer from initiating a proceeding under section 147. The notices were valid. (A.Y. 2005-06)

Areva T & D, SA v. ADIT (2012) 349 ITR 127 / (2011) 55 DTR 177 / 200 Taxman 84 (Delhi)(HC)

S. 148 : Reassessment - Notice - Change of opinion - Within four years - Reassessment held to be valid

If an inquiry by an Assessing Officer was not with respect to question of taxability of a particular receipt, Assessing Officer's action of not taxing such receipt without assigning reasons, cannot be seen as an act on his part of having formed an opinion with regard to non-taxability of such a receipt, and, therefore, such a receipt can be taxed subsequently by issuing a notice under section 148. (A.Y. 2004-05)

Gala Gymkhana (P.) Ltd. v. ACIT (2012) 211 Taxman 447 (Guj.)(HC)

S. 148 : Reassessment - Non-resident agent - Defective notice not curable - Reassessment quashed - Another notice was time barred [S. 163]

Assessee-company purchased machinery from a foreign company. Foreign company deputed IVO, its employee, for erection and installation of said machinery in India IVO received payment in India but did not pay tax. Assessing Officer issued show cause notice in terms of section 163 to assessee treating assessee to be an agent of IVO. Further, another notice under section 148 was issued to assessee treating it to be agent of foreign company. The Assessee challenged the notice by way of writ petition, the Court held that since IVO and foreign company were legally completely in different position vis-a-vis assessee, notice under section 148 was wholly defective and defect could not be treated as of curable nature. Further, it was held that where for A.Y. 1999-2000 another notice under section 148 was issued to assessee on similar grounds on 20-3-2003 but time limit for issuance of notice had expired on 20-3-2003, notice was barred by limitation. Petition was allowed. (A.Y. 1999-2000)

Arvind Mills Ltd. v. ACIT (2012) 211 Taxman 158 (Guj.)(HC)

S. 148 : Reassessment - Notice - Time limit - Notice "issued" within limitation period is valid even if "service" is later [S. 149]

For A.Y. 1998-99, the Assessing Officer issued a notice under section 148 dated 28.3.2005 (within the limitation period of 6 years). However, as this notice was returned un-served, a second notice

dated 17.6.2005 (beyond 6 years) which issued & served. The assessee contended that since the Assessing Officer had issued a second notice, the first one was non-est and as the second notice was issued beyond limitation period, the assessment proceedings were null and void. The CIT(A) upheld the plea. Before the Tribunal, the AM held that there was a difference between "issue" of the notice and its "service" and that the notice dated 28.3.2005 was valid, though not served, and the second notice was invalid and non-est. The JM took a contrary view and held that the first notice was invalid and the second notice having been issued after the limitation period did not give jurisdiction to make the assessment. On a reference to the Third Member, held:

The Act makes a clear distinction between "issue of notice" and "service of notice". Section 149 which prescribes the period of limitation provides that no notice under section 148 shall be "issued" after the expiry of the limitation period. The "service" of the notice is necessary under section 148 only to make the order of assessment. Once a notice is "issued" within the period of limitation, the Assessing Officer has jurisdiction to make the assessment. A notice is considered to have been "issued" if it is placed in the hands of a person authorized to serve it, and with a bona fide intent to have it served. Service of the notice is not a condition precedent to conferment of jurisdiction on the Assessing Officer but it is a condition precedent to the making of the order of assessment. On facts, as the Assessing Officer had issued the notice within the period of limitation, he had jurisdiction to reopen the assessment. [R. K. Upadhyaya v. Shanabhai P. Patel (1987) 166 ITR 163 (SC) followed] (A.Y. 1998-99)

ITO v. Lal Chand Agarwal (2012) 134 ITD 91 / 69 DTR 241 / 145 TTJ 711 (TM)(Agra)(Trib.)

S. 148 : Reassessment - Notice - Recording of reasons - Further information - Reasons recorded cannot be supplemented by receiving further information, provisions of section 292B cannot be invoked [S. 292B]

The Tribunal found that in the reasons recorded for reopening of assessment there was no mention of Anand enterprises. Since the recording of the reasons is the foundation of initiation of proceedings under section 148, it would not be effected by the provisions of section 292B of the Act. As the reopening has been done on non existent and factually incorrect reasons and Assessing Officer has not applied his independent mind and did not verify the information received from DDI (Investigation) prior to recording of reasons, the reopening of assessment held to be invalid. (A.Y. 1993-94)

Mahadev Trading Co v. ITO (2012) 135 ITD 1 / 65 DTR 140 / 143 TTJ 492 / 17 ITR 332 (Ahd.)(Trib.)

S. 148 : Reassessment - Recording of reasons - Mandatory before issue of notice - Mandatory requirement of law is not fulfilled - Reassessment proceedings without jurisdiction and liable to be struck down [S. 147]

The Tribunal held that the very basis for assuming jurisdiction under section 147 of the Act gets vitiated and, consequently, the entire proceedings are rendered void ab initio. Section 148(2) exclusively provides that, the Assessing Officer shall before issuing any notice under this record his reasons for doing so. Therefore it is mandatory before issue of notice. Mandatory requirement of law is not fulfilled reassessment proceedings became without jurisdiction and liable to be struck down. (A.Y. 1996-97)

Dadanbai B. Bachani v. ITO (2012) 137 ITD 218 / Income Tax Review - August P. 140 (Mum.)(Trib.)

S. 148 : Reassessment - Notice - Issued on the basis of survey under section 133A and statements obtained in the course of survey, reassessment held to be invalid [S. 133A, 147]

Reassessment was held to be invalid where notice under section 148 was issued solely on the basis of survey under section 133A and statements obtained in the course of survey and nothing else on record. (A.Y. 1999-2000 to 2005-06)

J. Mohan (Dr.) & Anr. v. ACIT (2012) 18 ITR 363 / 52 SOT 6 (URO)(Chennai)(Trib.)

S. 149 : Reassessment - Notice - Reassessment - Agent of non-resident - Limitation - Reassessment on the agent of non-resident under section 163 after expiry of two years from the end of relevant year held to be barred by limitation [S. 148, 153B, 163]

Search and seizure action was carried out at the premises of the petitioner on 17th September, 2007. The Assessing Officer of the view that there was business connection between the assessee and Bermudian Company, hence issued the notice under section 148 proposing to treat the assessee as agent under section 163 for proposing to levy capital gains tax for the A.Y. 2005-06. The notice under section 163 was issued dated 22-11-2010. The petitioner challenged the order passed under section 163 r.w.s. 147, on the ground that the said order was time barred. The Court held that proceedings initiated for treating the petitioner as an agent of a non-resident under section 163 after expiry of two years from the end of the relevant A.Y. was clearly barred by limitation under section 149(3). For the relevant A.Y. the such notice ought to have been issued on or before 31st March, 2008, where as the notice was issued on 22nd Nov., 2010. The revenue relied on the provisions of section 153B. The Court held that provision of section 153B cannot be said to obviate the bar of limitation on the facts of the case because the search was of the Indian Company and not of the person who is sought to be assessed. The High Court quashed the reassessment to treat the assessee as an agent of non-resident. (A.Y. 2005-06)

Ingram Micro India Ltd. v. Dy. CIT (2012) 67 DTR 50 / 247 CTR 262 (Bom.)(HC)

S. 151 : Reassessment - Sanction for issue of notice - Approval of JCIT - Notice issued by Assessing Officer with approval of JCIT was held to be valid [S. 148]

On the facts of the case the notice under section 148 was issued by Assessing Officer after approval of JCIT. The Tribunal has come to the conclusion that the jurisdiction was not correctly assumed by the Assessing Officer hence the proceedings were quashed. On appeal by the revenue the Court held that notice by the Assessing Officer after approval of JCIT cannot be held to be invalid on the ground that notice was issued by the Assessing Officer and not by JCIT. The Court held that explanation to section 151 inserted by the Finance Act, 2008 being clarificatory and having been made retrospective effect shall cover the issue, though the explanation which was added was not available when the Tribunal decided the matter. (A.Y. 1995-96)

CIT v. Reshma Arif (Smt) (2012) 74 DTR 357 / 251 CTR 349 (All.)(HC)

S. 151 : Reassessment - Sanction for issue of notice - Approval of the CIT - Approval of the Commissioner instead JCIT / Addl. CIT, renders reopening void [S. 147]

The assessee challenged the reassessment notice by way of writ petition. The High Court allowed the petition by observing that, if the approval of the JCIT / Addl.CIT to the reopening as required by section 151 was obtained, it is for the department to produce the same, whether the approval was granted or not is an objective fact which can be established only by producing the approval. Where a statute requires something to be done in a particular manner, it has to be done in that manner, approval by another authority will not satisfy the requirement. On the facts the approval of CIT was taken and not JCIT hence, the reassessment proceeding was quashed.(W.P.no 722 of 2011 dt 13-09-2012)

DSJ Communication Ltd. v. Dy. CIT (Bom.)(HC) www.itatonline.org

S. 151 : Reassessment - Sanction for issue of notice - Challenge after lapse of eight years - Circumstantial evidence - Not justified [S. 147, 148]

The Tribunal held that the assessee cannot challenge the issue of notice under section 148 in second round of appeal as regards non-compliance of conditions precedent required by section 151(2) after lapse of more than eight years, more so when the very fact that the assessee did not choose to make such acclaim till the file is transferred from the ITO Ward 17(2) would cast a doubt on the correctness of the claim of assessee. (A.Y. 1993-94)

Laxminaryan Agarwal (HUF) v. ITO (2012) 143 TTJ 175 / 65 DTR 70 (Mum.)(Trib.)

S. 151 : Reassessment - Sanction for issue of notice - Commissioner - Santion of Commissioner instead of JCIT held to be not valid - Reassessment quashed

Reassessment proceedings were initiated after lapse of four years. Assessing Officer was to take sanction of JCIT to initiate reassessment but he had approached Commissioner for sanction. Delhi High Court in CIT v. SPL's Siddhartha Ltd. (2012) 345 ITR 223, has held that only JCIT or Addl. CIT could grant approval for issue of notice under section 148. Following said decision, reassessment proceedings were to be quashed. (A.Y. 2001-02)

Sunint Investment & Technologies (P.) Ltd. v. ACIT (2012) 54 SOT 126 (URO)(Delhi)(Trib.)

S. 153 : Assessment - Reassessment - Limitation - Assessment on remand by Tribunal - Order of remand on 5-7-1994 - Order of assessment not passed within two years from end of financial year in which order of remand passed Assessment held to be barred by limitation - Assessee is entitled to refund of tax paid by it [S. 153(3), 250, 254]

The return filed by the assessee for the A.Y. 1988-89 upon being taken in scrutiny, the Assessing Officer made disallowances of commission paid to two agencies. The Assessing Officer computed the total income of Rs. 13,22,030/- and demanded tax and interest on such basis and ordered initiation of penalty proceedings under sections 271(1)(c) and 273(2)(aa) of the Act. The assessment order was confirmed by the Commissioner(Appeals). The Tribunal accepted the contention of the assessee that the additions were made without offering an opportunity to the assessee to cross-examine the representatives of the two agencies whose statements were recorded and relied upon, behind the assessee's back. The Tribunal by its order dated July 5, 1994, remitted the matter to the file of the Assessing Officer with a direction to summon those two parties again and allow the assessee to cross-examine them. For a long time thereafter, the Assessing Officer did not take any steps pursuant to the order of the Tribunal. Since despite repeated representations, the authorities did not take any steps, the assessee filed a writ petition and prayed for refund. During the pendency of the petition, the authorities were in the process of activating the assessment proceedings which had remained dormant for a number of years. The assessee contended that the assessment proceedings were barred by limitation. The Court allowing the Writ petition held that the Assessing Officer was required to pass a fresh order of assessment which was necessary on account of the order passed by the Tribunal under section 254 of the Act cancelling the assessment framed by the Assessing Officer. The period of limitation prescribed in section 153(2A) would apply. While the order was served on the Commissioner on August 3, 1994, a fresh order of assessment had to be passed by the Assessing Officer, within a period of two years of the end of the such F.Y. This not having been done, the proceedings had become time-barred. Accordingly the petition of assessee was allowed. (A.Y. 1988-89)

Instruments and Control Co. v. CCIT (2012) 349 ITR 571 / 79 DTR 465 (Guj.)(HC)

S. 153 : Assessment - Limitation - Delivery date to post office is relevant - Dispatch of assessment order after limitation period renders it void [S. 143]

For A.Y. 2006-07, the last date for passing the section 143(3) assessment order was 31.12.2008. The Assessing Officer passed an order dated 31.12.2008 which was served on the assessee on 16.02.2009 vide registered post. The assessee claimed that the envelope by which the order was dispatched showed that the assessment order was delivered to the post office on 12.2.2009 and that the

assessment order was "passed" after the limitation period and was void. The CIT(A) rejected the claim. On appeal by the assessee to the Tribunal, held allowing the appeal:
Section 153 provides that no assessment order shall be "made" under section 143 after the expiry of two years from the end of the A.Y. There is no requirement that service must be effected before the expiry date. However, an order can be considered to have been made / passed only when it leaves the control of the authority concerned. The mere signing of an order on the last date of limitation does not mean that it has been made / passed if it is not handed over to the person who is authorized to serve it. In order to make the assessment order complete and effective, it should be issued so as to be beyond the control of the authority concerned for any possible change or modification and this should be done within the limitation period though actual service of the assessment order may be beyond that period. When an assessment order has been purported to have been passed within the prescribed period of limitation but the same is served on the assessee after unreasonable delay without being an explanation coming forward for such delay, in the absence of any explanation whatsoever it can safely be presumed that the order was not made on the date on which it purports to have been made and on the basis of such presumption it can be held that the order was passed after the expiry of limitation. On facts, the Department could not produce any evidence to prove that the assessment order was ready and dispatched on 31.12.2008. Thus, the assessee's contention that the assessment order was not passed on 31.12.2008 has to be accepted and it has to be held that the order was barred by limitation [Kanu Bhai M. Patel (HUF) v. Hiren Bhatt or His sussessors to office & Ors. (2011) 334 ITR 25 (Guj.) & other judgements followed] (A.Y. 2006-07)
Subrata Roy v. ITO (Kol.)(Trib) www.itatonline.org

S. 153A : Assessment - Search - Special procedure for assessment - Abatement of regular assessment which has become final is not justified - Departmental appeal was allowed [S. 132]
Only an assessment or reassessment pending on the date of initiation of search under section 132 or requisition under section 132A shall abate under the second proviso to section 153A. Even if an appeal is pending against a competed assessment before the Tribunal on the date of search, such completed proceedings do not abate. The Court observed that the abatement of any proceedings has serious causes and effect in as much as the abatement of the proceedings takes away all the consequences that arise thereafter. In the present case after deducting bogus gifts in the regular assessment proceedings, the proceedings for penalty were drawn under section 271(1)(c). The material found in the search may be ground for notice and assessment under section 153A, but that would not efface or terminate all the consequences which have arisen out of the regular assessment or reassessment resulting in to the demand or proceedings of penalty. Accordingly the Tribunal erred in law in abating the regular assessment proceedings, which had became final, and restoring them as a consequence of search under section 132 and notice under section 153A to the file of the Assessing Officer. (A.Y. 2002-03)
CIT v. Shaila Agarwal (Smt) (2012) 346 ITR 130 / 65 DTR 41 / 246 CTR 266 / 204 Taxman 276 (All.)(HC)

S. 153A : Assessment - Search - Assessment completed - De novo assessment - Section 153A applies if incriminating material is found even if assessments are completed
Pursuant to a search under section 153A, the Assessing Officer passed an assessment order in which he assessed various amounts. The Tribunal [(2010) 1 ITR (Trib) 484] upheld the assessee's appeal on the ground that (a) no "*incriminating material*" was found in the course of search and (b) as ROIs for the said 6 years disclosed the particulars of the subject additions and these had been accepted by the Assessing Officer under section 143(1), no assessment was pending so as to have abated. It was held that section 153A was *not a de novo assessment* or a normal/ regular assessment and the additions made therein have to be necessarily restricted to the undisclosed income unearthed during the search. On appeal by the department to the High Court, Held reversing the Tribunal:

(i) Under section 153A, the Assessing Officer is empowered to assess or reassess the "total income" (which includes the disclosed & undisclosed income) of 6 years. This is a significant departure from the earlier block assessment scheme (section 158BC) in which only the undisclosed income could be assessed. Under section 153A, there can be only one assessment order in respect of each of the six A.Y., in which both the disclosed and the undisclosed income would be brought to tax. If the assessment proceedings are pending completion when the search is initiated, they will abate making way for the Assessing Officer to determine the total income of the assessee in which the undisclosed income would also be included. If the assessment proceedings have already been completed, there is no question of any abatement since no proceedings are pending & the Assessing Officer will have to reopen the assessments (without having the need to follow the strict provisions or complying with the strict conditions of section 147, 148 & 151) and determine the total income of the assessee;

(ii) The Tribunal's view that since the returns filed by the assessee for the six years had been processed under section 143(1)(a) before the search took place, section 153A cannot be invoked is not correct. The Assessing Officer has the power under section 153A to make assessment for all the six years and compute the total income of the assessee, including the undisclosed income, notwithstanding that ROIs were filed which stood processed under section 143(1)(a);

(iii) On facts, the Tribunal's finding that no material was found during the search is factually unsustainable since the entire case and arguments had proceeded on the basis that the document embodying the transaction was recovered from the assessee. If a document is found in the course of the search, section 153A is triggered & it is mandatory for the Assessing Officer to complete the assessment under section 153A. (A.Y. 2000-01, 2002-03 to 2005-06)

CIT v. Anil Kumar Bhatia (2013) 352 ITR 493 / (2012) 211 Taxman 453 / 80 DTR 169 (Delhi)(HC)

S. 153A : Assessment - Search - Computation of undisclosed income [S. 143]

Both the CIT(A) and the Tribunal have recorded a concurrent finding that there was no basis for making any addition towards low gross profit. They have found that the search on the assessee did not yield any incriminating material on the basis of which it can be said that the assessee was indulging in under invoicing or suppression of sales. They also found that the documents on which the Assessing Officer has placed reliance, were seized from a different person and not from the assessee and that no nexus between that person and the assessee has been established beyond doubt. In such circumstances, it has been held that the seized material cannot be used against the assessee. It has also been recorded by the CIT(A), whose decision has been confirmed by the Tribunal, that the documents upon which the Assessing Officer placed reliance relate to a subsequent period and not to the years under consideration. They relate to the period from 1st Nov., 2005 to 18th Nov., 205. It has thus been concurrently found by the CIT(A) and the Tribunal that even if an estimate of the gross profits has to be made, it has to be based on valid material which was absent in the present case and that there was no justification for making an addition for low gross profits on pure guess work. These factual findings have not been sought to be disturbed or impeached by reference to any material or evidence to the contrary. The Assessing Officer has not referred to any material to show that the quality of the Hing sold by the assessee was the same as that sold by the members of the group from whom the sales bills were seized during the search carried out simultaneously. Therefore, the CIT(A) and the Tribunal have rightly held that there was nothing to connect the assessee with those sales bills. In the light of this position, their finding that no addition can be made to the gross profit by substituting the sale price mentioned in the seized sales bills cannot be said to be vitiated as reasonable. (A.Y. 2000-01, 2003-04 & 2004-05)

CIT v. Lachman Dass Bhatia (2012) 77 DTR 17 / 254 CTR 383 / 211 Taxman 70 (Mag.)(Delhi)(HC)

S. 153A : Assessment - Search - Computation of undisclosed income - Method of accounting - Estimation - Duty of Tribunal [S. 132, 145, 254]

There is no condition in S. 153A that additions should be strictly made on the basis of evidence found in the course of the search or other post search material or information available with the Assessing Officer which can be related to the evidence found. This, however, does not mean that the assessment under section 153A can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment has to be made under this section only on the basis of seized material. Question, however, is whether the seized material can be relied upon to also draw the inference that there can be similar transactions throughout the period of six years covered by section 153A In the present case, there was material to show that the assessee has been indulging in off record transactions. Tribunal lost sight of the fact that all was not well with the books of account maintained by the assessee and it has been keeping away its income from the books. That should have been sufficient for the Tribunal to examine the estimate made by the Assessing Officer. Assessee cannot be permitted to take advantage of his own illegal acts, it was his duty to place all facts truthfully before the assessing authority, if he fails to do his duty he cannot be allowed to say that assessing authority failed to establish suppression of income. Papers themselves show two different rates, one higher and the other lower and on comparison with the sale bills it has been found that the sale bills show the lower rate and these findings have not been denied by the assessee. Tribunal, therefore, erred in looking for some other corroboration to substantiate the contents of the loose papers, overlooking that the loose papers needed no further corroboration and the sale bills compared with the seized papers themselves corroborated the suppression of income. A broker is stated to have admitted that the rate of import of Hing is between Rs. 1,500/- to Rs. 1,700/- per kg. approximately and the same was being sold in the local market at Rs. 3,000/- per kg. CIT(A) has held that the rate of Rs. 2,000/- is unreasonable and arbitrary. Whether this finding can stand ought to have been examined by the Tribunal in the light of the statement of the broker as well as the seized papers where the sale rate per kg. of Hing ranges from Rs. 300/- to Rs. 1,900/-. Therefore, the findings of fact arrived at by the Tribunal are not borne out by the evidence on record. Tribunal was not therefore justified in upholding the order of CIT(A) deleting addition, matter remanded for reconsideration. (A.Y. 2000-01 to 2006-07)

CIT v. Chetan Das Lachman Das (2012) 77 DTR 25 / 211 Taxman 61 / 254 CTR 392 (Delhi)(HC)

S. 153A : Assessment - Search - Computation of undisclosed income - Assessing Officer can take into consideration material other than what was available during the search and seizure operation for making an assessment of the undisclosed income of the assessee [S. 153C, 158BI]

Section 58BI, specifically state that the various provisions of Chapter XIV-B are not applicable to proceedings under section 153A/153C i.e. Search initiated under section 132 or requisitioned under section 132A after the 31st day of May, 2003. The effect of this is while the provisions of Chapter XIV-B limit the inquiry by the Assessing Officer to those materials found during the search and seizure operation, no such limitation is found insofar as sections 153A/153C are concerned. Therefore, it follows that for the purposes of sections 153A/153C the Assessing Officer can take into consideration material other than what was available during the search and seizure operation for making an assessment of the undisclosed income of the assessee. On facts the Court held that no substantial question of law arise, unless the conclusion arrived at are perverse, that was not the position in this case hence appeal of assessee was dismissed.

Gopal Lal Bhadruka & Ors. v. Dy. CIT (2012) 346 ITR 106 / 77 DTR 146 / 253 CTR 80/77 DTR 146/ (AP)(HC)

S. 153A : Assessment - Search - Special procedure for assessment - Abatement of pending assessment - New claim for deduction - Claim made for first time before Commissioner(Appeals) - Commissioner can entertain the claim [S. 132]

While filing the return in response to notice under section 153A, assessee voluntarily disallowed the interest of Rs. 58.86 which was disallowed in the original assessment. However, a note to the return of income was annexed claiming the said interest was allowable. Assessing Officer has accepted the loss as returned by the assessee. In appeal before Commissioner(Appeals), it was contended that the funds available in the hands of the assessee were mixed and there was no question of apportionment of such funds available with assessee. After obtaining the remand report he disallowed the interest of Rs. 10,81,326/- and deleted the remaining amount. In appeal before the Tribunal it was contended that the Commissioner was erred in giving relief to the assessee on the income disclosed by him in the return of income filed under section 153A, ignoring the fact that the Assessing Officer has merely assessed the total income at the returned income. Secondly, in view of Apex Court judgment in Goetze (India) Ltd. v. CIT (2006) 284 ITR 323 (SC), the Commissioner(Appeal) should not have entertained the claim of assessee. Tribunal held that requirement of section 153A is to compute the total income of each such A.y. without any reference to what was done in the original assessment, hence the assessee is entitled to seek relief on any addition which was made in the original assessment. As regards the claim made before the Commissioner(Appeals) following the ratio of National Thermal Power Co. Ltd. v. CIT (1998) 229 ITR 383 (SC), the Tribunal can examine and entertain the claim provided facts are exists on record for examination the claim. Accordingly the Tribunal dismissed the appeal of the revenue. (A.Y. 2001-02)

Dy. CIT v. Eversmile Construction Co. (P) Ltd. (2012) 65 DTR 39 / 143 TTJ 322 (Mum.)(Trib.)

S. 153A : Assessment - Search - No addition if no incriminating documents - "Container Freight Station" is an "Inland Port / Infrastructure facility" - Additions cannot be made under section 153A assessment if no incriminating documents were found in the course of search. Container freight station is an inland pot / infrastructure facility is entitled deduction under section 80IA(4) [S. 80IA(4)]

The Special bench had to consider two issues (i) whether an assessment under section 153A encompassed additions not based on any incriminating material found during the search and (ii) whether a "Container Freight Station" was an "Inland Port/ Infrastructure facility" for purposes of deduction under section 80IA(4). Held by the Special Bench:

(i) In assessments that are abated, the Assessing Officer retains the original jurisdiction as well as the jurisdiction conferred on him by section 153A for which assessments shall be made for each of the 6 assessment years separately;

(ii) In other cases, in addition to the income that has already been assessed, the assessment under section 153A will be made on the basis of incriminating material i.e. (a) the books of accounts and other documents found in the course of the search but not produced in the course of original assessment and (b) undisclosed income or property disclosed in the course of search;

(iii) A Container Freight Station, like an Inland Container Depot, is an "Inland Port" having regard to the fact that it is referred to as such in the statutory provisions and in the understanding of the CBEC, which administers the Customs Act. It has also been treated as part of the customs port for purpose of customs formalities and clearances. Accordingly, it is an "infrastructure facility" for purposes of section 80IA(4). (A.Y. 2003-04, 2004-05 to 2009-10)

All Cargo Global Logistics Ltd. v. Dy. CIT (2012) 137 ITD 287 / 74 DTR 89 / 147 TTJ 513 / 18 ITR 106 (SB)(Mum.)(Trib.)

S. 153A : Assessment - Search - Addition deleted of earlier year - Addition made in earlier proceeding for same A.Y. was deleted in appeal hence the proceedings cannot be revived and added over again in A.Y.

The additions made in the earlier proceedings for the same A.Y. which have been already deleted in appeal cannot be revived and added over again in the A.Y. under section 153A. The scheme of the Act does not permit matters that have become final between the assessee and the IT authorities to be reopened and reagitated except by process known to law. (A.Y. 2001-02, 2002-03)
ACIT v. Uttara S. Shorewala (Mrs) (2012) 147 TTJ 716 / 74 DTR 11 (Mum.)(Trib.)
Uttara S. Shorewala (Mrs) v. ACIT (2012) 147 TTJ 716 / 74 DTR 11 (Mum.)(Trib.)

S. 153A : Assessment - Search - Presumption - Since total undisclosed income was offered by assessee as per seized documents no separate addition was made in respect of cash found [S. 69, 292C]
Seized documents RM-1 and RM-2 were found in the possession and control of the assessee during the course of search in his case, a presumption under section 292C has to be drawn that the said documents belonged to the assessee and the contents thereof were true unless disproved by cogent evidence. Department having claimed that the contents of RM-1 and RM-2 were incorrect, the onus was on the Department to bring on record some acceptable evidence to prove that what was stated in the seized documents did not depict the actual state of affairs. In view of the provisions of section 292C, the contents of seized material are to be presumed to be true unless rebutted by the party claiming contrary; Assessing Officer and the CIT(A) having failed to discharge such onus by bringing on record some cogent evidence to disprove the notings on the seized papers, the notings on the seized documents clearly depicting purchase and sale of gold, diamonds and painting and investment of sale proceeds in property and shares have to be accepted as such and, therefore, additions towards undisclosed income / unexplained investment could not be made by disregarding such notings. (A.Y. 2003-04 to 2008-09)
Vivek Kumar Kathotia v. Dy. CIT (2012) 79 DTR 81 / 150 TTJ 462 (Kol.)(Trib.)

S. 153B : Assessment - Search - Limitation - Special audit - Period required for special audit has to be excluded in terms of explanation (ii) to section 153B and balance period of 60 days to be considered, hence the order is not time barred
The Assessing Officer passed an order under section 142(2A), directing special audit, said order was challenged in writ petition. High Court stayed the assessment proceedings. While disposing the writ petition the court stated that time schedule fixed under the Act would apply. A special audit was directed by the Assessing Officer vide order dated 19-1-2007, which was to be completed within 105 days. The Auditor furnished its audit report on 3-5-2007. The Assessing Officer, thereafter passed its assessment order on 29-6-2007. The Tribunal held that the order was time barred. Appeal by revenue, the Court held that, the period during which assessment proceedings were stayed i.e. 31-3-2006 to 18-12-2006, had to be excluded in terms of Explanation (i) to section 153B(1), and period of 105 days required for special audit had been gain to be excluded in terms of Explanation (ii) to section 153B. The proviso to Explanation to section 153B(1) is again became applicable and as per said proviso assessment order could have been passed on or before 3-7-2007, i.e. period of 60 days after special audit was to be submitted to Assessing Officer. Therefore the order of Tribunal, holding that assessment order dated 29-6-2007 as time barred was incorrect, accordingly the order of Tribunal reversed and appeal of revenue was allowed. (A.Y. 1998-99 to 2001-02)
CIT v. Ulike Promoters (P) Ltd. (2012) 205 Taxman 414 / 69 DTR 48 / 250 CTR 171/(2013) 356 ITR 507 (Delhi)(HC)

S. 153C : Assessment - Income of any other person - Search and seizure - Satisfaction - There is no requirement that the Assessing Officer should also be satisfied that such valuable articles or books of account or documents belong to any other person must conclusively reflect or disclose any undisclosed income [S. 132 , 153A, 158BD]

There was a search and seizure under section 132 against Puri group of Companies. The documents relating to assessee were found in the premises of Puri group of companies, accordingly the Assessing Officer recorded the satisfaction in accordance with section 153C(1) and handed over to the Assessing Officer of assessee along with other documents. The Assessing Officer issued the notice under section 153A of the Act to furnish the return for in respect of six assessment years. The assessee filed the return. After the Assessment orders for the A.Y. 2003-04 to 2008-09, the assessee has filed a writ petition. The main contention of the assessee is that the Assessing Officer has illegally assumed jurisdiction under section 153C read with section 153A of the Act there was no undisclosed income to be assessed in the hands of assessee. The assessee contended that the seizure of documents, the satisfaction recorded by the Assessing officer under section 153C(1) and assessment orders passed by the Assessing Officer for the A.Y. 2003-04 to 2008-09 have all to be struck down. The Court held that in view of provision of section 153C, satisfaction that is required to be reached by Assessing Officer having jurisdiction over searched person is that valuable article or books of account or documents seized during search belong to a person other than searched person, however there is no requirement in section 153C(1) that Assessing Officer should also be satisfied that such valuable articles or books of account or documents belong to other person must conclusively reflect or disclose any undisclosed income. Accordingly, the writ petition was dismissed. (A.Y. 2003-04 to 2008-09)

SSP Aviation Ltd. v. Dy. CIT (2012) 346 ITR 177 / 207 Taxman 260 / 252 CTR 291 / 70 DTR 275 (Delhi)(HC)

S. 153C : Assessment - Income of any other person - Search and seizure - Satisfaction

It is only the clerical satisfaction of the Assessing Officer that is contemplated under section 153C. In the instant case, the petitioner has not averred that the Assessing Officer did not record his satisfaction. He only demanded a copy of the satisfaction recorded by the Assessing Officer Request of the petitioner has been turned down stating that the assessee is not entitled to copy of the note. In his subsequent statement respondent has further clarified that the copy of the satisfaction recorded by the Assessing Officer was not given to the petitioner as it is a confidential correspondence and the reason for taking up his case for scrutiny had been already communicated to the petitioner in the notice issued under section 153A. Therefore, there is no substance in the case of the petitioner that the proceedings were initiated against him without recording the satisfaction of the Assessing Officer in terms of section 153C. (A.Y. 2003-04 to 2009 -10)

K. M. Mehaboob (Dr.) v. Dy. CIT (2012) 76 DTR 90 (Ker.)(HC)

S. 153C : Assessment - Income of any other person - Search and seizure - Best assessment - Quoting wrong section will not make the assessment invalid [S. 144]

For the A.Y. 2009-10 the best assessment was made under section 144 by making references to section 153C and 153A. The assessee challenged the assessment order by filing writ petition stating that the Assessing Officer referred the section 153A and 153C which are not applicable to relevant year. The Court held that best assessment cannot be held to be invalid merely because the Assessing Officer wrongly quoted the sections 153A and 153C (A.Y. 2003-04 to 2009-10)

K. M. Mehaboob (Dr.) v. Dy. CIT (2012) 76 DTR 449 / 211 Taxman 52 (Ker.)(HC)

S. 153C : Assessment - Income of any other person - Search and seizure - Recording of satisfaction - For transferring material no satisfaction is required to be recorded that the books of account or other evidence or material seized in the course of search represent undisclosed income of the other person [S. 153A]

The assessee challenged the assessment completed under section 153C read with section 153A, on the ground that the Assessing Officer who conducted search on the assessee at Mangalore under section 132 has not recorded the satisfaction as required under section 153C before transferring the files to the Assessing Officer of the assessee to make assessment under section 153C read with 153A. The

Court held that for transferring material no satisfaction is required to be recorded that the books of account or other evidence or material seized in the course of search represent undisclosed income of the other person. Accordingly the writ petition was dismissed. The Court followed K. M. Mehaboob (Dr.) v. Dy. CIT (2012) 76 DTR 90 (Ker.)(HC). (A.Y. 2003-04 to 2008-09)

K. M. Mehaboob (Dr.) v. Dy. CIT (2012) 76 DTR 449 / 211 Taxman 52 (Ker.)(HC)

S. 153C : Assessment - Search and seizure - Income of any other person - Approval of JCIT - Failure to obtain JCIT's approval renders section 153C assessment order void [S. 153D]

Pursuant to search & seizure action under section 132 on the premises of Mr. Shriram Soni, certain documents belonging to the assessee were found and seized pursuant to which a notice under section 153C was issued to the assessee and assessment under section 153C r.w.s. 144 were framed. In passing the assessment orders, the Assessing Officer (ITO) omitted to obtain the consent of the JCIT as mandated by section 153D. Before the Tribunal, the assessee argued that the failure to obtain the JCIT's consent rendered the assessment a nullity. Held by the Tribunal upholding the plea:

Section 153C authorises the Assessing Officer to exercise jurisdiction over any person in whose case incriminating material has been found during the course of search conducted on another person. Section 153D provides that no order of assessment shall be passed by an Assessing Officer below the rank of JCIT except with the prior approval of the JCIT. The fact that the heading to section 153D refers to a "prior approval" and that it uses negative wording and the word "shall" makes the intention of the Legislature clear that compliance of section 153D is mandatory. As the provision is mandatory, an act done in breach thereof will be invalid. Also, as the condition has been imposed in public interest, it cannot be waived by the assessee. Clause 9 of the Manual of Office Procedure also makes it clear that an assessment order under Chapter XIV-B can be passed only with the previous approval of the JCIT and that the approval must be in writing and stated to have been obtained in the body of the assessment order. Accordingly, in the absence of the JCIT's approval, the Assessing Officer had no jurisdiction to pass the section 153C order and it was null and void [CIT v. Ratnabai Dubhash (Mrs) (1998) 230 ITR 495 (Bom.)(HC) & CIT v. SPL's Siddhartha Ltd. (2012) 249 CTR 357 (Delhi)(HC) followed] (A.Y. 2001-02 to 2004-05)

Akil Gulamali Somki v. ITO (2012) 137 ITD 94 / 78 DTR 137 / 149 TTJ 898 / 20 ITR 255 (Pune)(Trib.)

S. 153C : Assessment - Income of any other person - Search and seizure - Computation

Assessing Officer made the addition of Rs. 5,00,000/- as unexplained investment in purchase of land. The CIT(A) deleted the same. The Tribunal held that, since all the sale deeds have undisputedly been registered and the assessee has paid the registration amount, it is difficult to accept that without passing of the sale consideration, duly stated therein, a vendor has executed the sale in favour of the assessee. Amount of consideration might have been received by the vendor in price meal but within the financial year under consideration. Therefore, the consideration of Rs. 5 lacs had been paid, the source of which remained unexplained, hence rightly taxed by the Assessing Officer. (A.Y. 1999-2000)

Dy. CIT v. Sandip M. Patel (2012) 78 DTR 260 / 137 ITD 104 / 150 TTJ 338 (Ahd.)(Trib.)

S. 153C : Assessment - Income of any other person - Search and seizure - Materials forwarded by other government authority

In a situation where certain incriminating material has been forwarded by another Government authority, i.e. Police Department to the Assessing Officer and those requisitioned documents did belong to the assessee, then the only recourse left with the Assessing Officer was to start the proceedings under section 153C so that the investigation on those documents could be made. It may or may not reveal the concealed amount of income, the Assessing Officer is duty bound first to

investigate and then only be able to decide about the factum of concealed income. Therefore, there was no fallacy in the issuance of notice under section 153C. (A.Y. 2002-03)
Dy. CIT v. Sandip M. Patel (2012) 137 ITD 104 / 78 DTR 260 / 150 TTJ 338 (Ahd.)(Trib.)

S. 153C : Assessment - Income of any other person - Search and seizue - Recording of satisfaction - Search assessment is void if Assessing Officer's satisfaction is not recorded [S. 132, 158BD]
Search & seizure operations under section 132 were conducted at the premises of P. C. Wadhwa. Pursuant thereto, a notice under section 153C was issued on the assessee requiring it to file its return. The assessee asked the Assessing Officer for a copy of the reasons which resulted in satisfaction for issue of the section 153C notice. The said reasons were not furnished by the Assessing Officer on the ground that there was no requirement in the Act which required such reasons to be furnished. The CIT(A) struck down the section 153C assessment on the ground that the Assessing Officer had not recorded any satisfaction before issue of the notice. On appeal by the department to the Tribunal, held, dismissing the appeal:
Section 153C is analogous to section 158BD. In the context of section 158BD, the Supreme Court held in Manish Maheshwari v. ACIT (2007) 289 ITR 341 (SC) that the recording of satisfaction by the Assessing Officer that undisclosed income belongs to any person, other than the person who was searched, is a condition precedent. This principle applies to section 153C as well. The burden is on the Revenue to show that the necessary ingredients of section 153C have been complied with. On facts, there is material to show the Assessing Officer in the case of the person searched was satisfied that any money, bullion, jewellery or other valuable articles or things or books accounts or documents seized or requisitioned belongs to someone else. There is nothing to show that such satisfaction was recorded by the Assessing Officer. Even in the assessment order, no seized document or material has been referred to by the Assessing Officer. Consequently, the conditions of section 153C are not satisfied and the assessment order had to be quashed [Vijaybhai N. Chandrani v. ACIT (2011) 333 ITR 436 (Guj.) and other judgements followed]. (A.Y. 2003-04 to 2008-09)
ACIT v. Global Estate (2013) 142 ITD 740(Agra)(Trib.)

S. 153C : Assessment - Income of any other person - Search and seizure - Recording of satisfaction - Search assessment is void if Assessing Officer's satisfaction not recorded [S. 132, 153A, 158BD]
A search & seizure action under section 132(1) was carried out in the case of Ingram Micro India Pvt. Ltd. As certain documents were found which allegedly showed that the assessee (a Singapore company) was not paying tax in India though it had a PE, an assessment under section 153C was made to bring such profits to tax. The assessee challenged the section 153C assessment on the ground that the Assessing Officer who had conducted the search had not recorded satisfaction that any income belonged to the assessee. Held by the Tribunal:
Umder section 153A & 153C, proceedings can be initiated only after the Assessing Officer comes to the satisfaction that the seized material pertains to a person other than the searched party and comes to the conclusion that proceedings are required to be initiated in the other party's case. In Manish Maheshwari v. ACIT (2007) 289 ITR 341 (SC), it was held in the context of section 158BD that the recording of satisfaction by the Assessing Officer that any undisclosed income belongs to any person, other than the person searched, is a "condition precedent" and that a notice issued without recording satisfaction and application of mind was a nullity. This principle has been applied to section 153C in SSP Aviation Ltd. v. Dy. CIT (2012) 207 Taxman 260 (Delhi) & P. Satyanarayana (Chennai)(Trib.). On facts, as the Department was not able to produce any material to show that the Assessing Officer assessing the searched party had reached the satisfaction that any income belonged to the assessee, the assessment had to be annulled. (A.Y. 2002-03 to 2007-08)(ITA nos .8133,8137, 8138, 8136 8135, &8132/M/2010 dt 21-12-2012)

Ingram Micro (India) Exports Pvt. Ltd. v. Dy. DIT (Mum.)(Trib.) www.itatonline.org

S. 154 : Rectification of mistake - Industrial undertaking - Assessment allowing deduction on profits before setting off carried forward losses - Rectification to restrict deduction - Matters debatable at the time - Rectification is not permissible [S. 80IA, 143(1)(a)]

The assessee's return was processed under section 143(1)(a) of the Act, allowing deduction under section 80-IA before setting off carried forward losses. The Assessing Officer in proceedings under section 154 of the Act restricted the deduction under section 80IA to the profits after setting off losses of earlier years, rejecting the assessee's objections based on CIT v. K. N. Oil Inds. (1997) 226 ITR 547 (MP). The Commissioner(Appeals) dismissed the assessee's appeal following CIT v. Kotagiri Inds. Co-op. Tea Factory Ltd. (1997) 224 ITR 604 (SC) and this was affirmed by the Tribunal and the High Court. On further appeal, the Court held, that the provisions of Chapter VI-A particularly those dealing with quantification of deductions, having been amended several times and even after the date of the decision relied on by the Tribunal, one could not say that this was a case of a patent mistake. Accordingly the order of High Court was set aside. (A.Y. 1997-98)

Dinosaur Steels Ltd. v. JCIT (2012) 349 ITR 360 / 80 DTR 217 / 254 CTR 640 (SC)

Editorial:- Decision of Madras High Court in Dinosaur Ltd. v. JCIT (2007) 288 ITR 476 (Mad.)(HC) set aside.

S. 154 : Rectification of mistake - Non consideration of Supreme Court decision is a mistake apparent on record and can be rectified

Assessee suffered the loss from the export of trading goods, which ought to have been adjusted against 90 percent of the export incentive as per the decision of the Supreme Court. High court held that non-consideration of the judgment of the Supreme Court and non-application of the ratio of the judgment of the Supreme Court to the facts of the present case is a glaring, patent and obvious mistake of law which can be rectified under section 154. Accordingly the appeal of revenue was allowed. (A.Y. 2002-03)

CIT v. Satish Kumar Agarwal (2012) 66 DTR 68 (Delhi)(HC)

Editorial:- Refer Circular No. 71 dated 20-12-1971 (1972) 83 ITR (St) 91

S. 154 : Rectification of mistake - Subsequent decision of Supreme Court would not obliterate conflict of opinion existing on the date of order - Revenue appeal was dismissed

Assessee filed the return of income claiming unabsorbed investment allowance to be set off under section 115J. The return was processed under section 143(1)(a). Subsequently, the Assessing Officer passed the order under section 154, withdrawing the claim. The Tribunal agreed with the contention of assessee that brought forward allowance could not be set off as against the income computed under section 115J. On appeal by revenue the High Court held that, a debatable point of law cannot be taken as a mistake apparent from record. A subsequent decision of the Supreme Court would not obliterate the conflict of opinion which existed as on the date of passing of assessment order. Order of Tribunal is up held and the appeal of revenue is dismissed. (A.Y. 1991-92 & 1992-93)

CIT v. Thambi Modern Spinning Mills Ltd. (2012) 341 ITR 229 (Mad.)(HC)

S. 154 : Rectification of mistake - Valuation of closing stock - When the closing stock is enhanced by the Assessing Officer he has to rectify the mistake in next years opening stock and has to give consequential relief

Assessee changed the method valuation of stock to the "cost to complete" for the A.Y. 1986-87 for determining its profits in accordance with the International and Indian Accounting Standards under which, in respect of each contract at the end of each year, the cost required to complete the contract was estimated and compared with the total value. Assessing Officer did not accept the change in the method and added value to work in progress amounting to Rs. 1,31,88,000/- The assessee has lost in

appeal, however the committee has not given permission to file an appeal before High Court. The return of assessee for A.Y. 1987-88 & 1988-89, was accepted under section 143(1) as per the method adopted by the assessee. Assessee filed an application under section 154 to pass consequential relief for the A.Y. 1987-88 and 1988-89, which was rejected by the Assessing Officer. The view of Assessing Officer was confirmed by the Tribunal. On appeal to High Court, the Court held that it is incumbent upon the Assessing Officer to follow the same principle in the subsequent years, mistake will appear from the record of the case and there is no question of entering in to any new material for the purpose of detecting the said mistake. High Court set aside the order of lower authorities and directing the Assessing Officer to treat the closing stock of earlier year to treat the opening stock of next year. (A.Y. 1987-88 to 1988-89)

Bridge & Roof Co. (India) Ltd. v. CIT (2012) 248 CTR 111 / 338 ITR 15 / 58 DTR 225 (Cal.)(HC)

S. 154 : Rectification of mistake - Deduction from the profit not enumerated in clause (i) to (ix) covered by the Explanation to Section 115JA(2) - Mistake apparent on record

The assessment was completed based on the profit taken from Profit and Loss appropriation account prepared in terms of Part II and III of Schedule IV of the Companies Act. The claim of the assessee of deduction from the profit not enumerated in clause (i) to (ix) covered by the Explanation to section 115JA(2) was held to be a mistake apparent on record. The order of Tribunal reversing the original Order and passing a revised assessment under Section 154 upheld by the High Court. (A.Y. 1997-98)

Sree Bhagawathy Textiles Ltd. v. ACIT (2012) 342 ITR 244 / (2011) 239 CTR 560 / 199 Taxman 14 / 53 DTR 7 (Ker.)(HC)

S. 154 : Assessment - Rectification of mistake - Book profits - Intimation - Computation of book profits for the purpose of expalantion 3 to section 40(b)(v) is a debatable hence cannot be rectified [S. 40(b)(v), 115J, 143(1)(a)]

While sending intimation under section 143(1)(a) it was decided that income from other sources could be taken into consideration for ascertaining book profit for the purpose of computation of allowable remuneration to partners and not the income from business alone; undoubtedly this is a debatable issue and such debatable issue cannot be a ground for rectification under section 154. (A.Y. 1995-96 to 1998-99)

MD. Serajuddin & Brothers v. CIT (2012) 80 DTR 46 / 210 Taxman 84 (Cal.)(HC)

S. 154 : Rectification of mistake - Book profit - Entries in the books of account - Issues and contentions being debatable and in realm of uncertainty, Invoking section 154 is not justified [S. 115JB]

The book profit as declared were in conformity with the provisions of Part II and III of Schedule VI to 1956 Act. The Assessing Officer and the Commissioner(Appeals) had not adversely commented or stated that the entry was contrary to the part II and III of schedule VI. The first proviso to section 115JB(2) had not been specifically referred to and applied by the Assessing Officer and CIT(A). They had not stated as to why and how the book profit were not computed in consonance with the provisions of part II and III of schedule VI to 1956 Act. The issues and contentions being debatable and in realm of uncertainty. It was held that invoking of Section 154 was not correct. (A.Y. 2002-03)

CIT v. R.T.C.L. Ltd. (2012) 348 ITR 120 / 208 Taxman 459 (Delhi)(HC)

S. 154 : Rectification of mistake - Debatable issue - Depreciation [S. 32]

Questions as to whether the assessee is under compulsion to claim current years depreciation for A.Y. 2000-01 even when it has opted not to claim it and whether the amendment made to section 32 from A.Y. 2002-03 has a prospective effect or retrospective effect vis-à-vis claim for current years depreciation are debatable issues which do not fall in the category of mistake apparent from record

and, therefore, assessment for A.Y. 2000-01 could not be rectified under section 154 by allowing the current years depreciation which was not claimed by the assessee. (A.Y. 2000-01)
CIT v. Historic Resort Hotels (2012) 253 CTR 608 / 78 DTR 73/(2013) 214 Taxman 119(Mag.) (Raj.)(HC)

S. 154 : Rectification of mistake - Debatable - Business expenditure - Delay in filing return - Interest [S. 37(3A), 139(8)]
Question whether newspapers were small and whether expenses were spent on sales promotion is debatable, rectification proceedings to disallow expenditure held to be not valid. Computation of interest payable, mistake in calculating period of interest, reduction of advance tax paid after due date of filing return and delay in filing return being obvious mistakes which could be rectified. (A.Y. 1979-80)
Kesharwani Zarda Bhandar v. CIT (2012) 349 ITR 519 (All.)(HC)

S. 154 : Rectification of mistake - Share in partnership firm - Interest - Regular assessment - Levy of interest held to be justified, notice is not mandatory [S. 155, 139(8), 215]
Assessing Officer passed regular assessment order under section 143(3) which resulted in refund. Subsequently rectification order was passed under section 154/155 to adopt assessee's share income from firm and interest under sections 215 and 139(8) was charged. The Court held that the Assessing Officer was entitled to charge interest under sections 215 and 139(8), even though same had not been levied at time of passing of regular assessment order and rectification order is regular assessment order. Order levying interest under sections 215 and 139(8) can be passed under section 154/155 without adhering to requirement of notice under sub-section (3) of section 154. (A.Y. 1985-86)
Dr. P. C. Khurana v. CIT (2012) 73 DTR 145 / 211 Taxman 43 (Mag.)/73 DTR 145(P&H)(HC)

S. 154 : Rectification of mistake - Intimation - Additional tax - Industrial undertaking - Rectification of mistake - Levy of additional tax held to be justified in rectification proceedings [S. 80B(5), 80IA, 143(IA)]
Assessee's one industrial undertaking earned profit of Rs. 1.28 crores while another one incurred loss of Rs. 1.14 crores. While computing deduction under section 80-IA, assessee did not consider loss of Unit-II; he deducted 30 per cent of profit of Unit-I at 38 lakhs. In return, instead of declaring gross total income at Rs. 14 lakh, it declared nil income and carried forwards Rs. 24 lakhs. Since returned income was at loss and assessed income was 'nil', additional tax under section 143(1A) was chargeable on difference of returned and assessed income at Rs. 24 lakhs. Assessing Officer had failed to do so and, consequently, said mistake was sought to be rectified which assessee opposed. The Court held that gross total income as defined under section 80B(5) includes total income computed in accordance with provisions of Act, before making any deduction under Chapter VI-A and an assessee could not have made any deduction, from gross total income for purposes of claiming benefit to return income as Nil and carry forward loss, since assessee had claimed deduction which were not permissible, section 143(1A) would be clearly be attracted and additional tax would be payable while correcting return. (A.Y. 1996-97)
CIT v. Anand Duplex Ltd. (2012) 211 Taxman 48 (Mag.)(All.)(HC)

S. 154 : Rectification of mistake - Waiver of interest - Hardship - Order was passed on a misconception or an error in interpreting notification, which could be rectified under section 154 [S. 119(2)(a), 148, 234A, 234B, 234C]
A search was conducted at premises of assessee and pursuant to a notice under section 148 assessment was completed. Interest under sections 234A, 234B and 234C was also levied .Assessee, pleading hardship, moved an application before CCIT, invoking its power available under notification dated 23-5-1996 issued under section 119(2)(a), to waive interest. Chief Commissioner, accepting

plea of assessee and noticing fact of filing of income-tax return and payment of tax by assessee, waived interest in full. Subsequently, however, order of CCIT was rectified under section 154 on ground that waiver of interest was against law as assessee did not fall within terms of notification for short reason that it had filed income-tax return only after search and detection of concealed income and not voluntarily. The assessee filed the writ petition against the rectification order under section 154. The Court held that since order of CCIT granting waiver of interest was without noticing that assessee as per specifications of notification was not entitled to make such a claim, said order was a misconception or an error in interpreting notification, which could be rectified under section 154. Accordingly the writ petition was dismissed. (A.Y. 1989-90 to 1995-96)

Link Line Enterprises v. ACIT (2012) 211 Taxman 471 (Ker.)(HC)

S. 154 : Rectification of mistake - Credit for TDS - Full credit for TDS certificate must be given though inadvertently the assessee has claimed less credit [S. 143(1), 199, Rule 37BA]

The assessee filed the return of income along with TDS certificate of Rs. 31,47,636/-. However, inadvertently the assessee claimed credit for Rs. 16,67,134/- in the return of income. The return was processed under section 143(1) and only refund of Rs. 1,95,554/- was issued. The assessee moved application under section 154 and claimed the refund on the basis of certificates which were filed along with the return. The Assessing Officer has rejected the claim. On appeal the Commissioner(Appeals) has allowed the claim. On appeal to the Tribunal, the Tribunal held that as per Rule 37BA credit for tax deducted at source and paid to the Central Government has to be given for the A.Y. in which such income is assessable. On the facts the assessee offered the entire income which was assessed by the Assessing Officer. The Tribunal rejected the contention of revenue that the assessee should have filed the revised the return. The Tribunal confirmed the view of Commissioner(Appeal) and held that the assessee is entitled to the credit of TDS which was filed along with the return. (A.Y. 2005-06)

ITO v. Krishraj Hotels & Motels (P) Ltd. (2012) 145 TTJ 118 / 68 DTR 167 (Delhi)(Trib.)

S. 154 : Rectification of mistake - Set off of loss - E-Return - Department is hauled up for Central processing return (CPC) fiasco & unnecessarily harassing assessee but spared of costs on the ground that Assessing Officer & CIT(A) were "only doing their duty" - Copy of order served on CBDT for necessary action

The assessee filed an e-return disclosing income of Rs. Nil which was arrived at after setting off against the current year's income of 9.53 crores, the brought forward losses of Rs. 12.43 crores. In the electronic processing, the loss set off was shown at Zero and a demand of Rs. 3 crores was raised. The assessee filed a rectification application under section 154. The Assessing Officer rejected the application on the ground that the assessee had "not claimed any loss" while the CIT(A) rejected it on the ground that "set off of losses cannot be a matter of rectification". The assessee filed an appeal before the Tribunal and demanded costs under section 254(2B) for the hardship. Held by the Tribunal:

(i) The Assessing Officer & CIT(A) were not justified in rejecting the assessee's claim because as the losses had already been determined in the earlier years, the same were required to be allowed as set off against current income of the assessee. The CPC itself later issued a rectification order setting off losses of Rs. 9.53 crores though it still did not mention carry forward of losses. The assessee's plea for costs under section 254(2B) for "unnecessary hardship" cannot be accepted because the lower authorities were only "doing their duty".

(ii) As regards the CPC, observed:

We would like to take this opportunity to bring to the notice of CBDT that after the procedure of Central processing of returns, many issues have come before various forums where unnecessary demands have been raised due to non-grant of TDS, wrong computation of income, adjustment of the previous year demand which have already been deleted by the jurisdictional assessing officer.

Therefore, we would like to urge the CBDT to take up this matter urgently and establish proper coordination between the assessing authority and Central Processing Authority so that these problems are immediately solved and unnecessary litigation can be avoided. Copy of this order should be forwarded to the Chief Commissioner of Income-tax, Chandigarh and Chairman of CBDT for necessary action. (A.Y. 2009-10)

Ambala Central Co-operative Bank Ltd. v. ITO (2012) 52 SOT 233 (Chd.)(Trib.)

S. 154 : Rectification of mistake - Retrospective amendment of law, rectification order is justified

The assessment was the subject matter of appeal before the first appellate authority and in accordance with the directions of the first appellate authority the Assessing Officer recomputed the claim under section 80HHC allowing the deduction. The Assessing Officer noted the Taxation Laws (Amendment), Act, 2005 has brought amendments in section 80HHC with retrospective effect whereby assessee having export turnover exceeding Rs. 10 Crores is entitled to benefit of second proviso to section 80HHC(3), only if the assessee has necessary evidence to prove that he had an option to choose either duty draw back or DEPB scheme. On the facts as the turnover was more than 10 crores, it had no such option other than DEPB, accordingly the Assessing Officer passed the order under section 154 based on retrospective amendment to section 80HHC. In an appeal before the Tribunal the Tribunal held that rectification under section 154 can be done on the retrospective amendment made by the legislature. (A.Y. 2001-02)

Baby Marine Products v. ACIT (2012) 147 TTJ 385 / 73 DTR 169 (TM)(Cochin)(Trib.)

S. 154 : Rectification of mistake - Judgment of jurisdictional High Court not considered is held to be mistake apparent from record [S. 10(10C), Rule 2BA]

Non-consideration of judgment of jurisdictional High Court is is clearly a mistake apparent from record.Accordingly the assessee's application to allow exemption under section 10(10C) was maintainable notwithstanding the fact that voluntary retirement scheme was not in conformity with Rule 2BA. (A.Y. 2004-05)

Uttara Ghosh (Smt) v. Dy. CIT (2012) 139 ITD 88 / (2013) 152 TTJ 517 / 82 DTR 181 (Kol.)(Trib.)

S. 154 : Rectification of mistake - Decision of Supreme Court - Withdrawal of deduction under section 80IB qua DEPB amount allowed earlier by way of rectification under section 154 on the basis of the decision of the apex court is not justified [S.80IB, 28(iiid)]

Deduction under section 80IB qua DEPB amount allowed earlier was as per jurisdictional High Court decision and could not be withdrawn by way of rectification under section 154 on the basis of the decision of the Apex Court, more so when the allowance of deduction allowed to the assessee is not a glaring, obvious, patent and apparent mistake from record. Supreme Court has not considered the amendment provision of section 28(iiid) in rendering the judgment, it is treated per incuriam. Issue also debatable, hence the appeal of assessee was allowed. (A.Y. 2005-06, 2006-07)

Sarraf Export v. ITO (2012) 80 DTR 344 / (2013) 151 TTJ 40 / (2013) 142 ITD 388 (Jodh.)(Trib.)

S. 158B : Block assessment - Definitions - Undisclosed income - Deduction at source -Advance tax - Search and seizure - If return of income is not filed on due date, though tax is deducted and advance tax is paid income will be assessed as undisclosed income - Payment of advance tax not indicative of intention to disclosue [S. 2(45), 132, 158BC, 158BD]

A search under section 132 was conducted on 23.2.1996 when it was detected that though the assessee had taxable income for A.Y. 1995-96 it had not filed a ROI and the due date (31.10.1995) had lapsed. The Assessing Officer issued a section 158BD notice directing the assessee to file a return

for the block period. The assessee claimed that as it had paid advance tax on the income for A.Y. 1995-96, the income could not be said to be "undisclosed". The Assessing Officer rejected the claim though the Tribunal and High Court accepted the assessee's claim on the basis that payment of Advance Tax itself necessarily implies disclosure of the income on which the advance is paid. On appeal by the department to the Supreme Court, held reversing the Tribunal and High Court:
Section 158B(b) defines the expression "undisclosed income" to mean that income "which has not been or would not have been disclosed for the purposes of this Act". The only way of disclosing income on the part of an assessee is through filing of a return and therefore an "undisclosed income" signifies income not stated in the return filed. It cannot be said that payment of Advance Tax by an assessee per se is tantamount to disclosure of total income. There can be no generic rule as to the significance of payment of Advance Tax in construing intention of disclosure of income. This depends on the time at which the search is conducted in relation to the due date for filing return. If the search is conducted after the expiry of the due date for filing return, payment of Advance Tax is irrelevant in construing the intention of the assessee to disclose income because it is a case where income has clearly not been disclosed. The possibility of the intention to disclose does not arise since the opportunity of disclosure has lapsed. If search is conducted prior to the due date for filing return, the opportunity to disclose income by filing a return still persists. In such a case, payment of Advance Tax may be a material fact for construing whether an assessee intended to disclose. An assessee is entitled to make the legitimate claim that even though the search or the documents recovered show income earned by him, he has paid Advance Tax for the relevant assessment year and has an opportunity to declare the total income, in the return of income, which he would file by the due date. Hence, the fulcrum of such a decision is the due date for filing of return of income vis-à-vis date of search. Also, because Advance Tax is based on estimated income, it cannot result in the disclosure of the total income assessable and chargeable to tax. The proposition that payment of Advance Tax is tantamount to disclosure of income would be contrary to the very purpose of filing of return. On facts, as the assessee had not filed the ROI by the date of search and the due date had lapsed, the income found was "undisclosed" even though advance-tax thereon had been paid. Similarly, as TDS is also computed on the estimated income of an assessee for the relevant F.Y., it does not amount to disclosure of income, nor does it indicate the intention to disclose income if the ROI is not filed. (A.Y. 1995-96)
ACIT v. A. R. Enterprises (2013) 350 ITR 489 / 3 SCC 196 / 212 Taxman 531 / 256 CTR 1 / 82 DTR 97 (SC)
CIT v. B. R. Shah (2013) 350 ITR 489 (SC)
CIT v. Dharmin D. Shah (2013) 350 ITR 489 (SC)
CIT v. Nachammai (2013) 350 ITR 489 (SC)
CIT v. Urvashi N.Shah (2013) 350 ITR 489 (SC)
CIT v. P. Sesgodan (2013) 350 ITR 489 (SC)
Editorial:- Decision of Madras High Court in ACIT v. A. R. Enterprises (2005) 274 ITR 110 (Mad.)(HC) reversed.

S. 158B : Block assessment - Definitions - Search and Seizure - Addition for short - Accounting the payments received by the assessee from the distributor, Addition is held to be justified on the ground of accounts evidence collected in the course of search
On the basis of accounts seized, evidence collected from the film distributor and the statements recorded from him, Assessing Officer was justified in making addition for short-accounting the payments received by the assessee from the distributor. (A.Y. 1988-89 to 1997-98)
CIT v. A. H. Khais (2012) 74 DTR 54 / 252 CTR 427 (Ker.)(HC)

S. 158B : Block assessment - Definitions - Cash credits - Confessional statement before FERA proceedings - Gifts from non-residents on facts held to be non genuine, additions confirmed by the Tribunal was up held [S. 68, 158BC]

Assessee is running health clinics along with her family. A search was conducted at clinics and residential premises of assessee and her family wherein it was noticed that assessee and said others received substantial gifts from certain Non-Resident Indians out of their Non-Resident External Accounts during A.Y. 1994-95, 1995-96 and 1996-97. Evidence in form of confirmatory letters, deed of gifts, etc., were found during course of search. Authorities on examination of confirmatory letters, and surrounding circumstances reached a prima facie view that gifts were not genuine. A notice under section 158BC was, accordingly issued. Thereafter, before assessment for block period could be completed, Assessing Officer came across confessional statement made by assessee's husband and son under FERA stating that gifts were not genuine and accordingly, made addition under section 68 was made. Assessee contended that confessional statement made by assessee's husband and son was not evidence which was found during course of search and, therefore, could not be relied upon for block assessment under Chapter XIV-B. Since statements made under FERA were relatable to confirmatory letters given by donors of gifts found during course of search it could be considered to compute undisclosed income. Further since it was only on account of search that documents were found which showed that gifts were not genuine and moreover, it was received in excess of over Rs. 35 lakhs from persons who were not related in any manner to assessee or her family, it could be said that alleged gifts received by assessee were nothing but a modus operandi to convert her cash income into regular income, therefore, additions were rightly made. Appeal of assessee was dismissed. (Block period 1-4-1995 to 26-3-1996)

Rajrani Gupta (Smt) v. Dy. CIT (2012) 211 Taxman 346 / (2013) 257 CTR 47 / 83 DTR 254 (Bom.)(HC)

Editorial:- Rajrani Gupta (Smt) v. Dy. CIT (2000) 72 ITD 155 (Mum.)(Trib.) affirmed.

S. 158B : Block assessment - Definitions - Computation of undisclosed income - Stock reconciliation filed - Addition was not justified - Addition on the basis of slip - Receipts and payment only net can be taxed [S. 158BB]

The assessee-company was engaged in the business manufacturing of and trading in auto and tractor parts and components. Addition of undisclosed income was made inventorising huge stock amounting to crores of rupees consisting innumerable items, in a short time of one day. Assessee's detailed reconciliation of stock considering purchases and issue of stock after date of search, which was not disputed by Assessing Officer, was not accepted. Assessee's products were excisable and excise authorities were present in premises to monitor production and dispatches from bonded section and they had not reported any discrepancy. The Court held that addition made by Assessing Officer on account of unexplained investment in excess/shortage of stock was not justified.

The Court also held that in making addition on basis of slips seized during search showing cash receipts as well as expenses, Assessing Officer cannot take note of only income part reflected in seized material, ignoring expenditure part reflected in same seized material. Order of Tribunal confirmed.

CIT v. D. D. Gears Ltd. (2012) 211 Taxman 8 (Mag.) / (2013) 83 DTR 88 (Delhi)(HC)

S. 158B : Block assessment - Definitions - Undisclosed income - Amounts disclosed in the regular assessment - Addition cannot be made in block assessment [S. 158BB]

Assessee carried on business of manufacturing fabric liquid whitener under mark 'Ujala'. He along with his family members incorporated a company JL for manufacture of same aforesaid product and under an agreement permitted company JL to use his mark 'Ujala' on conditions that company JL shall pay to assessee royalty and reimburse assessee advertisement expenses which had been specifically spent by assessee with reference to market covered by company JL. Later on, assessee

entered into a 'shareholders' Agreement, with a Mauritius company BIIL and under said agreement, BILL consented to invest in JL and mark 'Ujala' stood assigned to company JL. For A.Y. 2000-01, assessee showed royalty income up to September, 1999 and assessee had not demanded reimbursement of expenses as he himself owned a large majority of equity capital of JL. A search under section 132 was conducted upon assessee. Assessing Officer passed block assessment order and made addition on account of royalty income and reimbursement of advertisement expenses being undisclosed income. The Court held that since Assessing Officer during regular assessment itself was aware of fact that income by way of royalty was not paid with effect from September/October, 1999, and further it was not established by Assessing Officer that assessee was, in fact, reimbursed advertisement expenses, question of undisclosed income did not arise. Therefore, impugned addition was not justified. (B.P. 1-4-1990 to 1-11-2000)

CIT v. M. P. Ramchandran (2012) 211 Taxman 11 (Mag.) / (2013) 83 DTR 143 (Bom.)(HC)

S. 158B : Block assessment - Definitions - Undisclosed income - Agreement for development of land already declared in ROI prior to search, long term capital gain arising on transfer outside scope

Assessee having already declared the agreement entered into by them with a company for the development of their landed property in their returns prior to date of search and also the capital gain arising on transfer of proportionate portion of land in A.Y. 2000-01 and subsequent years, the long term capital gains fall outside the scope of the definition of "undisclosed income" in section 158B(b). (Block Period 1-4-1996 to 29-1-2003)

ACIT v. Late Arun Kumar Haridas Dattani By LRs (2012) 72 DTR 154 / 148 TTJ 763 (Cochin)(Trib.)

S. 158BB : Block assessment - Computation - Undisclosed income - Sworn statement during search - Addition which was confirmed by High Court was set aside [S. 69C, 132(4), 158BA, 158BC]

High Court has overruled the decisions of the CIT(A) and the Tribunal even on factual aspects of the explanation/evidence submitted by the assessee vis-a-vis undisclosed income discovered during the search. It ought to have remitted the case to the CIT(A) for giving opportunity to the assessee to produce relevant supporting documents. Therefore, impugned judgment of the High Court is set aside and the case is remitted to the CIT(A) to decide the matter uninfluenced by the judgment of the High Court. (Block Period 1st April, 1990 to 13th March, 2001)

M. K. Shanmugam v. CIT (2012) 349 ITR 384 / 210 Taxman 574 / 254 CTR 317 / 79 DTR 286 (SC)

Editorial:- Judgment of High Court in CIT v. M. K. Shanmugam (2012) 79 DTR 269 (Mad.) reversed.

S. 158BB : Block assessment - Computation - Undisclosed income - Search and seizure - Assets in the name of wife of assessee - Addition cannot be made [S. 132]

There was search and seizure action in the premises of assessee and seized the assets. The Assessing Officer treated the income and assets of wife also as income of assessee. In appeal the Commissioner(Appeals) and Tribunal also confirmed the addition. On appeal by the assessee relying on the ratio of Apex Court in DSP v. K. Inbasagaran (2006) 282 ITR 435 (SC), Dhirajlal Girdharilal v. CIT (1954) 26 ITR 736 (SC), Lalchand Bhagt Ambica Ram v. CIT (1959) 37 ITR 288 (SC), the High Court set aside the order and held that addition of income from assets belonging to wife of assessee is not justified. The Court also held that the finding of fact not based on evidence can be set aside. (A.Y. 1985-86)

S. K. Bahadur v. UOI (2012) 345 ITR 95 / 253 CTR 449 (Delhi)(HC)

S. 158BB : Block assessment - Computation - Undisclosed income - Income which has accrued to the assessee prior to the date of the commencement of the block period would not constitute undisclosed income - Assessing Officer has no jurisdiction to include that income which is disclosed in the regular return [S. 69, 158BC]

The Assessing Officer has treated the opening capital shown by the assessee as on 1st April, 1985 is the undisclosed income for the block period, though the block period is for the period from 1st April, 1985 to 12th December, 1985. The addition was deleted by the Tribunal. In appeal before the Court the revenue contended that the assessee was not able to show source of said income therefore provision of section 69 is attracted therefore deemed to be income of the assessee of such F.Y. and constituted unexplained investment. The Court held that opening capital accrued to the assessee at a point of time anterior to the commencement of block period hence cannot be, treated as undisclosed income. The Court also held that the Assessing Officer has no jurisdiction to include that income which is disclosed in the regular returns.

CIT v. Annapoornamma Chnadrashekar (Smt.) (2012) 250 CTR 387 / 69 DTR 31 / 204 Taxman 158 (Mag.)/(2013) 353 ITR 55(Karn.)(HC)

CIT v. C. Girish (2012) 250 CTR 387 / 69 DTR 31/(2013)353 ITR 55 (Karn.) (HC)

CIT v. C. Mahesh (2012) 250 CTR 387 / 69 DTR 31/(2013) 353 ITR 55 (Karn.) (HC)

CIT v. C. Ravishankar (2012) 250 CTR 387 / 69 DTR 31 /(2013) 353 ITR 55 (Karn.) (HC)

S. 158BB : Block assessment - Computation of income - Undisclosed income cannot be made for first time in computation of undisclosed income [S. 132, 158BC, 80IA]

Tribunal cannot cancel the assessment of undisclosed income if the same is based on tenable and acceptable evidence recovered in the course of search and which is not disproved by the assessee; when the department relies on the seized records for estimating undisclosed income, there is no reason why expenditure stated therein should be disbelieved. As substantial question of law arise the High Court can condider the addition. High Court also held that deduction under section 80IA cannot be made for the first time in computation of undisclosed income. (A.Y. 1988-89 to 1997-98)

CIT v. P. D. Abraham Alias Appachan & Anr. (2012) 349 ITR 442 / 74 DTR 34 / 252 CTR 407 (Ker.)(HC)

P. D. Abraham Alias Appachan & Anr. v. CIT (2012) 349 ITR 442 / 74 DTR 34 / 252 CTR 407 (Ker.)(HC)

S. 158BB : Block assessment - Procedure - Computation - Undisclosed income [S. 158BC]

Record showing unrecorded sales of different dates seized and on that basis the Assessing Officer estimated the sales for entire year. Addition partly upheld by Tribunal. In such cases, some amount of estimate has to be made, however, it should not be unreasonable or arbitrary. Estimate has to have some rational connection with the addition being made. Finding shows that the Tribunal had adopted a rational basis for determining the unaccounted production for the block period. View taken by the Tribunal is a plausible and reasonable view in which no perversity could be pointed out. (Block Period 1-4-1989 to 24-3-2000)

Surinder Kumar v. CIT (2012) 340 ITR 173 / 76 DTR 71 (P&H)(HC)

S. 158BB : Block assessment - Computation - Undisclosed income - Deduction under section 80IB(10)

As per explanation to section 158BB(1), as amended with retrospective from 1st July, 1995, total income / loss for the block period has to be computed in accordance with the provisions of the Act

and the same would include Chapter VI-A. Section 80IB is a part of Chapter VI-A. In view of the above, while computing the undisclosed income for the block period the assessee is entitled to claim the deduction under section 80IB. (Block Period 1-04-95 to 21-02-02)

CIT v. Sheth Developers (P) Ltd. (2012) 77 DTR 249 / 254 CTR 127 (Bom.)(HC)

S. 158BB : Block assessment - Computation - Undisclosed income - Sworn statement during search - Addition was held to be justified [S. 69C, 132(4), 158BA, 158BC]

Assessee himself in his sworn statement made during search having admitted that he had received a sum of Rs. 42 lacs by way of 'on money' for sale of property earlier purchased in joint names of himself and his wife and having offered the same for taxation in his hands as undisclosed income, Assessing Officer had not committed any error in making the addition of Rs. 42 lakhs while completing the block assessment. Contention of assessee that 50 per cent of the amount belonged to his wife liable to be assessed in her hand cannot be accepted in view of the finding of Assessing Officer that assessee was regular defaulter in filing returns and had treated income returned in invalid returns filed beyond time for various assessment years as undisclosed income of assessee.

For A.Y. 1991-92, 1992-93 and 1996-97 assessee filed invalid return beyond time and did not submit supporting documents alongwith cash flow statement in order to explain investments. Assessing Officer also found that the assessee did not maintain proper books of account from F.Y. 1998-98 till date of search. This position was admitted by assessee himself in his sworn statement. Assessee had not produced any material to show that the remaining credits were outstanding as on 31st March, 1998 and the assessee also did not furnish the name and address of the creditors. Further, as per section 158BA block assessment is in addition to regular assessment for each previous year falling in the block period. Therefore, the CIT(A) and the Tribunal were not justified in deleting addition made by Assessing Officer under section 69C for A.Y. 1998-99 in the block assessment. Appeal of department was allowed. (Block Period 1st April, 1990 to 13th March, 2001)

CIT v. M. K. Shanmugam (2012) 349 ITR 369 / 254 CTR 318 / 79 DTR 269 / (2011) 203 Taxman 136 (Mad.)(HC)

Editorial:- Supreme Court set aside the order of High Court and remitted the matter to Commissioner(Appeals) to decide on merit. M. K. Shanmuguam v. CIT (2012) 79 DTR 286 (SC)

S. 158BB : Block assessment - Computation - Undisclosed income - Presumption of documents - Documents is to be read as whole if income is assessed, the expenditure also to be allowed unless it is prohibited by law or amounted to offences [S. 37(1), 132(4A)]

Having once drawn the presumption that the contents of the documents (of the assessee) taken into possession during the search were true, the Revenue could not have, consistently with that presumption, proceeded to require the assessee to produce materials in support of the expenditure entries. Therefore, in the absence of any materials, in the form of documents, the Revenue could not have denied the benefit of any expenses which could otherwise have incurred to the assessee, as an allowable deduction under section 37(1). Further, Revenue was unable to show how any of them were prohibited by law, or amounted to offences. Tribunal did not commit any error of law in holding that such expenses were deductible under the main part of section 37(1).

CIT v. Indeo Airways (P) Ltd. (2012)349 ITR 85/ 79 DTR 289 (Delhi)(HC)

S. 158BC : Block assessment - Undisclosed income - Annulment - Interest is not payable [S. 132, 158BFA]

When the assessment under section 158BC of the Income-tax Act, 1961 itself has been annulled on the ground of a defective notice, interest for delay in filing the return would not be payable under section 158BFA. (Block Period: 1988-89 to 1998-99)

CIT v. Micro Nova Pharmaceuticals P. Ltd. (2012) 340 ITR 118 / 68 DT 294 / 249 CTR 110 (Karn.)(HC)

S. 158BC : Block assessment - Undisclosed income - Set off against miscellaneous receipts is entitled to set off - Levy of surcharge subject to the decision of larger bench of Supreme Court [S. 132, 158BFA]

The Assessing Officer and the appellate authority held that the assessee was not entitled to set off of the amount as miscellaneous income was shown as income from other sources and not from arrack business the unaccounted sale of arrack and the miscellaneous income shown in the books of account by the assessee. The Tribunal held that the assessee is entitled to setoff. As regards estimate of undisclosed income the Tribunal confirmed the addition. The Court held that as the assessee himself admitted that he had not included the excise duty in the sale price, which was Rs. 2 per of such sale, the inclusion of the excise duty was unassailable and levy of surcharge and interest was also justified. The Court made it clear that the levy of surcharge shall be subject to the larger bench decision of the Supreme Court in the case of CIT v. Rajiv Bhatara (2009) 310 ITR 105 (SC). (Block Period 1992-93 to 2002-03)

J. P. Narayanaswamy v. Dy. CIT (2012) 340 ITR 193 / 249 CTR 314 / 68 DTR 210 (Karn.)(HC)

S. 158BC : Block assessment - Notice - Assessee to submit its return of income "within period of 15 days", which is less than 15 days as mandatory period of time as stipulated under section 158BC had not been complied with, hence, notice invalid, as notice being void ab initio, consequently block assessment also held to be invalid [S. 292B]

The time to be granted to assessee in terms of section 158BC is a minimum of 15 days and a maximum of 45 days. If the said period of time is not granted, notice is invalid rendering the entire proceedings as without jurisdiction. In the instant case, notice under section 158BC called upon the assessee to submit its return of income "within period of 15 days". Within a period of 15 days was less than 15 days. Therefore the mandatory period of time as stipulated under section 158BC had not been complied with. Notice was invalid. As per statute, no extra time can be granted subsequently. Hence, grant of extra time is without authority of law. It cannot validate an invalid notice. Notice being void ab initio consequent block assessment held to be invalid. (Block period 1-4-1987 to 5-11-1996 1988 to 1998-99)

CIT v. Micro Labs Ltd. (2012) 348 ITR 75 / 254 CTR 81 / 78 DTR 326 / 211 Taxman 15 (Karn.)(HC)

S. 158BC : Block assessment - Firm - Partners - Presumptions - Matter remanded - If no search warrant assessment cannot be made under section 158BC [S. 132, 132(4A), 158BC, 292C]

During search certain documents were seized from possession of a partner of assessee-firm on basis of which addition was made. Assessing Officer without examining partners during assessment, made additions of undisclosed investment. Presumption under section 132(4A) was not available to Assessing Officer on basis of seized documents. However, merely because partners were not examined by Assessing Officer at time of assessment, it could not be stated that no reliance could be placed on seized materials for purposes of making additions. Matter remanded. The Court also held that where no search warrant was issued under section 132 in the name of assessee there could be not valid block assessment proceedings under section 158BC, since the provisions of section 158BC come in to operation only where a search warrant is issued under section 132 in the name of assessee. (Block period 1-4-1989 to 17-12-1999)

CIT v. Sonal Constructions (2012) 211 Taxman 167 (Mag.) / (2013) 87 DTR 232 /260 CTR 377(Delhi)(HC)

CIT v. Urmila Lodhi (2012) 211 Taxman 167 (Mag.) / (2013) 87 DTR 232/260 CTR 377 (Delhi)(HC)

S. 158BC : Block assessment - Undisclosed income - Just because the cash vouchers were found additions cannot be made - There is no bar in assessing the total income or undisclosed income less than returned income [S. 158B(b), 158BB]

The Tribunal held that additions cannot be made in the block assessment only on the ground that the vouchers are of unverifiable nature which cannot be considered as incriminating materials. Similarly unmoved trade debtors cannot be assessed as undisclosed income. The Tribunal also held that there is no bar in determining the total income / undisclosed income less than the returned income if facts so warrant. There is no basis for determining the undisclosed income even on the returned income offered as precautionary measure. Assessing Officer is directed to determine the undisclosed income accordingly without reference to any admitted income in the return filed under protest.

United Phosphorous Ltd. v. CIT (2012) 67 DTR 395 / 144 TTJ 683 (Mum.)(Trib.)
ACIT v. United Phosphors Ltd. (2012) 67 DTR 395 / 144 TTJ 683 (Mum.) (Trib.)

S. 158BC : Block assessment - Warrant - Undisclosed income of any other person - As there was no warrant in the name of assessee block assessment in the name of assessee was set aside [S. 158BD]

A warrant was issued in name of "C" a partner of assessee firm for initiation of search proceedings. There was nothing in the said warrant indicating that it had been issued in name of "C" in capacity as partner of firm. More over the assessment was made in the hands of "C" under section 158BC. Subsequently the assessment order was passed in the name of firm also under section 158BC. Before the Commissioner(Appeals) the Assessee challenged that the assessment under section 158BC in the hands of firm is illegal. However, the Commissioner(Appeals) dismissed the ground and up held the order. On appeal to the Tribunal the Tribunal held that is a treaty law that the assessment has to be completed under Section 158BC in the case of a person whose name search warrant is issued and in the case of 'Other persons', the assessment should be made under section 158BD r.w.s. 158BC. When it is crystal clear from the panchanama that the warrant was issued in the case of 'C' only and the assessee-firm had been mentioned as the place to be searched it cannot be said that the warrant was in the case of assessee firm. The Tribunal held that the assessment under section 158BC is bad in law and set aside the order.

Kothamangalam Aggregates Nelkrishi v. Dy. CIT (2012) 136 ITD 244 / 147 TTJ 408 / 73 DTR 101 (TM)(Cochin)(Trib.)

S. 158BD : Block assessment - Undisclosed income of any other person - Notice issued under section 158BC, in respect of assessment under section 158BD is held to be valid, entire proceedings cannot be held to be void [S. 158BC]

The proceedings under section 158BD were initiated against the assessee, however the notice was issued under section 158BC. On appeal the Tribunal held that the notice issued under section 158BC is void ab initio and consequently the assessment order passed in a proceedings which commenced by issue of such notice is also illegal and therefore set aside the assessment order. On appeal by revenue the court held that in the absence of any prescription of a notice in a prescribed manner under section 158BD, the only notice that requires to be issued both under section 158BC and 158BD is the notice which is prescribed under section 158BC. The Court held that the Tribunal was not justified in holding that a notice issued under section 158BC is void ab initio. The Court also held that in order to clarify the position by Finance Act, 2002, the words "under section 158BC" is expressly provided, said amendment is clarificatory in nature.

CIT v. Annapoornamma Chnadrashekar (Smt.) (2012) 250 CTR 387 / 69 DTR 31/(2013) 353 ITR 55 (Karn.)(HC)

S. 158BD : Block assessment - Undisclosed income of any other person - Recording of satisfaction - Limitation - If the Assessing Officer is same for under section 158BC and 158BD, recording of satisfaction is not required [S. 158BC, 158BE]

Where the assessing officer has jurisdiction to assess the searched person under section 158BC and also to assessee the other persons under section 158BD of the Act whose undisclosed income is found during the search. Then there is no necessity for the assessing officer to record satisfaction as required under section 158BD of the Act. Assessment under section 158BD initiated with in two months after completition of assessment under section 158BC, and completed within two years was within limitation period as per section 158BE(2)(b).

CIT v. Bimbis Creams & Bakes (2012) 75 DTR 362 / 254 CTR 633/210 Taxman 44(Mag.) (Ker.)(HC)

S. 158BD : Block assessment - Undisclosed income of any other person - Search and seizure - Notice - Giving less than 15 days to file the return cannot be held to be invalid, assessment cannot be quashed on that ground [S. 158BC, 292B]

The effective party is entitled to the fair opportunity and the assessment being made by a fair procedure, minimum period of 15 days has been specified statutorily. At the same time, the effect of violation of principles of natural justice is not to always nullify the exercise of jurisdiction but to ensure that the compliance of such principles is made unless prejudice is caused. The notice specifying lessor period can be read as specifying the statutory period, this principle is duly recognized under section 292B. The Tribunal erred in concluding that failure to give notice of 15 days will vitiate the assessment itself without considering the prejudice to the assessee. Total absence of notice may be on different footing but if notice is duly served, the assessee can either avail of the statutory time for filing of the return irrespective of shorter period mentioned in the notice or can be given fresh opportunity if it is held that the assessee suffered prejudice on account of shorter period mentioned in the notice. In any situation, it is not permissible to quash the assessment proceedings merely on the ground that period mentioned in the notice was lesser than the statutory period specified under section 158BC(a). Appeal of revenue was allowed. (Block period 1st April, 1988 to 16th April, 1999)

CIT v. Naveen Verma (2012) 78 DTR 321 / 346 ITR 100 / 254 CTR 76 / 254 CTR 76 (P&H)(HC)

Editorial:- Refer Navin verma v. ACIT (2006) 100 ITD 73 (Delhi)(Trib.) reversed.

S. 158BD : Block assessment - Undisclosed income of any other person - Review petition allowed - Satisfaction not recorded - Same Assessing Officer - Matter restored to the Tribunal [S. 158BC, 158BD]

If both the assessments i.e. one under section 158BC and the other under section 158BD are completed by the same officer, the decision of the Supreme Court in Manish Maheshwari v. ACIT (2007) 208 CTR (SC) 97 / 289 ITR 341 (SC) has no application. In the instant case Revenue has produced documents to substantiate that both the assessments were completed by the same officer. Therefore, review petition is allowed by recalling the judgment in CIT v. T. M. Kuriachan (Dr.) (2012) 79 DTR 443 (Ker.)(HC) and the order of the Tribunal is vacated with the direction that if, on verification by the Tribunal it is noticed that assessments on both assessees one under section 158BC and the other under section 158BD were completed by the very same Assessing Officer, the Tribunal would treat its order as cancelled and restore the appeal before it to take decision on merits after hearing both sides. (Review petition No. 658 of 2012 in ITA No. 12 of 2011 dt 12th September, 2012)

CIT v. T. M. Kuriachan (Dr) (2012) 79 DTR 443 / (2013) 256 CTR 316 / 214 Taxman 85 (Mag.)(Ker.)(HC)

Editorial:- Judgment in CIT v. T. M. Kuriachan (Dr) (2012) 79 DTR 443 / (2013) 256 CTR 318 (Ker.)(HC) is recalled (IT Appeal No. 12 of 2011 dt. 5th March, 2012)

S. 158BD : Block assessment - Undisclosed income of any other person - Alleged accommodation entries - Addition was deleted

Pursuant to search at premises of 'M', a creditor, certain documents were seized. 'M' admitted of having undertaken business of accommodation entries. Assessee's books showed some loans from 'M'. Consequently, proceedings were initiated against assessee. He contested validity of these proceedings on ground that nothing had been mentioned in statement of 'M' about assessee. However, Assessing Officer made addition as undisclosed income. Statement of 'M' did not mention assessee's name and it did not transpire from records that loans were accommodation entries and there was nothing to link assessee with entries found in documents seized. The Court held that, no addition can be made in assessee's hands. Accordingly the appeal of revenue was dismissed.

CIT v. Priyanka Ship Breaking Co. (P.) Ltd. (2012) 211 Taxman 20 (Mag.)(Delhi)(HC)

S. 158BD : Block assessment - Undisclosed income of any other person – Satisfaction - Recording of satisfaction has to be done before completion of proceedings under section 158BC - Assessment of the assessee under section 158BD is held to be valid [S. 158BC]

Assessment under section 158BC on the persons searched having been concluded on 6th July 2007and satisfaction note for proceeding under section 158BD against assessee having been recorded on the basis of letter of Dy. CIT dt. 13th July, 2007 and further the assessment under section 158BC having been quashed as barred by limitation by the Tribunal and the High Court, assessment of the assessee under section 158BD is valid. (Block period 1st April, 1996 to 31st Dec., 2002)

Gopal S. Agrawal v. Dy. CIT (2012) 136 ITD 199 / 75 DTR 182 / 149 TTJ 313 (Mum.)(Trib.)

S. 158BE : Block assessment - Time limit - Last Panchnama - Search and seizure - If there is more than one authorization, for the purpose of calculating the limitation under section 158BE is the last of the Panchnama recording the conclusion of search irrespective of the date of authorizations [S. 132]

On the facts of the case for conducting the first search proceedings, the authorization was first issued on 10th September, 1997. The search commenced on 11th September, 1997 and proceedings were completed on 11th September, 1997. There was also an authorization on same date, in respect of which, another search was commenced on 11th September, 1997 and completed on 11th September, 1997. The second search commenced on 5th November, 1997 was concluded on 5th November, 1997. Subsequent there to, in connection with this, there was one more authorization dated 31St October, 1997, for which the search commenced on 3rd November, 1997 and concluded on 3rd November, 1997. Thus, the last of the Panchnama evidencing the conclusion of search with reference to the authorization issued on 3rd October, 1997 was 3rd November, 1997. Going by the above facts, the time limit available for completion of block assessment, as per section 158BE(1)(b), would be the end of the month in which the last of Panchnamas evidencing the conclusion of search in respect of which the authorization was executed. Hence, the relevant starting point is to be calculated taking the last Panchnama dt. 3rd November, 1997; that the period of two year time limit commenced on 30th November, 1997 to expire on 30th November, 1999. The assessment of the relevant year was made on 26th November, 1999. Accordingly the appeal of revenue was allowed. (Block period 1998-99 to 1997-98)

CIT v. P. Shanthi (Smt.) LR of Minor P. Balaji (2012) 251 CTR 418 / 75 DTR 6 (Mad.)(HC)
P. Balaji v. Dy. CIT (2012) 251 CTR 418 / 75 DTR 6 (Mad.)(HC)

S. 158BE : Block assessment - Time limit - Extension under section 158BE, Explanation 1(iii) - Assessment held to be time barred - Search assessment cannot be equated to a notice under section 148 to reopen assessment [S. 127, 129, 148, 158BC]

Section 129 is applicable when in the same jurisdiction, there is a change of incumbent and one Assessing Officer is succeeded by another. In such a case, the main section provides that the

successor officer is entitled to continue the proceeding from the stage at which it was left by his predecessor subject to the caveat, expressed in the proviso, that if the assessee demands that before the proceeding is continued the previous proceedings or any part thereof shall be reopened or that before any assessment order is passed against him, he shall be reheard, such a demand has to be accepted. If as a result of accepting the assessee's demand under the proviso to section 129 sometime is taken and the assessment proceedings cannot be completed within the normal period of limitation, then the period of limitation gets extended by such time taken for giving the assessee an opportunity to reopen the earlier proceedings or for rehearing. Section 129 is applicable to normal assessments made under section 143(3) as well as the block assessments made under section 158BC. The question however is whether there was a change in the incumbent of the office in the assessee's case so as to attract section 129. Section 129 is not attracted to the assessee's case. The case of the assessee is one of a transfer under section 127 from one jurisdiction to another jurisdiction. By order passed under section 127 on 15th May, 2002, the jurisdiction to assess the assessee was transferred from the ITO, Bangalore to ITO New Delhi. Section 129 speaks of change of an incumbent of an office without any change of the jurisdiction. Explanation 1(iii) to section 158BE speaks only of the proviso to section 129. There were no earlier proceedings against the assessee pursuant to the search in Bangalore which got transferred to Delhi. The notice under section 158BC was itself issued only by the Assessing Officer at Delhi and it is by this notice that the proceedings were commenced. If the proceedings had been commenced by the Assessing Officer at Bangalore and during the pendency of the proceedings the case had been transferred to Delhi it would possibly be argued that the proviso to section 129 would extend the time limit. However, no opinion is expressed about the same because that is not the factual position in the present case. In the present case the assessee proceedings were commenced only by the Assessing Officer at Delhi by notice issued on 11th June, 2002. Thereafter there was no change in the incumbent of the office so as to attract the provisions of section 129. In such a situation there is no scope for importing the proviso to section 129 to extend the period of limitation. Even factually there is nothing on record to show that the assessee made any request or demand before the Assessing Officer in Delhi that the previous proceedings, if any, should be reopened or that before any order of assessment is passed against her, she should be reheard. Therefore, both factually and legally there is no scope for invoking Explanation 1(iii) to section 158BE to extend the period of limitation. The assessment order under section 158BC ought to have, therefore, been completed on or before 30th June, 2002 as per section 158BE(1)(b). Since it was completed only on 30th July, 2002, it is barred by limitation.

Shibani Dutta v. CIT (2012) 77 DTR 220 / 253 CTR 263 / 211 Taxman 31 (Mag.)(Delhi) (HC)

S. 158BE : Block assessment - Time limit - Assessment order was passed beyond one year from that date, and, hence, same was liable to be set aside

Premises of assessee was searched thrice, respective panchanama for them were drawn on 7/2/1996, 19/2/1996 and 24/4/1996. The assessment order was passed on 24/4/1997. Tribunal held that as there was no seizure vide panchanama dated 24/4/1996, same was not a valid panchanama for purpose of section 158BE and last panchanama for same would be 19/2/1996 when certain books of account and documents were seized. Accordingly Tribunal held that assessment order was passed beyond one year from that date, and, hence, same was liable to be set aside. On appeal by revenue the Court held that the order passed by Tribunal was justified. (B.P. 1/4/1985 to 6/2/1996)

D. T. S. Rao v. ACIT (2012) 210 Taxman 47 (Mag.)(Karn.)(HC)

S. 158BE : Block assessment - Time limit - Prohibitory order cannot extend the limitation period for passing order

Search was conducted on 12.12.2001 and concluded on 13.12.2001 and Panchanama was also drawn. Thereafter, subsequent Panchanamas drawn on 08.02.2002 and 15.02.2002 merely issuing prohibitory

orders could not extend the limitation period for passing the assessment order. (Block Period: 01.04.1995 to 12.12.2001)

A. Rakesh Kumar Jain v. JCIT (2012) 80 DTR 257 / 254 CTR 576 / (2013) 214 Taxman 39 (Mag.)(Mad.)(HC)

Editorial:SLP granted, JT .CIT v.Rakesh Kumar Jain (C.C.NO 11042 of 2013 dt 5-07-2013(2013) 217 Taxman 153(Mag.)(SC)

S. 158BE : Block assessment - Time limit - Exclusion of period to approach Settlement Commission - Period taken to approach Settlement Commission and its rejection is to be excluded while computing limitation under section 158BE - Explanation 1(iv) to section 158BE is retrospective in nature [S. 113, 158BFA]

In a search conducted in the business as well as residential premises of partners of assessee-firm which concluded on 23-10-2000 various incriminating materials were seized. Based on the results of the search and seizure, the assessee filed petitions before the Settlement Commission on 31-5-2001. Notice under section 158BC was issued on 18-9-2000 and served on the assessees on 26-9-2000. The assessee stated to have sought for time for filing the return and ultimately filed return on 27-2-2001. The Settlement Commission rejected the petitions filed by the assessee on 11-6-2002. The assessment orders were passed on 26-9-2003. On appeal, the assessee contended that the assessment made was barred by limitation since Explanation 1(iv) to section 158BE not having a retrospective effect, the time during which the applications were pending before the Settlement Commission could not be ignored. In other words, the period during which the applications were pending before the Settlement Commissioner should not be excluded in the matter of computing the time-limit for passing assessment orders under the block assessment procedure. The assessees further pointed out that the insertion of Explanation 1(iv) to section 158BE under the Finance Act, 2002 with effect from 1-6-2002 is prospective in character. As such even by invoking the Explanation, the applications already filed before the Settlement Commission could not come for any reckoning of the exclusion period. The Tribunal held that Explanation 1(iv) to section 158BE is retrospective in nature; as such the block assessment order passed on 26-9-2003 was well within the limitation period. On appeal the court up held the order of Tribunal and appeal of assessee was dismissed. The High Court also up held the levy of surcharge holding that section 113 is retrospective in nature. Levy of penalty under section 158BFA was also confirmed as the assessee has not brought any positive evidence. (Block period 1991-92 to 2001-02)

Super Cloth v. CIT (2012) 211 Taxman 25 (Mag.)(Mad.)(HC)

S. 158BE : Block assessment - Time limit - Panchnama - A panchnama which does not record a search does not extend limitation, hence order held to be invalid

The Assessing Officer issued two authorizations for search, one dated 17.2.2002 and the other 20.12.2002. In respect of the first authorisation, the last panchnama was drawn on 3.1.2003 while in respect of the second authorization, the last panchnama was drawn on 27.2.2002. The section 158BC assessment order was passed on 31.1.2005 on the basis that the "last panchnama" was drawn on 3.1.2003. The assessee claimed that as the panchnama dated 3.1.2003 was merely for revocation of a section 132(3) order, it was not a "panchnama of search" and so could be taken into account. The "last panchnama" was the one dated 27.2.2002 according to which the assessment order was barred by limitation under section 158BE read with Explanation 2 thereof. Held by the Special Bench upholding the plea:

(i) Section 158BE(1) prescribes the time limit for completion of the block assessment with reference to the end of the month in which the "last of the authorisations for search" was executed. Explanation 2 provides that the authorisation shall be deemed to have been executed "on the conclusion of search as recorded in the last panchnama drawn". The "panchnama" referred to in Explanation 2(a) to section 158BE is a panchnama which documents the conclusion of a search. If a panchnama does not reveal that a search was at all carried out on the day to which it relates, it would not be a panchnama

relating to a search and consequently would not be relevant to determine the time limit for passing the assessment order. [CIT v. S. K. Katyal (2009) 308 ITR 168 (Delhi)(HC), CIT v. White & White Minerals Pvt. Ltd. (2011) 330 ITR 172 (Raj.)(HC) & C. Ramaiah Reddy v. CIT (2011) 244 CTR 126 (Karn.)(HC) followed];

(ii) On facts, the panchnama dated 3.1.2003 was drawn as a formality to lift the prohibitory order. There was no conclusion of search. Whatever material was required to be seized or impounded was already seized / impounded by the Department. It was merely a release order and could not extend the period of limitation. Consequently, the section 158BC assessment order is barred by limitation; (Block Period 1997-98 to 2003-04)

ACIT v. Shree Ram Lime Products Ltd. (2012) 137 ITD 220 / 73 DTR 68 / 147 TTJ 121 / 17 ITR 1 (SB)(Jodh.)(Trib.)

S. 158BFA : Block assessment - Concealment penalty - Penalty is payable on the differential amount

Penalty under section 158BFA(2) is payable on the differential amount i.e. income that is shown by the assessee in the return and that ultimately assessed; however, most of the addition being estimate of profits from the film industry, penalty is sustained in respect of two additions only. (A.Y. 1988-89 to 1997-98)

CIT v. P. D. Abraham Alias Appachan & Anr. (2012) 74 DTR 34 / 349 ITR 442 / 252 CTR 407 (Ker.)(HC)

S. 158BFA : Block assessment - Penalty - Search and seizure - Question of law admitted by High Court - Levy of penalty is not justified

The assessee filed the return of income declaring the income of Rs. 10 lakhs along with the note attached with the return. The Assessing Offier assessed the income at Rs. 38.32 lakhs. On appeal the Tribunal confirmed the addition of Rs. 13,13,816/-. Assessee filed an appeal which was admitted by High Court. The Assessing Officer levied the penalty of Rs. 8,82,884/-. In appeal Commissioner(Appeals) deleted the penalty. On appeal by the revenue the Tribunal dismissed the appeal of revenue by observing that the admission of substantial question of law by the High Court lends credence to the bona fides of the assessee. Hence, the order of Commissioner(Appeals) confirmed. (ITA No.(SS)A. 27/Mum/2011, Bench 'E' dated 24-8-2012)

ACIT v. Ekta Exports (2012) Income Tax Review- September P. 89 (Mum.)(Trib.)

S. 158BFA(2) : Block assessment - Penalty - Concealment - Penalty under section is not mandatory - However the Tribunal was not justified in deleting the penalty

In pursuance of search and seizure action the assessee filed the return of income declaring income of Rs. 45 lakhs for the block period. Assessing Officer assessed the income at Rs. 97.30 lakhs. In appeal before Tribunal the addition was confirmed of Rs. 18.35 lakhs, which has became final. The Assessing Officer levied the penalty of Rs. 11.06 lakhs, which was confirmed by the Commissioner(Appeals). On appeal to the Tribunal the Tribunal deleted the penalty. On appeal by revenue to High Court, the Court held that penalty corresponding to addition of Rs. 17.22 lacs was deleted on the ground that the assessee had demonstrated that there was estimation of additions and therefore penalty could not be levied. The Court held that in the absence of requirement to prove concealment or furnishing of inaccurate particulars found in section 271(1)(c) of the Act cannot form the sole basis to delete penalty imposed by the Assessing Officer. The matter was restored back to the Tribunal to determine the matter for fresh consideration.

CIT v. Becharbhai P. Parmar (2012) 341 ITR 499 / 248 CTR 86 / 67 DTR 367 / 2012 Tax L R 489 (Guj.)(HC)

S. 158BFA(2) : Block assessment - Penalty - Concealment - Additions confirmed over and above income declared by assessee, levy of penalty was justified

The assessee made disclosure of income for the block period, which had not been offered to tax. While framing the assessment certain additions were made by the Assessing Officer. On appeal Tribunal confirmed the addition. The Assessing Officer levied the penalty under section 158BFA(2) of the Income-tax Act, 1961, this was confirmed by the Tribunal. On appeal to High Court, the Court held that nothing was pointed out to demonstrate how the levy of penalty was not justified, accordingly the High Court confirmed the order of Tribunal. (Block Period 1-4-1995 to 8-1-2000)

Kandoi Bhogilal Mulchand v. Dy. CIT (2012) 341 ITR 271 / 67 DTR 361 / 248 CTR 80 (Guj.)(HC)

S. 158BFA(2) : Block assessment - Penalty - Concealment - Estimation - Penalty cannot be levied where additions are made on estimate

Penalty under section 158BFA(2) was not leviable where addition is made on estimation basis.

CIT v. Giriraj Agarwal Giri (Dr.) (2012) 346 ITR 152 / 72 DTR 79 / 253 CTR 109 (Raj.)(HC)

S. 158BFA(2) : Block assessment - Penalty - Concealment - Held to be justified

On the facts the Court held that penalty can be levied if the assessee has consciously suppressed undisclosed income from the return filed pursuant to the notice under section 158BC(a) of the Act even after recovery of details of undisclosed income during the serach. On appeal Tribunal had cancelled the penalty. On appeal by revenue, the High Court held that levy of penalty in respct of bogus calim of borrowed from sister-in-law and amont admitted in sworn statement, levy of penalty was held to be justified. (A.Y. 1988-89 to 1997-98)

CIT v. P. D. Abraham Alias Appachan & Anr. (2012) 349 ITR 442 / 74 DTR 34 / 252 CTR 407 (Ker.)(HC)

S. 158BFA(2) : Block assessment - Penalty - Concealment - Though the Tribunal has confirmed the addition, as the appeal against the quantum addition is admitted by High Court, penalty levied was deleted by the Tribunal

On the facts the Tribunal has confirmed the addition on account of gross profit merely on the basis that the entries were found and recorded in the ledger account found in the possession of a third party pertaining to assessee and not on the basis of material found in the possession of assessee. Appeal against the quantum was admitted by the High Court. The Tribunal held that where question of law has been admitted by the High Court against quantum addition no penalty can be levied. The Tribunal deleted the penalty on law as well as on facts. (Block Period 1-4-96 to 10-2-2003)

Sadhu Ram Goyal v. Dy. CIT (2011) 128 ITD 436 / 63 DTR 296 / (2012) 144 TTJ 111 (Jp.)(Trib.)

Praveen Kumar Goyal v. Dy. CIT (2011) 128 ITD 436 / 63 DTR 296 / (2012) 144 TTJ 111 (Jp.)(Trib.)

S. 160 : Representative assessee - Non resident - Agent - Subsidiary of holding company - Subsidiary company is not assessable as representative assessee [S. 161, 162, 163]

The first petitioner was a company incorporated in the State of New York in the United States of America. The second petitioner was a company incorporated in Mauritius that held shares in group companies and investments and had a wholly owned subsidiary in India, G, the fourth respondent to carry on the business of computer software, i.e, data entry conversion, data processing, data analysis, business support billing, etc. The entire share capital of 'G' was acquired by the second petitioner along with certain individuals Promotion Board. The second petitioner was a wholly owned subsidiary, through various intermediate holdings of the first petitioner. There were a series of agreements. The consequence of these agreements was that: (a) the shares of the Indian company

moved by a gift, from GM, a Mauritius company to GI, another Mauritius company; (b) the shares of the GI were transferred to a holding company. The shares with the holding company were then transferred and so on in a series of transactions, and finally the holding company was GG, in which other business process outsourcing businesses from other countries were also consolidated; (c) The shares of GG were sold to a Luxembourg company, and through a series of transactions, the holding shares were acquired by G (Lux); (d) in the aforesaid manner, G (Lux) acquired 99.1 per cent of the preferred stock and 60.6 per cent of the nominal common stock of GG (Lux) a newly organized Luxembourg company and which was a transfer of a capital asset situated outside India, i.e, shares in a company incorporated in Luxembourg. According to the petitioners, the only capital asset in India which was transferred in the course of the restructuring and reorganization transactions was the gift of the shares of G by the second petitioner. A Mauritius company and certain nominee shareholders to GI and GIH, respectively (both Mauritius companies). Therefore, no income had accrued or arisen or could be deemed to have accrued or arisen in India. The Income-tax Department, on the other hand, maintained that it was a taxable event in India. On a writ petition against the notice: Held, allowing the petition, that even if business connections were proved, it would at the most make the fourth respondent an agent of the petitioners had in the eventuality, the I.T. Dept. could treat the fourth respondent as a representative assessee of the first petitioner. However, in order to assess a particular income, it had to be further established by the Department that the fourth respondent had some connection with the income earned by the first petitioner which was sought to be taxed at the hands of the fourth respondent. There was no such live link of income earned by the first petitioner and the fourth respondent in respect of the transaction which was sought to be taxed. The transaction in question, viz. transfer of share to a third party, took place outside India. The fourth respondent was sought to be taxed as representative assessee when he had no role in the transfer. Merely because those shares related to the fourth respondent that would not make it an agent qua deemed capital gains purportedly earned by the petitioner. Therefore, the notice was not valid and was liable to be quashed. (A.Y. 2005-06)

General Electric Co. & Anr. v. Dy. DIT & Ors. (2012) 347 ITR 60 / (2011) 243 CTR 417 / 201 Taxman 341 / 60 DTR 297 (Delhi)(HC)

S. 163 : Representative assesses - Agent - liability - Non-resident - Section is not attracted [S. 161]

Once a person comes within any of clauses of section 163(1), such a person would be 'agent' of non-resident for purpose of Act, however, merely because a person is an agent or is to be treated as an agent, would not lead to an automatic conclusion that he becomes liable to pay taxes on behalf of non-resident. As per section 163(1)(c), income should be deemed to accrue or arise in India and therefore said section is not attracted when there is no transfer of capital asset situated in India.

Vodafone International Holdings B.V. v. UOI (2012) 341 ITR 1 / 204 Taxman 408 / 247 CTR 1 / 66 DTR 265 / 6 SCC 613 / Vol. 42 Tax LR 305 (SC)

S. 163 : Representative assessees - Agent of a non-resident - Business Connection - Mere relation between the parties which facilitates or assists the carrying on of the business held as business connection [S. 9(i)]

The assessee held to be an agent of non-resident company under Section 163 of the Income-tax Act, 1961 on the principle that mere relation between the business of non-resident and the activity in India which facilitates or assists the carrying on of the business would also result in a business connection within the meaning of Section 163(1)(b) and Section 9(1)(i) of the Act. As also the non-resident was in receipt of income from the assessee as per section 163(1)(c) of the Act. (A.Y. 1998-99)

ADIT v. Jet Airways (India) P. Ltd. (2012) 50 SOT 543 / 74 DTR 363 / 148 TTJ 298 (Mum.)(Trib.)

S. 163 : Representative assessee - Agent - Non-resident - Shipping business - Assessment as representative assessee cannot be made when the foreign shipping companies have discharged their liabilities under section 172 [S. 172]

The assessee is carrying on the business of transporting coal by time chartering of vessels. On going through the records the Assessing Officer observed that the assessee had engaged two FSCs in the previous year relevant to the A.Y., as the FSCs have not filed the return for income accruing and arising in India, the Assessing Officer issued notice under section 148 and thereafter completed the assessment under section 163 treating the assessee company as "representative assessee". On appeal the Commissioner(Appeals), confirmed the order of Assessing Officer. On appeal to the Tribunal, the Tribunal held that when the foreign shipping companies themselves have already discharged their liabilities towards tax by complying with the provisions of section 172, there is no question of any further liability in their hands and therefore, there is no justification in making the assessment again in the hands of the assessee company in the status of representative assessee. (A.Y. 2007-08)

Sical Logistics Ltd. v. ADIT (I) (2012) 72 DTR 29 / 53 SOT 313 / 147 TTJ 115 (Chennai)(Trib.)

S. 167B : Charge of tax - Shares of members unknown - Association of persons or individuals - Co-owners inheriting property from their ancestors - No evidence to show that they acted as an association of persons - Assessable in status of individual [S. 2(31)]

In order to assess individuals as an association of persons, the individual co-owners should have joined their resources and thereafter acquired property in the name of the association of persons and the property should have been commonly managed. Only then could the income be assessed in the hands of the association of persons. Conversely, the mere accruing of income jointly to more persons than one would not constitute them an association of persons in respect of such income. In other words, unless the associates have done some acts or performed some operations together, which have helped to produce the income in question and that had resulted in that income, they cannot be termed as an association of persons. Unless the members combine or join in a common purpose, it cannot be held that they have formed themselves into an association of persons. Held accordingly, that the assessees, co-owners, had inherited the property from their ancestors and there was nothing to show that they had acted as an association of persons. Thus, the rental income from the plinths was to be assessed in the status of individual. Once it was held that the income was to be assessed as individual and not an association of persons section 167B was not applicable. The income in the hands of the assessees could not be assessed in the status of an association of persons. Accordingly the appeal of assessee was allowed. (A.Y. 2004-05)

Sudhir Nagpal v. ITO (2012) 349 ITR 636 (P&H)(HC)

S. 172 : Shipping business - Non-residents - Freight payment - Agent of ship - DTAA - India-UAE - Double taxation relief - Claim of freight payment by the agent of ship ,owner of the ship is a resident of UAE - Held that no scope of taxing the income of the ship in any of the ports in India in view of Art. 8 of DTAA [S. 90, Art. 8]

The assessee is an agent of the ship registered in UAE. The assessee furnished return under section 172(3) of the Act claiming that no tax was payable as final freight beneficiary was the shipping company, a resident of UAE which was not liable for tax under Article 9 of DTAA. But the Assessing Officer rejected assessee's claim. It was held that the owner of the ship being admittedly a resident of UAE, there was no scope of taxing the income of the ship in any of the ports in India in view of Art. 8 of DTAA between India and UAE; assessee company therefore could not be assessed as agent of UAE company.

DIT (IT) v. Venkatesh Karrier Ltd. (2012) 349 ITR 124 / 74 DTR 141 / 251 CTR 170 / 206 Taxman 488 (Guj.)(HC)

S. 174 : Assessment of persons leaving India - Assessment - Prima facie satisfaction - Notice under section 174(4) is mandatory, notice under section 143(2) is not sufficient [S. 143(2), 175]

From the petitioner an amount of Rs. 1,74,000/- was seized by Police on night patrol duty. The seized amount was deposited in Court and after setting apart an amount of 33 percent towards income tax due the balance amount was released. The petitioner received the notice under section 142(1) as no return were filed .The assessee filed the return declaring the total income of Rs. 36,000/-. In the course of assessment proceedings the explanation was given for the sources of the cash. The Assessing Officer disbelieved the explanation and assessed the the entire cash recovered as unaccounted cash recovered. The revision petition filed by the assessee under section 264 was also dismissed by Commissioner. The Assessee filed the writ petition. The Court held that before invoking the powers under section 174 and 175 there has to be prima facie satisfaction of the facts and circumstances and a specific notice has to be issued under section 174(4). The Court also held that the issue of notice under section 142(1) is not sufficient. Accordingly the assessment orders were set aside. (A.Y. 2003-04, 2004-05)

Abdul Vahab P. v. ACIT (2012) 249 CTR 102 / 205 Taxman 77 / 69 DTR 101 (Ker.)(HC)

S. 179 : Private company - Liability of directors - Non-executive director - Natural justice - Order passed without giving an opportunity of being heard and without informing about efforts made by the department to recover tax due from company was set aside [S. 264]

The assessee was non-executive director of company. He resigned from the Board on 29th April, 1994. On 27th September, 2006 the assessee was issued notice to recover the tax due of the company for the A.Y. 1986-87 to 1993-94 under section 179 of the income tax Act. The assessee informed to the Assessing Officer that the Company is a partnership form having 80% share hence, the Assessing Officer must proceed against the firm for recovery dues of the Company. The Assessing Officer rejected the application of assessee. Assessee moved petition under section 264 which was rejected by the Commissioner without giving an opportunity of hearing. On writ petition the Court set aside the order of Commissioner and Assessing Officer and directed the Assessing Officer to pass an order after following principle of natural justice and including granting a personal hearing (A.Y. 1986-87 to 1993-94)

Bhupatlal J. Sheth v. ITO (2012) 210 Taxman 481 / 80DTR 279 (Bom.)(HC)

S. 179 : Private company - Liability of directors - Tax which could not be recovered from the Company then only recovered from the Director if it is proved that there was negligence on part of director-Director can not be held liable for penalty and interest [S. 2(7), 2(28A), 2(43), 271(1)(c)]

The petitioner is one of the two directors of AB Ltd. For the A.Y. 1997-98, the demand for tax and penalty raised against company AB Ltd. remained unpaid by the company till 2010 despite, notices and attachment of company's property. The company filed nil return but the assessment was completed on positive income and penalty under section 271(1)(c) was also imposed. On 4-12-2002 the ITO, issued a tax demand and penalty payable by the company on 1-8-2001 the TRO issued a prohibitory order stating that in view of the warrant of attachment issued on 19-1-2001, the machinery lying in the factory premises of the company shall not be sold or transferred or removed from the place of the factory without the permission of the Tax Recovery Officer (TRO) of the Income-tax department. On 8-10-2010 again the Assistant Commissioner wrote a letter to the company stating that the arrears of amounts demanded were still outstanding for the A.Y. 1997-98 which included unpaid tax and penalty. On 29-8-2011, the TRO even attached personal property of the petitioner, namely, his share in an immovable property situated at Gujarat Saw Mill. 14-2-2012 the Assistant Commissioner asked the petitioner why the demand of company should not be recovered from him under section 179. The assessee filed the Writ petition aginst the order under section 179 the Court held that basic requirement of section 179 that tax due cannot be recovered

from company could be said to have been satisfied. Only tax due and not penalty and interest, can be recovered from director under section 179. Director can avoid liability of company under section 179 if he proves that non-recovery cannot be attributed to gross negligence, misfeasance or breach of duty on his part in relation to affairs of company. On facts nothing came to be stated by ACIT regarding gross negligence on part of petitioner due to which tax dues from company could not be recovered and in absence of any such consideration, ACIT could not have ordered recovery of dues of company from director. Accordingly the writ petition of assessee was allowed and order under section 179 was quashed. (A.Y. 1997-98)

Maganbhai Hansrajbhai Patel v. ACIT (2013) 82 DTR 259 / (2012) 211 Taxman 386 / (2013) 353 ITR 567 (Guj.)(HC)

Sanjay Ghai v. ACIT (2013) 82 DTR 248 (Delhi)(HC)(A.Y. 1999-2000 & 2003-04)

S. 192 : Deduction at source - Salary - Conveyance allowance - Assessee cannot be held to be assessee in default [S. 10(14)]

Life Insurance Corporation (LIC), the employer of the Development officer cannot be held to be assessee in default for not deducting tax at source from conveyance and additional conveyance allowance paid to its officer, as the same was permissible deduction under section 10(14) of the Act.

Senior Branch Manager, LIC of India v. CIT & Anr. (2012) 72 DTR 152 (All.)(HC)

S. 192 : Deduction at source - Salary - Hospital engaged some doctors on fixed monthly remuneration - Governed by its service rules - Remuneration paid is salary tax is to be deducted

Where assessee-hospital engaged some doctors on fixed monthly remuneration, and doctors were governed by its service rules, remuneration paid was taxable as 'salaries' and liable for deduction of tax under section 192. (A.Y. 2007-08 & 2009-10)

Dy. CIT v. Wockhard Hospitals Ltd. (2012) 139 ITD 161 / (2013) 82 DTR 263 /152 TTJ 80(Hyd.)(Trib.)

S. 194A : Deduction at source - Interest other than interest on securities - Interest - Definitions - Discount - Discounting charges is not "Interest" hence not liable to deduct tax at source [S. 2(28A), 40(a)(ia), 195]

The assessee paid Rs. 3.97 Crores to an associate concern in Singapore on account of discounted charges for getting the export sale bills discounted. The Assessing Officer held that that the discounting charges was "interest" under section 2(28A) and that as there was no TDS, the expenditure had to be disallowed under section 40(a)(i). This was reversed by the CIT(A) and Tribunal. The High Court also up held the order [CIT v. Gargill Global Trading P. Ltd. (2011) 335 ITR 94 (Delhi)] Relied on Circular No. 65 dated 2.09.1971, Circular No. 674 dated 22.03.1993 & Vijay Ship Breaking Corporation v. CIT (2009) 314 ITR 309 (SC) and held that as the discounting charges were not in respect of any debt incurred or money borrowed and were merely discount of the sale consideration on sale of goods, it was not "interest" under section 2(28A) and there was no obligation to deduct TDS thereon. On appeal by the department to the Supreme Court, held that, delay is condoned. The Special Leave Petitions are dismissed. (A.Y. 2004-05, 2005-06)(C.C.1957/2011 dt 10-5-2012)

CIT v. Cargil Global Trading Pvt. Ltd. (SC) www.itatonline.org

Editorial:- Affirmed ACIT v. Cargill Global Trading (I) P. Ltd. (2009) 34 SOT 424 / 126 TTJ 516 / 31 DTR 289 / (2011) 9 ITR 558 (Delhi)(Trib.) / CIT v. Gargill Global Trading P. Ltd. (2011) 335 ITR 94 (Delhi)(HC)

S. 194A : Deduction at source - Interest other than interest on securities - Housing Board - Interest credited or paid by Housing Board on amount deposited by allot tees on account of delayed allotment of flats is not subject to deduction of tax at source [S. 2(28A)]

The Assessee had floated a self financing scheme for sale of Houses / flats. Allottees were required to deposit some amount with the assessee. One of the condition of allotment was if there was delay in construction of project the assessee was liable to pay interest to the allottees. Assessee paid interest to allottees. The Assessing Officer held that the payment being interest with in the meaning of section 2(28A) the assessee was liable to deduct tax at source. On appeal Commissioner(Appeals) held that the payment was in the nature of compensation hence the assessee was not liable to deduct tax at source. The Tribunal confirmed the view of the Commissioner(Appeals). On further appeal by the revenue, the Court held that the Tribunal was right in law in holding that interest paid/credited by the housing Board on the amount deposited by the allottees on account of delayed allotment of flats does not fall under the definition of interest as assigned to it in clause (28A) of section 2 and that the interest paid or credited by Housing Board to its allottees was of capital nature and thus is not subject to deduction at source.

CIT v. H. P. Housing Board (2012) 340 ITR 388 / 205 Taxman 5 / 67 DTR 113 / 247 CTR 464 (HP)(HC)

S. 194A : Deduction at source - Interest - Co-operative society - Circular No. 9 of 2002 dated 11-9-2002 is invalid, being in conflict with the provisions of section 194A(3)(v) - Board cannot override or withdraw the exemption under section 194A(3)(v) [S. 119]

The petitioners challenged the validity of circular No. 9 of 2002 dated 11-9-2002 (2002) 258 ITR 98 (ST) / 177 CTR 1 (ST), which clarified that: "3. A question has also been raised as to whether nominal members, associate members and sympathizer members are also covered by the exemption under section 194A(3)(v). It is hereby clarified that the exemption is available only to such members who have joined in application for the registration of the Co-operative society and those who are admitted to membership after registration in accordance with the bye-laws and rules. A member eligible for exemption under section 194A(3)(v) must have subscribed to and fully paid for at least one share of the co-operative bank, must be entitled to participate and vote in the general body meeting and/or special general body meetings of the co-operative bank". The petitioner contended that Board's power to issue clarification under section 119 of the Act. It is the contention of the petitioner that clause (v) of sub-section (3) of the section 194A provides for exemption from deduction of tax at source under sub-section 1 of section 194A in case of a member of a co-operative society and no further distinction can therefore be made by the CBDT between different classes of members. The Court held that section 194A(3)(v) provides for exemption from deduction of tax at source in case of a member of a co-operative society and no further distinction can, therefore be made by way of circular by the CBDT between different classes of members, therefore circular No. 9 of 2002 is invalid being in conflict with the provisions of section 194A(3)(v); Board cannot override or withdraw the exemption under section 194A(3)(v). Accordingly the petition was allowed.

Gujarat Urban Co-operative Federation & Ors. v. UOI (2012) 75 DTR 354 / 209 Taxman 340 (Guj.)(HC)

S. 194A : Deduction at source - Interest - Interest on delayed payment of compensation under motor accident claims - No obligation to deduct tax at source [S. 2(28A), Motor Vehicles Act, 1988]

The assessee-insurance company paid compensation and interest thereon under the Motor Vehicle Act, 1988 to the claimants without complying with the provisions of section 194A. The assessing authority held that since assessee had failed to deduct tax on the amount of interest, they were liable to deposit the amount of short deduction of tax (TDS) under section 201(1) along with interest under section 201(1A). On second appeal, the Tribunal held that the interest paid on delayed payment of compensation under 1988 Act did not come within the ambit of section 2(28A) and, therefore, the assessee was not under any legal obligation to deduct TDS while making said payment. On revenue's appeal the Court held that Interest paid on delayed payment of compensation under motor accident

claims does not come within ambit of section 2(28A) and therefore, there is no obligation to deduct tax at source while making said payment of interest. (A.Y. 1998-99 to 2002-03)
CIT v. Oriental Insurance Co. Ltd. (2012) 211 Taxman 369 (All.)(HC)

S. 194C : Deduction at source - Contractors - Sub-contractor - Assessee is supplying technical knowhow and product manufactured in brand name of assessee, contract for work, liable to deduct tax at source
Assessee is marketing pharmaceutical products. Assessee and supplier are interrelated, assessee supplying technical knowhow and products manufactured in brand name of assessee. The Assessing officer held that the assessee is required to deduct tax at source. On appeal Commissioner(Appeals) and Tribunal held that assessee is not required to deduct tax at source. On appeal by revenue the High Court held that looking at the rear nature of transaction and reading the all three agreements together ,the provisions of section 194C of the Act is applicable and the view of Assessing Officer is justified and appeal of revenue was allowed. (A.Y. 1997-98)
CIT v. Nova Nordrisk Pharma India Ltd. (2012) 341 ITR 451 / 71 DTR 53 / 250 CTR 98 / 205 Taxman 203 (Karn.)(HC)

S. 194C : Deduction at source - Contractors - works contract - Copy right - Amounts not deductible - Franchiasee agreement to utilize the copy right is held not be a works contract - Hence provisions of section 40(a)(ia) is not applicable [S. 40(a)(ia)]
Agreement between assessee and franchisees was an agreement for permitting payee to utilize the name and copyright of the assessee in the study material and in running the coaching centres, and there were mutual rights, duties and obligations and it was not a work contract. The provisions of section 194C and consequently section 40(a)(ia) not applicable. (A.Y. 2004-05, 2005-06)
CIT v. Career Launcher India Ltd. (2012) 71 DTR 161 / 207 Taxman 28 / 250 CTR 240 (Delhi)(HC)

S. 194C : Deduction at source - Contract - Turnkey project - Electrical sub-station
Where the Turnkey project for setting up an electrical sub-station consisted of three separate contracts a clarified in the bid documents which included the contract for supply of material, no tax was deductable at source under section 194C of the Act from the payments made under the contract for supply of material.
CIT & Ors. v. Karnataka Power Transmission Corporation Ltd. (2012) 72 DTR 17 / 208 Taxman 73 (Karn.)(HC)

S. 194C : Deduction at source - Contractors - Sub-contractors - Hiring services - Agreement for hiring services of contractors for rendering transportation services for goods and passengers by buses, cars, sumos, utility vans, etc. would be covered under section 194C and not under section 194I [S. 194I]
The assessee company had engaged the services of contractors for rendering transportation services for goods and passengers by buses, cars, sumos, utility vans, etc. The assessee made deduction of tax in accordance with the provisions under section 194C. The revenue authorities, however, held that carriages for the purpose of carrying goods and passengers would be treated to be machinery within the meaning of explanation to section 194I and, therefore, the assessee was liable to deduct higher amount of tax as per section 194I.
It was held that on comparison of the two Explanations added to section 194I and 194C, it appears that it was never the intention for the Legislature to overlap any of the items mentioned within the meaning of 'rent', by including the same within the meaning of 'work' under section 194C. Since the agreement for carriage of goods by vehicles other than railways comes within the purview of explanation of 'work' within the meaning of section 194C, it necessarily follows that it was never the

intention of the Legislature to include the amount taken for hiring of such vehicles within the meaning of word 'rent'. Appeal of revenue was dismissed and the order of Tribunal up held. (A.Y. 2007-08)

CIT (TDS) v. Reliance Engineering Associates (P) Ltd. (2012) 209 Taxman 351 (Guj.)(HC)

S. 194C : Deduction at source - Contractors - Works contract - Contract for purchase of natural gas, payment of charges for transportation of natural gas to seller, the transportation charges not liable to tax deduction at source

The assessee was engaged in the manufacture of fertilizers. For its activities, it consumed natural gas which was supplied by different agencies through pipelines. According to the revenue, while purchasing the gas from the agencies, the assessee entered into a work contract for transport of such gas from the sellers premises to the buyers consumption points. It was the case of the Revenue that upon payment for such works contract, the assessee was required to deduct tax at source at the appropriate rate under section 194C of the Act. The Tribunal referred to various clauses of the agreement between the assessee and the seller holding that the assessee did not hire any service for carriage of goods and that, therefore, the case would not fall in clause (c) of Explanation III to section 194C of the Act. Held, dismissing the appeal that Transportation of gas was only a part of the entire sale transaction. The clear understanding of the parties that the ownership of gas would pass on to the buyer at the delivery point showed that the transport of gas by the seller was a step towards execution of contract for sale of gas and there was no contract for carriage of goods. Section 194C(1) does not require that a contract to carry out a work or the contract to supply labour to carry out work should be confined to works contract. However, there was no contract between the seller and the assessee for carriage of goods. Transportation of gas by the seller was only in furtherance of contract of sale of goods. Thus, the case was not covered under section 194C. The transportation charges did not depend on the consumption of quantity of gas but were a fixed monthly charges to be borne by the assessee as part of the agreement between the parties. Therefore, the application of section 194C did not arise. Appeal of revenue was dismissed. (A.Y. 2005-06)

CIT v. Krishak Bharati Co-op. Ltd. (2012) 349 ITR 68 / 253 CTR 402 / 211 Taxman 236 / 78 DTR 154 (Guj.)(HC)

S. 194C : Deduction at source - Contractors - Sub-contractors - Provisions of section 194C is applicable and not section 194I [S. 194I]

Assessee-transporter had given sub-contracts to dumper owners for transportation of goods. Dumpers were not taken on hire/rent. Payments to sub-contractors would attract provisions of section 194C and not provisions of section 194I. Appeal of revenue was dismissed. (A.Y. 2007-08)

CIT v. Shree Mahalaxmi Transport Co. (2011) 339 ITR 484 / (2012) 211 Taxman 232 (Guj.)(HC)

S. 194C : Deduction at source - Contractors - Bus contractor - Payments made by school to bus contractors providing pick and drop facility is contract and not rent [S. 194I]

Payments made by school to bus operators for providing pick and drop facility to school students is not a case of hire of machinery but of service rendered by transport contractor to assessee, therefore section 194C is applicable and not section 194I. (A.Y. 2008-09 & 2009-10)

Lotus Valley Educational Society v. ACIT (2012) 13 ITR 61 (Delhi)(Trib.)

S. 194C : Deduction at source - Contractors - Sub-contractors - Canteen contractors is sub-contractor

Assessee entering into contract with another person for carrying out part of work undertaken. Deduction at 1% is proper and order of Commissioner(Appeals) was confirmed. (A.Y. 2005-06 & 2006-07)

Dy. CIT v. Aban Offshore Ltd. (2012) 13 ITR 180 (Chennai)(Trib.)

S. 194C : Deduction at source - Contractors - Electricity Board - Additional transmission lines - Assessee is not liable to deduct tax at source on payment made to State Electricity Boards [S. 201(1), 201(1A)]

Assessee made payments to State Electricity Boards for construction of transmission lines for providing power to Railway traction sub-station. Payment was made for necessary infrastructure by a person requiring electricity supply under section 46 of the Electricity Act, 2003 is not contractual payment. The payment does not tantamount to works contract hence, the assessee is not liable to deduct the tax at source. Accordingly the demand raised under section 201(1) and interest charged under section 201(1A) of the Act was deleted. (A.Y. 2000-01 to 2005-06 & 2007-08)

Chief Project Manager, Railway Electrification, Ambala Cantt. v. ITO (2012) 67 DTR 48 / 144 TTJ 495 (Chd.)(Trib.)

S. 194C : Deduction at source - Contarctors - Aggregation - Proviso which was inserted with effect from 1-10-2004 for aggregation of payments of Rs. 50,000/-, does not have retrospective effect

Amendment by Finance Act, 2004, with effect from October 1, 2004, insertion of proviso to section 194C(3), providing for aggregation of payments credited or paid exceeds Rs. 50,000/- during the F.Y., the assessee is liable to deduct tax at sources though the each payment is below Rs. 20,000/-. The Tribunal held that the proviso is not retrospective hence, the payments made before October 1, 2004 which are below Rs. 20,000/- cannot be disallowed. (A.Y. 2005-06)

K. D. Manufacturing v. ITO (2012) 14 ITR 265 / 145 TTJ 1 (UO)(Ahd.)(Trib.)

S. 194C : Deduction at source - Contractors - Sub-contractor - Where lorries and trucks are hired for its own use TDS is not required to be deducted hence amount cannot be disallowed [S. 40(a)(ia)]

On the facts of the case the assessee has hired the Trucks/lorries for transporting of the consignment booked by it under its own supervision and control with all responsibility and liabilities. Therefore hiring of Truck and lorries cannot be called to be work as per definition given in explanation 3 of section 194C of the Act, hence the assessee is not liable to deduct tax at source. (A.Y. 2005-06)

Kranti Road Transport (P) Ltd. v. ACIT (2012) 50 SOT 15 (Visakha.)(Trib.)

S. 194C : Deduction at source - Contract - Works contract - Payment for making diaries and catalogues is held not a works contract as no material supplied by the assessee

Payment made to two parties for preparing diaries, catalogues and folders as per requirements of the assessee. It was held that as no material was supplied by the assessee, the same does not constitute work contract. Therefore, assessee not obliged to deduct tax at source. (A.Y. 2007-08)

Dy. CIT v. Eastern Medikit Ltd. (2012) 135 ITD 461 / 71 DTR 241 / 146 TTJ 551 / 18 ITR 457 (Delhi)(Trib.)

S. 194C : Deduction at source - Contract - Other party is not privy to the contract between the assessee and the principal, hence no TDS is to be deducted for payment made to other party

The provisions of section 194C apply only when condition of "carrying out any work in pursuance of a contract" is fulfilled. In the instant case as per the agreement, the risk and responsibility of the carrying out contract work is on assessee and other party does not have privity to contract between the assessee and the principal. Therefore the payment made by assessee to the other party does not fall within the purview of section 194C of the Act. (A.Y. 2007-08)

Bhail Bulk Carriers v. ITO (2012) 50 SOT 622 / 74 DTR 155 (Mum.)(Trib.)

S. 194C : Deduction at source - Work Contracts - Agreement for lease of dumpers and JCBs only and not executing any work or contract - Held not work contract and thus, not required to deduct tax under section 195 and hence no disallowance under section 40(a)(ia) [S. 40(a)(ia)]

The assessee paid lease rentals for taking dumpers and JCBs on lease from two companies. The Assessing Officer disallowed the rent under section 40(a)(ia) on the ground that the lease rentals were paid towards transport contract/work contract for transportation of goods and moving and shifting of materials and thus the assessee defaulted in deducting TDS under section 194C. It was held that the agreement was for lease of dumpers and JCBs only and not executing any work or contract. Thus, the lease agreement could not be classified as work or service contract and therefore assessee was not required to deduct tax while making payment of lease rental. (A.Y. 2005-06)

Dy. CIT v. Raj Laxmi Stone Crusher (P) Ltd. (2012) 52 SOT 112 (Delhi)(Trib.)

S. 194C : Deduction at source - Contract work - Transport Contractor - As no contract with truck owner and truck merely hired not liable to deduct tax at source

Assessee was a transport contractor for one 'J' and payments were made to truck owner and driver by 'J' on behalf of assessee after deducting TDS. Assessing Officer held that assessee had availed services of truck drivers or transporters for carrying out work of 'J' thus, there existed sub contractorship and assessee itself should have deducted tax at source. Since assessee had not entered into a contract with truck owners for part performance of its works with joint liability and he had simply hired trucks under his own obligation, he was not liable to deduct tax under section 194C. (A.Y. 2007-08)

Kuldeep Kumar Sharma v. ITO (2012) 53 SOT 230 (Delhi)(Trib.)

S. 194C : Deduction at source - Contractors - Agreement for refurbishment of hotel at NIBM campus - Assessee solely responsible for 'carrying out the work' - Clear cut relationship of 'contractor' and 'sub-contractor' existed - S. 194C attracted [S. 40(a)(ia)]

Assessee entered into an agreement with NIBM for comprehensive refurbishment of hotel at NIBM campus. As per agreement entered into between assessee and NIBM, assessee was assigned and was solely responsible for 'carrying out the work'. It was held that there was a clear cut relationship of 'contractor' and 'sub-contractor' between assessee qua JR & Co. and thus, assessee was responsible for deducting TDS under section 194C for making payment to JR & Co. (A.Y. 2007-08)

Ratan J. Batliboi v. ACIT (2012) 138 ITD 355 / 80 DTR 425 / (2013) 152 TTJ 164 (Mum.)(Trib.)

S. 194C : Deduction at source - Contractors - Hire charges for machinery / equipments was not liable to tax at source [S. 40(a)(ia)]

Assessee firm executed a contract job for construction of fencing along with boarder road at Meghalaya. Assessee obtained on hire machinery / equipments from 'B' and made payment of hire charges to 'B'. Assessee had to put machinery in use not on hour basis but on earth cutting measurement basis. Certificate issued by 'B' also states that payment was on account of hire charges to 'B' on measurement basis for excavation of earth and rock and not for any contractual work relating to construction for boarder fencing. It was held that assessee was not liable to deduct TDS under section 194C on payments made to 'B' and therefore, addition under section 40(a)(ia) made by Assessing Officer and sustained by Commissioner(Appeals) was unwarranted. (A.Y. 2006-07 & 2007-08)

Roy Mitra Enterprise v. ACIT (2012) 53 SOT 238 (Kol.)(Trib.)

S. 194C : Deduction at source - Contractor / sub-contractor - Payment to labourers through Maharashtra Mathadi Hamal - No relationship of principal and contractor between parties - Not liable for TDS

Assessee was registered under Maharashtra Mathadi Hamal and other Workers (Regulation of Employment and Welfare) Act, 1969. As per provisions of said Act, assessee appointed labourers through Mathadi Board. Assessee made payment of wages to Mathadi Board which in turn remitted same to labourers. It was held that there being no relationship of principal and contractor between parties, assessee was not required to deduct tax at source while making payment of wages to Mathadi Board. (A.Y. 2007-08)

Gokuldas Virjibhai & Co. v. ITO (2012) 139 ITD 284 (Pune)(Trib.)

S. 194H : Dedcution at source - Commission or brokerage - Discount - The discount made available to the licensed stamp vendors under the provisions of the Gujarat Stamps Supply and Sales Rules 1987, does not fall within the expression "Commission" or "brokerage" under section 194H of the Act

The assessee, an association of stamp vendors, bought stamps from the State Govt. at a discount. The department claimed that the stamp vendors were "agents" of the State Govt. and that the said discount was "commission or brokerage" and the State Govt. ought to deduct TDS under section 194H. The assessee filed a Writ Petition to challenge the department's action. The Gujarat High Court upheld the assessee's plea that (a) title in the stamps passed to the vendors and that they were not "agents" of the State Govt. but were transacting on a "principal to principal" basis and (b) the discount available to the stamp vendors was not "commission or brokerage" so as to fall within section 194H. On appeal by the department to the Supreme Court, held dismissing the appeal:

We are satisfied that 0.50% to 4% discount given to the Stamp Vendors is for purchasing the stamps in bulk quantity and the said discount is in the nature of cash discount. In the circumstances, we concur with the impugned judgement that the impugned transaction is a sale. Consequently, section 194H of the Income-tax Act, 1961 has no application.

CIT v. Ahmedabad Stamp Vendors Association (2012) 348 ITR 378 / 210 Taxman 269 / 254 CTR 111 / 79 DTR 81 (SC)

Editorial:- Decision of Gujarat High Court in Ahamedabad Stamp Vendors Association v. UOI (2002) 257 ITR 202 (Guj.)(HC) is affirmed.

S. 194H : Deduction at source - Commission - Brokerage - Sale of milk and milk products - Agents - TDS is not deductible on sale of milk and milk products at concessionaires

Assessee has sold the products to the concessionaires on a principal to principal basis, that the concessionaries buy the products at a given price after making full payment for the purchases on delivery, that the milk and other products once sold to the concessionaires became their property and cannot be taken back from them, that any loss on account of damage, pilferage and wastage is to the account of the concessionaires and that in these circumstances the payment made to the concessionaires cannot be treated as "commission" for services rendered and consequently there was no liability on the part of assessee to deduct tax. Assessing Officer held that the relationship of assessee and concessionaries are agent hence liable to deduct tax at source. The view of Assessing Officer was followed by the Commissioner(Appeals). On appeal to the Tribunal, the Tribunal held that the real test to be applied is whether the property in the milk and products passed to the concessionaries at the time of delivery. On applying the test the Tribunal came to the conclusion that difference between the price at which the assessee sold the milk and other products to the concessionaries were to sell them to consumers was not liable to be treated as commission within the meaning of section 194H. On appeal to the High Court by revenue the Court also confirmed the view of Tribunal and held that sale of milk and milk products by assessee dairy to concessionaries/agents who hold the same from the booths owned by the assessee was on principal to principal basis and therefore assessee dairy was not liable to deduct tax at source under section 194H from the payments made to concessionaires. Appeal of revenue was dismissed. (A.Y. 2004-05, 2005-06)

CIT v. Mother Dairy India Ltd. (2012) 70 DTR 223 / 249 CTR 559 / 206 Taxman 157 (Delhi)(HC)
CIT v. Mother Dairy Food Processing Ltd. (2012) 70 DTR 223 / 249 CTR 559 / 206 Taxman 157 (Delhi)(HC)

S. 194H : Deduction at source - Commission - Brokerage - Failure to deduct tax at source the defaulter is liable only for interest and penalty and not the tax [S. 201(IA), Constitution of India - Art. 226]

The assessee, a publisher of newspapers, gave 10-15% trade discount to advertising agencies as per rules of the Indian Newspaper Society. The Assessing Officer held that the said discount constituted "commission" and that the assessee ought to have deducted TDS under section 194H and was liable as assessee-in-default under section 201. The assessee filed a Writ Petition to challenge the said order. Held by the High Court:

(i) Though the assessee has an alternate remedy of appeal against a section 201 order, a writ is maintainable if the authority has wrongly assumed jurisdiction. Also, a huge demand has been raised and multiplicity of proceedings will increase the assessee's sufferings even though section 194H is clearly not applicable;

(ii) To constitute "commission or brokerage" under section 194H, it is necessary that person receiving payment should be acting as agent and rendering services. The relationship between the assessee and the advertising agency in accordance with the INS Rules is that of a principal to principal because (a) the assessee has no control over the advertising agency, (b) the advertising agency is responsible for payment even if the advertiser has not paid the advertising agency, (c) the advertising agencies are rendering service to the advertisers/ customers & other terms. The "discount" was not "commission";

(iii) The deductor cannot be treated an assessee in default till it is found that the assessee (recipient) has also failed to pay such tax directly. To declare a deductor who failed to deduct the tax at source as an assessee in default, condition precedent is that assessee has also failed to pay tax directly. However, even then, the short deducted tax cannot be realised from the deductor and he is at best liable for interest and penalty only;

(iv) The Department's practice of hurriedly passing assessment orders shortly before the limitation period is about to expire and justifying this practice by saying that there was shortage of time and hence facts could not be verified properly is not appreciated because it puts citizens to great harassment as exorbitant demands are raised and it breaches the principles of natural justice. (A.Y. 2009-10, 2010-11)

Jagran Prakashan Ltd. v. Dy. CIT (TDS) (2012) 345 ITR 288 / 73 DTR 233 / 251 CTR 65 / 209 Taxman 92 (All.)(HC)

S. 194H : Deduction at source - Commission - Brokerage - In absence of principal-agent relationship, payment, though called "commission", not covered [S. 201]

The assessee obtained a bank guarantee and paid 'bank guarantee commission'. The Assessing Officer & CIT(A) took the view that since the payment was characterized as "commission" it fell within the ambit of section 194H and the assessee ought to have deducted TDS. The assessee was held liable as assessee-in-default under section 201. On appeal by the assessee, held reversing the Assessing Officer and Commissioner(Appeals):

Section 194H defines the expression "commission or brokerage" to include any payment received by a person acting on behalf of another person for services rendered or for any services in the course of buying or selling of goods. Applying the principle of noscitur a sociis & ejusdem generis, the expression "commission" has to take its colour from the expression "brokerage". As the expression "brokerage", in common parlance and in law, means 'fees or commission given to or charged by a broker', the expression 'commission' must be confined to a payment made to agents, etc. for effecting

sales and carrying out business transactions and cannot extend to payments which are for services rendered or products offered on a principal to principal basis. A principal-agent relationship is a sine qua non for invoking the provisions of section 194H. As there is no principal agent relationship between a bank issuing the bank guarantee and the assessee, the payment, though termed "commission", is not covered by section 194H [SRL Ranbaxy Ltd. v. ACIT (2012) 143 TTJ 265 (Delhi)(Trib.) referred]. (A.Y. 2004-05)

Kotak Securities Limited v. Dy. CIT (2012) 14 ITR 495 / 50 SOT 158 / 73 DTR 265 / 147 TTJ 443 (Mum.)(Trib.)

S. 194H : Deduction at source - Commissioner - Brokerage - Derivatives are securities therefore tax at source is not deductible [S. 40(a)(ia)]

Tribunal held that as per definition of derivative in section 2 sub section (ac) read with Section 2 of sub-section (h)(ia) the derivates are securities and therefore covered by the exception provided in Explanation (1) to Section 194H. Hence the brokerage paid cannot be disallowed under section 40(a)(ia). Therefore tax at source is not applicable (A.Y. 2005-06)

Dy. CIT v. Noble Enclave & Towers (P) Ltd. (2012) 50 SOT 5 (Kol.)(Trib.)

S. 194H : Deduction at source - Discount - Principal - Agency - Amount retained by collection centers is not commission hence provisions of section 194H cannot be applied

Amount of discount retained by the collection centres is not 'commission' paid by the assessee to the collection centres and consequently section 194H does not apply to such amounts. Since assessee has not paid any amounts to the collection centres, provisions of section 194H could, not have been met. Existence of principal-agency relationship is a sine qua non for invoking section 194H. (A.Y. 2006-07)

SRL Ranbaxy Ltd. v. Addl. CIT (2012) 143 TTJ 265 / 65 DTR 185 / 50 SOT 173 (URO)(Delhi)(Trib.)

S. 194H : Deduction at source - Commission - Credit card companies - Commission retained by credit card companies out of amounts paid to merchant establishment is not liable for deduction of tax at source [S. 40(a)(ia)]

The assessee company is engaged in business of direct retail trading in consumer goods claimed deduction in respect of commission paid to credit card companies. The Assessing Officer disallowed the commission under section 40(a)(ia) on the ground that the assessee failed to deduct tax at source. In appeal Commissioner(Appeals) allowed the appeal by observing that sale made on basis of a credit card is clearly a transaction of the merchant only and credit card company only facilitates the electronic payment, for a certain payment for a certain charge. The commission retained by the credit card company is therefore in the nature of normal bank charges and not in the nature of commission/brokerage for acting on behalf of the merchant establishment. Therefore not liable to deduct tax at source. On appeal by revenue the Tribunal also confirmed the order of Commissioner(Appeals). (A.Y. 2007-08)(ITA No. 905/Hyd./2011 dated 10-4-2011 Bench 'D')

Dy. CIT v. Vah Magnan Retail (P) Ltd. (2012) BCAJ July P. 56 (Hyd.)(Trib.)

S. 194I : Deduction at source - Rent - Co-owners - Each of the co-owners of building had definite share in the premises and individual payment being less than 1,20,000 per annum the assessee cannot be treated to be in default for non-deduction of tax at source [S. 26, 201(1), 201(1A)]

The property is owned by 15 co-owners and their shares definite. The property was let out to Bank i.e. assessee. The assessee bank is paying rent each co-owner separately and individual payment is less than 1,20,000 per annum. The Assessing Officer treated the payment to Assessing Officer and as it failed to deduct tax at source treated the assessee in default. Appeal of the assessee was allowed by

Commissioner(Appeals), which was confirmed by the Tribunal. Revenue filed an appeal before the High Court. The High Court held that it is not necessary that there should be a physical division of property by meats and bounds in order to attract the provisions of section 26. The provision of section 26 come in to play the movement the share of each co-owner in the property is determined and ascertainable. On the facts assessee bank is paying rent to each of the 15 co-owners of building separately as per their definite share in the premises and individual payment being less than Rs. 1,20,000/- per annum, the assessee cannot be treated to be in default for non-deduction of tax at source under section 194I. (A.Y. 1996-97 to 2002-03)

CIT v. Senior Manager, State Bank of India & Anr. (2012) 75 DTR 313 / 252 CTR 523 / 206 Taxman 607 (All.)(HC)

S. 194I : Deduction at source - Rent - landing and parking charges payable to Airport Authority of India can be held to be rent hence provision of section 194I is held not applicable

Landing and parking charges paid by the assessee to Airport Authority of India do not amount to rent within the meaning of section 194I. Charges levied are in the nature of fee for the services offered rather than in the nature of rent for the use of the land. (A.Y. 1997-98 to 1999-2000)

CIT v. Singapore Airlines Ltd. (2012) 252 CTR 429 / 76 DTR 420 (Mad.)(HC)

S. 194I : Deduction at source - Rent - Enhanced rent- Liability to deduct tax at source arises only when it pays rent or debits whichever is earlier and not on the basis of enhanced rent demanded by the land lord

The landlord demanded enhanced lease rent. The assessee made a provision in the books of account, however in the computation of income the assessee disallowed the provision debited in the profit and loss account. The later year the enhanced rent was settled at lower figure. The assessee paid the amount along with interest and deducted at source. The Assessing Officer demanded the interest on delayed payment of along with interest. On appeal, the Tribunal held that a mere entry in the books of account will not determine the income or expenditure of assessee. The Tribunal further held that liability to deduct tax at source arises only when it pays rent or debits whichever is earlier and not on the basis of enhanced rent demanded by the land lord. (A.Y. 2007-08)

ITO v. Hotel Parag Ltd. (2013) 86 DTR 121 / 154 TTJ 382 / (2012) 53 SOT 205 (Bang.)(Trib.)

S. 194I : Deduction at source - Rent - Payment to State Electricity Board - Transmission of electricity is not liable to deduct tax at source

Payments made by assessee, a State Electricity Board, to PGCIL for transmission of power purchased by it from NTPC was made for the services of transmission of electricity and not for use of transmission wires per se in as much as these transmission lines are used not only for transmission of electricity to the assessee but also for transmission of electricity to various other entities, and the assessee has no say in the manner in which such transmission lines can be controlled or used by PGCIL and therefore section 194I has no application in respect of impugned payments for transmission of electricity. (A.Y. 2006-07 to 2009-10)

Chhattisgarh State Electricity Board v. ITO (2012) 65 DTR 1 / 143 TTJ 151 / 14 ITR 91 / 50 SOT 33 (Mum.)(Trib.)

S. 194I : Deduction at source - Rent - Transmission charges - Payment made was neither in the nature of fees for technical services nor rent, therefore, assessee not liable to deduct TDS from the transmission charge [S. 194J]

In the instant case, the assessee company engaged in distribution of electricity to the local areas assigned to it was purchasing electricity from power generation company and distributed the same by using the transmission network of the transmission company. It was held that the transmission charges paid to transmission company was neither in the nature of fees for technical services nor rent

and, therefore, assessee was not liable to deduct TDS from the transmission charge. (A.Y. 2005-06 to 2007-08)

Bangalore Electricity Supply Co. Ltd. v. ITO (2012) 149 TTJ 102 / 71 DTR 186 / 20 ITR 365 (Bang.)(Trib.)

ITO v. Bangalore Electricity Supply Co. Ltd. (2012) 149 TTJ 102 / 71 DTR 186 / 20 ITR 365 (Bang.)(Trib.)

S. 194I : Deduction at source - Rent - No TDS where lessor - Lessee relationship does not exist

Assessee was a 100% subsidiary of its holding company 'M'. Holding company took an office premises on rent and permitted assessee to use of portion of said premises. Assessee reimbursed certain amount of rent to holding company without deducting TDS. It was held that where there is no lessor-lessee relationship between holding company and assessee, provisions of section 194I were not applicable. (A.Y. 2008-09)

ACIT v. Result Services P. Ltd. (2012) 52 SOT 598 (Delhi)(Trib.)

S. 194I : Deduction at source - Rent - Upfront charges was liable for tax deduction at source [S. 201(1), 201(1A)]

Assessee had taken a land on lease for a period of 99 years from 'S'. It paid certain amount to 'S' as upfront charges which was non refundable. Assessee did not deduct TDS from such payment. It was held that definition of `rent' given under Explanation to section 194I would squarely cover payment made by assessee as upfront fee and, therefore, assessee having not deducted tax at source, rigours of section 201(1) and 201(1A) were attracted. However, since 'S' had included upfront charges paid by assessee in its income and paid taxes thereon, TDS could not be recovered from assessee on such amounts despite assessee being one in default. (A.Y. 2007-08)

Foxconn India Developers Ltd. v. ITO (2012) 53 SOT 213 (Chennai)(Trib.)

S. 194J : Deduction at source - Technical services - School contractor - Payments made by school to contractors for training students in horse riding - Liable to deduct tax at source [S. 194C]

The assessee entered into a contract with Mustang Riding School to provide five horses for Rs. 10,000/- per horse per month along with qualified and experienced instructor to teach the children horse riding. The school deducted the tax at source as per section 194C of the Income-tax Act. The Assessing Officer held that it was fee for professional or technical services to the assessee and therefore, invoked section 194J. The order was upheld by the Commissioner(Appeals) and Tribunal. (A.Y. 2008-09, 2009-10)

Lotus Valley Educational Society v. ACIT (2012) 13 ITR 61 (Delhi)(Trib.)

S. 194J : Deduction at source - Technical fees - Leaseline charges held not to be fees for technical services

Following decision of Angel Broking Ltd. (2010) 3 ITR (Trib.) 294 (Mum.) it was held that the leaseline charges are not in the nature of fees for technical services as per Section 194J of the Act. (A.Y. 2006-07)

ACIT v. Omniscient Securities Pvt. Ltd. (2012) 15 ITR 82 (Mum.)(Trib.)

S. 194J : Deduction at source - Fees for professional or technical services - State Load Dispatch Centre charges is not in the nature of fees for technical services hence not liable to deduction of tax at source

In the said case, the assessee was granted distribution and retail supply of power by Karnataka Electricity Regulatory Commission. In pursuance of the mandate of Electricity Act, 2003, the government of Karnataka formed the State Load Dispatch Center (SLDC) for smooth flow of

operations amongst the power generation company. It was held that the provisions of section 194J are not attracted to SLDC charges paid by the assessee, a power distribution company as the assessee or its employees do not receive or derive any benefit of technical nature from SLDC in their sphere of work. The said charges paid by it are only reimbursement of actual expenses, and therefore, no deduction of tax was to be made thereon. (A.Y. 2005-06 to 2007-08)

Bangalore Electricity Supply Co. Ltd. v. ITO (2012) 71 DTR 186 / 149 TTJ 102 / 20 ITR 365 (Bang.)(Trib.)

S. 194J : Deduction at source - Fees for technical services - Super stockist charges was not liable to deduction of tax at source

Assessee-company was engaged in manufacturing, trading and distribution of drugs. It entered into an agreement with 'Z' Ltd., appointing said firm as its 'super stockist'. Super stockist was be responsible for getting stock of manufactured products of assessee company for onward transmission to market, through retailer. It was noted that super stockiest was not an employee, agent or legal representative or partner of assessee for any purpose. It was also apparent that super stockiest was selling goods produced by assessee at rate of 80 per cent of MRP and in that way it was earning income of 10 per cent of MRP which was stipulated in Memorandum of Understanding (MOU) and hence, there was no direct payment made by assessee to super stockiest, relationship between assessee company and its super stockiest was on a principal to principal basis and, in such a case, provisions of section 194J were not applicable. (A.Y. 2007-08 to 2011-12)

Piramal Healthcare Ltd. v. ACIT (2012) 53 SOT 253 (Mum.)(Trib.)

S. 194J : Deduction at source - Fees for professional or technical services - Payment of State load despatch centre charges to electricity transmission company [S. 194C]

State Load Despatch Centre (SLDC) is responsible for optimum scheduling and despatch of electricity within the state in accordance with the contracts entered into with the licensees and generating companies. It has to monitor grid operations, keep accounts of the quantity of electricity transmitted through the State grid and exercise supervision and control over the transmission system. Its main duty is the general co-ordination of production and transmission of electricity for an even distribution. Considering the nature of obligation placed on the centre and the role it performs, it cannot be said that it is rendering any technical services to the applicant. Thus, the fee paid to the centre does not qualify as fees for technical services. It appears to be more of a supervisory charges. Therefore, no withholding of tax in terms of section 194J or 194C is called for on the said charges.

Ajmer Vidyut Vitran Nigam Ltd. In re (2012) 76 DTR 209 / 252 CTR 467 / 210 Taxman 502/(2013) 353 ITR 640 (AAR)

S. 194LA : Deduction at source - Compensation on acquisition of certain immoveable property - Provision is held to be constitutionally valid only when compensation was paid tax had to be deducted, petition was dismissed

The petitioners were aggrieved by the action on the part of the respondents in deducting tax at source under section 194LA while paying the amount of compensation on acquisition of the land belonging to the petitioners. The petitioners had also challenged the constitutional validity of section 194LA of the I.T. Act. 1961.

It was held that the question of deducting tax at source arises at the time of making payment. In the instant case, compensation was paid on 28-4-2010 and on that day, section 194LA was on the statute book and, therefore, tax had to be deducted while making the payment of compensation.

The object of section 194LA as per the CBDT Circular No. 5 of 2005, of 2005 dated 15-7-(2005) 276 ITR (St.) 151 is to curb the tendency of evading taxes by not reporting the income comprised in the compensation received on acquisition of immovable property. Section 194LA does not determine the tax liability of the person receiving the amount of compensation but it merely requires the person

paying the compensation to deduct certain percentage of the sum payable as compensation towards the tax liability of the recipient that would be determined in the assessment proceedings. Therefore, the argument that section 194LA purports to impose tax on the cost of the land acquired under the Land Acquisition Act is without any merit. Consequently, the challenge to the constitutional validity of section 194LA must fail. Petition was dismissed.

Leela Bhagwansing Advani v. Union of India (2012) 209 Taxman 356 / 80 DTR 136 / 254 CTR 496 (Bom.)(HC)

S. 195 : Deduction at source - Non-resident - Fees for technical services - "make available" technical knowledge, mere provision of service is not enough; the payer must be enabled to perform the service himself, hence the assesse is not liable to deduct tax at source - DTAA - India-Nether land [S. 90, 201, Art. 12]

The assessee, engaged in prospecting and mining for diamonds entered into an agreement with a Netherlands company for conducting air borne survey and providing high resolution geophysical data. The Assessing Officer held that the consideration was chargeable to tax as "fees for technical services" under Article 12 of the India-Netherlands DTAA and held the assessee liable under section 195 & 201 for failure to deduct TDS. This was reversed by the CIT(A) & Tribunal on the ground that though the Dutch company had performed services using technical knowledge and expertise, such technical experience etc had not been "made available" to the assessee. On appeal by the department to the High Court, Held dismissing the appeal:

Article 12(5) of the DTAA defines "fees for technical services" to mean payments in consideration for the rendering of any technical or consultancy services "which make available technical knowledge, experience, etc. or consist of the development and transfer of a technical plan or technical design. To be said to "make available", the service should be aimed at and result in transmitting technical knowledge etc. so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into terminology "making available", the technical knowledge, skills, etc. must remain with the person receiving the service even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider has gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. On facts, while the Dutch company performed the surveys using substantial technical skills, it has not made available the technical expertise in respect of such collection or processing of data to the assessees, which the assessee can apply independently and without assistance and undertake such survey independently. Consequently, the consideration is not assessable as "fees for technical services" (AAR Rulings in Perfetti Van Melle Holding, Shell India&Areva T&D distinguished) (A.Y. 2004-05)

CIT v. De Beers India Minerals Pvt. Ltd. (2012) 346 ITR 467 / 72 DTR 82 / 208 Taxman 406 (Karn.)(HC)

S. 195 : Deduction at source - Income deemed to accrue or arise in India - Amounts not deductible - Reimbursement of expenses global management expenses, communication Uplink charges and other expenses provisions of neither section 195 nor 194J are applicable because such payments are not chargeable to tax at all hence cannot be disallowed [S. 9, 40(a)(i), 194J, 197]

The assessee is in the business of supplying chain, management, logistics and freight forwarding that is movement of goods and cargo with in India or outside by road, rail air or ship. To undertake these activities, the assessee company has arrangement with its parent company which is foreign company for rendering global management services and VST uplinking enabling it to have global communication net work. The Assessing Officer did not dispute the genuiness of these payments but

disallowed the expenses on the ground that while remitting the aforesaid payment on its parent company the assessee had failed to deduct tax at source hence the he disallowed the payment by applying the provision of section 40(a)(i). On appeal the disallowance was deleted by the Commissioner(Appeals) and Tribunal. On appeal by the revenue the High Court following the ratio of decision in Van Oord ACZ India (P) Ltd. v. CIT (2010) 323 ITR 130 (Delhi)(HC), held that the assessee company has paid reimbursement of expenses of global management expenses, communication uplink charges and other expenses provisions of neither section 195 nor 194J are applicable because such payments are not chargeable to tax at all hence cannot be disallowed. (A.Y. 2004-05)

CIT v. Expeditors International (India) (P) Ltd. (2012) 209 Taxman 18 (Delhi)(HC)

S. 195 : Deduction at source - Non-resident - Other sums - Income deemed to accrue or arise in India - Foreign agent - Commission - Business connection - Permanent establishment [S. 4(1), 40(a)(ia), 195]

A foreign agent of an Indian exporter operates in his own country and his commission is directly remitted to him. Such commission is not received by him or in his behalf in India, and such agent is not liable to income tax in India on commission received by him. As there was no right to receive income earned in India nor there was any business connection between assessee and ETUK, therefore when income was not chargeable to tax in India under section 4(1), there was no question of invoking provisions of section 195 hence no disallowance can be made under section 40(a)(ia). (A.Y. 2007-08)

CIT v. Eon Technology (P) Ltd. (2011) 203 Taxman 266 / 64 DTR 257 / (2012) 343 ITR 366 / 246 CTR 40 (Delhi)(HC)

Editorial:- Affirmed view of Tribunal in Dy. Eon Technology (P) Ltd. (2011) 46 SOT 323 (Delhi)(Trib.)

S. 195 : Deduction at source - Non-resident - Production of mineral oil - Not liable to deduct at source [S. 40(a)(i), 44AB]

The assessee had during the relevant previous year, paid for offshore drilling services and machinery repairs /rentals varying amounts to M/s. International Tubular F2E and International Off shore Management both of which were non-resident entities. On such payments, the assessee deducted tax at 4 percent considering the, services rendered by the non-residents entities fall under section 44B of the Act. As per assessee only 10 percent, of the receipts could be deemed income and 40 percent of such 10 percent works out 4 percent. However, Assessing Officer was of the opinion that the assessee was required to deduct at 40 percent, on the gross sum paid to such entities under section 195 of the Act. As the assessee failed to deduct the tax at prescribed rate he disallowed the amount under section 40(a)(ia). In appeal Commissioner(Appeals) held that the assessee had taken a bona fide view hence disallowance was not called for. On the facts the assessee had deducted the tax at specified rate on 10 percent, of the bare boat charges paid to Norway company who is non-resident, computed as per the provisions of section 44BB. Therefore, there is no violation of the provisions of section 195, hence no disallowance can be made under section 40(a)(ia) of the Act. (A.Y. 2005-06, 2006-07)

Dy. CIT v. Aban Offshore Ltd. (2012) 13 ITR 180 (Chennai)(Trib.)

S. 195 : Deduction at source - Non-resident - Reimbursement of expenses - Clearing and forwarding agent - Not liable to deduct at source [S. 40(a)(ia), 172, 194C]

Reimbursement of payment towards sea freight transport, CCI charges, steam freight charges and REPO container charges made by the assessee to C&F agents who have already made the payment on behalf of the assessee is covered under section 172 and not by section 194C or 195 and the agent having already deducted TDS from the transportation charges and shipping bill before making these payments to the principal which have been reimbursed by the assessee, assessee was not liable to

deduct tax at source from such payments and consequently, same could not be disallowed by invoking the provisions of section 40(a)(ia). (A.Y. 2005-06)
ACIT v. Minpro Industries (2012) 65 DTR 113 / 143 TTJ 331 (Jodh.)(Trib.)

S. 195 : Deduction at source - Non-resident - Payee is not assessed - Under section 195 tax deduction at source liability is on payer if payee is not assessed [S.201(1), 201(IA)]
The assessee made a public issue of Global Depository Receipts (GDR) for which it engaged international lead managers like Jardine Fleming, Merrill Lynch etc and paid management and underwriting commission of Rs. 7.68 crores without deducting TDS. The Assessing Officer & CIT(A) held that the said commission constituted "fees for technical services" and that the assessee ought to have deducted TDS under section 195. The assessee was held to be in default under section 201. Before the Tribunal, the assessee argued that as no action has been taken by the department against the payees and the time for taking such action had expired, no order under sections 195 & 201 could be passed. Held by the Tribunal:
No order under section 201(l) or (1A) holding the payer to be in default can be passed where the Revenue has not taken any action against the payee and the time limit for taking action against the payee under section 147 has expired. On facts, the admitted position is that no assessment has been made in the hands of the payee in respect of the sums received from the assessee in respect of GDR issues. Similarly no proceedings have been taken against it till date for assessing such income. The time limit for issuing notice under section 148 has also come to an end. As the time limit for taking action against the payee under section 147 is not available, and there is no course left to the Revenue for making the assessment of the non-resident, exconsequenti, no lawful order can be passed against the assessee either under section 201(1) or (1A) [Mahindra and Mahindra Ltd. v. Dy. CIT (2009) 313 ITR 263 (Mum.)(SB)(AT)(SB) followed].(A.Y. 1998-99)
Crompton Greaves Ltd. v. Dy. CIT (2012) 50 SOT 562 / 75 DTR 292 / 17 ITR 151 / 149 TTJ 484 (Mum.)(Trib.)

S. 195 : Deduction at source - Income deemed to accrue or arise in India - Business profits - DTAA - India-Switzerland - As there is no PE in India, assessee is not liable to deduct tax at source in respect of remittance towards advertising expenses [S. 9, Art. 7]
The assessee company was engaged in manufacturing and trading of pharmaceuticals bulk drugs and formulations mainly for exports and research and development in the field of pharmaceuticals. The assessee remitted towards advertisement expenses certain amount to Russian advertising agencies through its parent Swiss company in respect of advertisement campaign launched in Russia for introduction of medicine 'Dlianos'. Thus, in the view of the fact that there was a DTAA between India & Switzerland and India & Russia, the amount remitted by assessee towards advertisement could be assessed as business profits as per section 9, but having regards to fact that non- resident advertising company had no PE in India, amount in question could not be brought to tax in India. Thus, assessee was not liable to deduct TDS under section 195 as amount in question was not itself chargeable to tax. (A.Y. 1998-99, 1999-2000)
Dy. CIT v. Sandoz (P.) Ltd. (2012) 137 ITD 326 / 80 DTR 129 (Mum.)(Trib.)

S. 195 : Deduction at source - obligation to withhold tax - Obligation arises only if payment is chargeable to tax in hands of non-resident recipient in India
The obligation of tax deduction at source arises under this provision arises only if payment is chargeable to tax in hands of non-resident recipient in India. Therefore, merely because a person has not deducted tax at source from remittance abroad, it cannot be inferred that person making remittance abroad, it cannot be inferred that person making remittance has committed a failure in discharging his tax withholding obligation. (A.Y. 2006-07)

Dresser Rand India (P.) Ltd. v. Addl. CIT (2012) 53 SOT 173 / 13 ITR 422 / (2011) 61 DTR 265 / 141 TTJ 385 (Mum.)(Trib.)

S. 195 : Deduction at source - Non-resident - Foreign shipping companies

Assessee-Government undertaking was engaged in transporting coal from one port to another port. For said purpose, assessee was using its own vessels as well as hiring vessels from foreign companies. Assessing Officer disallowed hire charges paid by assessee to foreign companies on ground that assessee had not deducted tax at source. Since said hire charges was income in hands of foreign shipping companies for service rendered in India and it was not shown by assessee that foreign shipping companies were exempted by DTAA from payment of tax, assessee was liable to deduct to tax at source. (A.Y. 2002-03 to 2004-05, 2006-07)

Poompuhar Shipping Corporation Ltd. v. ADIT (IT) (2012) 53 SOT 451/(2013) 155 TTJ 81(UO) (Chennai)(Trib.)

S. 195 : Deduction at source - Non-resident - Permanent establishment - Fees for technical services - Assessee is liable to deduct tax at source as there exists a service PE - DTAA - India-UK-Canada [S. 9(1)(vii), 90, Art. 5.2]

Applicant, an Indian company, is a subsidiary of an overseas entity for co-ordinating the services of various vendors in India to whom it has outsourced some activities needed by it. Overseas entity deputed or seconded some of its employees to the applicant to render their services in India. The salaries were paid by overseas entity. The applicant has reimbursed the remuneration paid by the overseas entity. The Authority for Advance Ruling held that since the employees are rendering services to their employer in India by working for a specified period for subsidiary or associate enterprise of their employer, there exists a service PE within the meaning of Article 5.2 of the Indo-UK. DTAA and Indo-Canada DTAA, therefore income is deemed to accrue or arise in India and the applicant is liable to deduct tax at source under section 195.

Centrica India Offshore (P) Ltd., In re (2012) 348 ITR 45 / 68 DTR 297 / 206 Taxman 545 / 249 CTR 11 (AAR)

S. 195 : Deduction at source - Non-resident - Interest - Income on sale of CCDs - CCDs in the nature of debt until converted - Therefore income recharacterised as interest income hence benefit under India-Mauritius DTAA is held not applicable and liable to deduct tax treating the same as interest [S. 45, 90, Art. 11]

Z, the applicant and an Indian Company V (hereinafter referred as "V") invested in equity shares and CCDs of Company S (hereinafter referred as "S"), wholly owned subsidiary of V. Under the investment agreement executed between S, V and Z, the CCDs were mandatorily convertible into equity shares upon the expiry of 72 months from the investment date; additionally, prior to the mandatory conversion date, Z had a put option to sell specific number of equity shares and CCDs to V and V had the call option to purchase the said shares and CCDs from Z. V exercised the call option and purchased the CCDs from Z. The tax officer however rejected the application and asked V to deposit the withholding tax on this transaction. Z subsequently approached the AAR for a ruling on the issue.

AAR held that CCD was in the nature of a debt instrument and the obligation to repay the principal and an interest component were embedded in the concept of debt. The AAR further concluded that 'interest' denotes any type of income that become payable on a debenture. On review of the investment agreement the AAR concluded that S had no power to exercise any management control over its business and that for all practical purposes V and S were a single entity.Additionally, V was required to share with Z, its financial statement, debt servicing status etc.

In light of such provisions, the AAR observed that on a close reading of the investment agreements, it was apparent that the commitment to repay the debt was on V, the parent of S and not S and

therefore, the purchase of CCDs by V from Z should be considered repayment of the debt such that income arising to Z should be treated as interest income.
Z, In re (2012) 345 ITR 11 / 69 DTR 329 / 249 CTR 225 / 206 Taxman 528 (AAR)

S. 195 : Deduction at source - Non-resident - India-Netherland DTAA - Make Available - Recipient of services must be conveyed the right to continue the practice put into effect and adopted
The term "Make Available" means that the recipient of the services should be in a position to derive an enduring benefit and be in a position to utilize the knowledge or know-how in future on his own. Where the expertise in running the industry run by the group is provided to Indian entity in group to be applied in running business, the employees of Indian entity get equipped to carry on that business model or service model on their own without reference to service provider when service agreement comes to an end. This would not be termed as make available as the recipient must also be conveyed specially the right to continue the practice put into effect and adopted under agreement on its expiry.
Perfetti Van Melle Holdings B.V. (2012) 342 ITR 200 / 246 CTR 8 / 204 Taxman 166 / 65 DTR 12 (AAR)

S. 195 : Deduction at source - Non-resident - India-Netherland DTAA - Services giving knowledge and experience in the nature of assistance to team of Indian company - Taxable in India
The applicant is Netherland company, engaged in the manufacture and sale of sugar confessionary and gum. The services giving knowledge and experience of the confectionary industry to an Indian company were technical in nature. The agreement clearly shows that the services were in the nature of assistance to team of Indian company. The recipient of the services was bound to apply specified services to optimize the profit to give maximum royalty based on turnover. Therefore, the services under the service agreement when read with the trademark and technology and know-how licence agreement, fell within the purview of article 12(5) of the DTAA. Therefore, the payment was taxable as per DTAA and Indian Company is liable to withhold taxes under Section 195 of the Act.
Perfetti Van Melle Holding B.V., In re (2012) 342 ITR 200 / 246 CTR 8 / 204 Taxman 166 / 65 DTR 12 (AAR)

S. 195 : Deduction at source - Non-resident - Other sums - Interest - Interest payment to Swedish company is not taxable in India hence the assessee has no obligation to with hold the tax
The assessee is engaged in the business of providing telecommunication services across different circles in India. During course of its business, it entered in to a contract with Ericsson India (P) Ltd. and Ericsson AB for procuring cellular telecommunication equipment, soft ware services and documentation. To facilitate the financing for such procurements, the assessee availed the of a loan facility from ABN Amro Bank Stockholm Branch and NORDEA Bank AB Sweden. Loans taken from Swedish Banks guaranteed by Swedish Export Credits Guarantee Board. The assessee approached the Authority for advance ruing on the plea that all the agreements relating to the transaction were negotiated and concluded outside India. It takes the stand that loan having been guaranteed by EKN, the interest paid under the transactions is not liable to charge to tax in India under the income-tax Act in view of article 11(3) of Double Taxation Avoidance Convention between India and Sweden. The Authority held as under
(i) That guaranteeing a loan is not the same as extending a loan or endorsing a loan. Thus, on the basis of article 11(3) of the DTAA between India and Sweden, the applicant could not claim that the interest paid or payable could not be taxed in India.
(ii) That in view of the Protacol to the DTAA in which there was a most favoured nation clause covering interest dealt with in article (11)(3) of the DTAA, even a loan or credit guaranteed by EKN

would come within the purview of the exemption contained in article 11(3) of the DTAA. Therefore, the payment of interest by the applicant to SEK through NORDEA Bank AB was not taxable in India under article 11(3) of the Double Taxation Avoidance Agreement between India and Sweden.

(iii) That since it was claimed that SEK had no permanent establishment in India, there would be no obligation on the applicant to with hold taxes under section 195 of the Income-tax Act, 1961, on the interest payable on the transaction.

Idea Cellular Limited (2012) 343 ITR 381 / 248 CTR 124 / 206 Taxman 238 / 68 DTR 109 (AAR)

S. 195 : Deduction at source - Non-resident - Other sums - DTAA - India-Japan - Informatics software and services - Royalty - Payment received from the sale of software products to the end users/customers through its independent reseller in India is royalty, hence tax is deductible [Art. 7, 12]

The applicant, a Japanese scientific informatics software and services company for life sciences, chemical and material research and development was a subsidiary of a company incorporated in the U.S.A. It had a liaison office in India which acted as a co-ordinator. No sales were carried through the liaison office. The applicant sought an advance ruling on the questions whether payment received by the applicant from sale of software products to end users / customers through an independent resellers in India were taxable as business profits under Article 7 of the DTAA between India and Japan, whether payments received by the applicant from sale of software products to end user / customers through its independent reseller in India would not constitute "royalties and fees for technical services" as defined in article 12 of the DTAA and whether any tax needed to be deducted by the customers while making remittances to the applicant as consideration. The Authority ruled that:

(i) That what was paid by the reseller to the applicant and for updates and maintenance was royalty and not business income covered by article 7 of the DTAA.

(ii) That the payments received by the applicant from the sale of software products to the end users/customers through its independent reseller in India were royalty as defined in article 12 of the DTAA.

(iii) That tax needed to be deducted by the customers while making the remittances to the applicant as consideration for the software supplied to them.

Acclerys K. K. (2012) 343 ITR 304 / 248 CTR 163 / 68 DTR 206 (AAR)

S. 195 : Deduction at source - Non-resident - Secondment agreement - Reimbursement of salaries to US principal - Right to terminate secondment is not right to terminate employment, payment not reimbursement but income, withholding under section 195 subject to adjudication by assessing authority [S. 9(1)(1)]

The applicant, an Indian company is a wholly owned subsidiary of a company incorporated in USA. It entered into an agreement with its U.S. principal for seconding certain of the employees of the principal to the applicant based on the U.S. principal's global mobility policy. The applicant was to reimburse the principal for salaries of these employees and also pay the principal a service charge at $ 15 per employee per payroll cycle for processing the payroll of the seconded employees. These employees are to act in accordance with the instructions and directions of the applicant.

The questions before the Authority were whether amount reimbursed to US principal on cost to cost basis under the terms of secondment agreement would be taxable in India and taxes to be withheld and whether payments for payroll processing charges is taxable as per the provisions of the DTAA between India and USA.

Authority observed that mere right of applicant to terminate secondment of employees from its foreign parent is not sufficient to establish employer-employee relationship. Right to terminate secondment is not the right to terminate their employment. In the result, what is paid by applicant to foreign parent under the secondment agreement is not mere reimbursement but is income chargeable

to tax. As applicant has not furnished adequate details and not sought any ruling on whether reimbursement and payroll processing payments are fees for technical services, payments to foreign parent held liable to withholding tax under section 195 subject to any final adjudication by assessing authority.

Target Corporation India (P) Ltd In re (2012) 348 ITR 61 / 75 DTR 385 / 209 Taxman 601 / 252 CTR 242 (AAR)

S. 197 : Deduction at source - Certificate for lower rate - Pendency of proceedings [S. 264, 276B, 271C, Income-tax Rules, 1962 - 28AA, Constitution of India - Art. 226]

Issue of certificate under sub section (1) of section 197 is mandatory on fulfillment of conditions enumerated under the Rules. Rejection of application of assessee on the ground that the assessee had violated the provisions of TDS and proceedings under section 276B and 271C were pending was not sustainable. None of these grounds validly form part of reasons for rejecting an application filed by an assessee under section 197(1) r/w/r 28AA. The objection raised by the Revenue with regard to alternative remedy of revision available under section 264 cannot act as a complete bar to the exercise of writ jurisdiction of this Court. Where the order challenged is patently illegal or invalid as being contrary to law, the petition would lie to the High Court. Assessing Officer is directed to redecide the application within a period of two weeks.

Serco BPO (P) Ltd. v. ACIT (2012) 77 DTR 81 / 253 CTR 410 (P&H)(HC)

S. 197 : Deduction at source - Certificate for lower rate - Certificate cannot be denied on the ground that financial year is over directed to issue certificate

Assessee was a non-profit making organization involved in general public utility services. In past certificate of no-deduction was issued under section 197, for F.Y. 2009-10. Assessee filed its application on 22-6-2009 for issuance of certificate under section 197. Said application was rejected by impugned order dated 13-8-2010 on ground that there was letter of Assessing Officer dated 25-3-2010 reporting ITO(TDS) that an amount of Rs. 27,36,625/- for A.Y. 2004-05 and Rs. 4,62,13,909/- for year 2005-06 was outstanding against assessee. However, it was found that such reason was not at all correct because as on 25-3-2010, no dues was outstanding against assessee as demand raised for A.Y. 2004-05 and 2005-06 was nullified by Tribunal much before. The Court held that necessary certificate should be issued by ITO(TDS) making it effective for F.Y. in question and same could not be denied on ground that relevant financial year was over. (A.Y. 2010-11)

Management Committee (CFH Scheme) v. ITO (2012) 210 Taxman 491 / 252 CTR 363 / 76 DTR 1 (Orissa)(HC)

S. 199 : Deduction at source - Credit for tax deducted - Income assessed - Assessee is entitled to credit on TDS certificate only in the A.Y. in which income on which tax is deducted is assessed [S. 194A]

The assessees were holding cumulative terra deposits in banks entitling them for interest on deposits which was periodically credited by the bank in the deposit account. As required under section 194A the bank recovered tax at source on interest credited in the deposit account of the assessees. Assessees claimed credit of tax based on TDS certificates issued by Banks however the interest income was not offered to tax. Assessing Officer has not allowed the credit for tax deducted. Before Commissioner(Appeals) it was contended that only TDS deducted may be assessed as income for the relevant year and entitled to refund of balance amount of tax deducted. Commissioner(Appeals) held that even if interest is not assessable in the A.Y. concerned the assessees are entitled to credit for tax deducted at source in the A.Y. relevant previous years during which recovery of tax and remittance of the same was made to banks. On appeal filed by the revenue the Tribunal held that the assessees are entitled to full credit of tax in the A.Y. concerned, no matter interest income on which deduction has been made is not returned or assessed in those A.Y. On appeal by revenue to High Court, the High

Court held that as per section 199 read with Rule 37BA, assessee is entitled to credit based on TDS certificate in the A.Y. in which income from which tax is deducted is assessed. Accordingly the departmental appeal was allowed. (A.Y. 1997-98 to 2000-01)

CIT v. Pushpa Vijoy (Smt) & Ors. (2012) 67 DTR 354 / 206 Taxman 22 / 247 CTR 575 / Vol. 42 Tax. L R. 301 (Ker.)(HC)

S. 199 : Deduction at source - Credit for tax deducted - Year of credit - Rent - Credit to be given in the year of receipt [S. 194I]

One 'G' desired to take the franchisee of 'T', a brand belonging to the assessee-company. For said purpose, the franchisee needed to take some property on rent. The property which was so chosen belonged to five members of 'S' family. Since the landlords did not know the franchisee very well, they did not prefer to enter into a direct agreement with 'G'. As such, a rent agreement was executed between 'A' Ltd., a sister-concern of the assessee and the franchisee in terms of which 'G' paid the rent to the assessee after deduction of tax at source. The assessee paid over the gross amount of rent to 'A' Ltd., on gross basisand 'A' Ltd., paid the rent to the landlords after deduction of tax at source at the rate applicable. The assessee filed its return declaring total loss of Rs. 7.72 crore. On the basis of the AIR information for CASS-08, it transpired that the assessee-company received rent of Rs. 39 lakh. The Assessing Officer observed that the assessee had claimed credit for tax deducted at source without offering the amount of rent for taxation from which such tax was deducted. On being called upon to explain as to why the said rental income was not offered for taxation, it was submitted that the assessee and 'A' Ltd., were only the link between landlords of the property and the franchisee. That was stated to be the reason for which the assessee had not shown any rental income. The Assessing Officer, on going through the assessee's explanation, agreed that the assessee did not receive any rental income. He, therefore, did not make any addition on this account. However, he held that the amount of TDS could not be refunded to the assessee as the assessee had not shown any income from rent. Held that, in case where amount on which tax was deducted at source is not at all chargeable to tax, command of section 199 will have to be harmoniously and pragmatically read as providing for allowing credit for tax deducted at source in year of receipt of amount, in which tax was deducted at source. Since assessee received amount after deduction of tax at source from 'G' and such amount was not admittedly chargeable to tax in its hands, credit for tax deducted at source was to be allowed in instant year. (A.Y. 2007-08)

Arvind Murjani Brands (P.) Ltd. v. ITO (2012) 137 ITD 173 / 76 DTR 252 / 149 TTJ 221 (Mum.)(Trib.)

S. 199 : Deduction at source - Credit for tax deducted - Deducted twice - Credit must be given

There was one transaction resulting into income but deduction of tax at source has been made twice to facilitate the compliance with the requisite provisions; assessee having received the impugned amount after deduction of tax at source from G&G and such amount not admittedly chargeable to tax in its hands, credit for TDS should be allowed to assessee in the previous year relevant to A.Y. under consideration. (A.Y. 2007-08)

Arvind Murjani Brands P. Ltd. v. ITO (2012) 149 TTJ 221 / 137 ITD 173 / 76 DTR 252 (Mum.)(Trib.)

S. 199 : Deduction at source - Credit for tax deducted - Assessing was directed to give credit for tax deducted at source

After processing the return under section 143(1) assessee filed a rectification petition enclosing copy of TDS certificate on which no action had been taken by Assessing Officer. Commissioner(Appeals) rejected claim of assessee holding that non-granting of TDS did not arise out of impugned assessment order. The Tribunal held that, if TDS was relating to A.Y. under consideration, Assessing Officer whenever determined an amount of tax due from assessee, he had to consider TDS certificate relevant

to A.Y. under consideration. Accordingly the Tribunal directed the Assessing Officer to consider TDS certificate filed by assessee relating to relevant A.Y. and give credit for same. (A.Y. 2005-06, 2007-08)

Imerys Ceramics (India) (P.) Ltd. v. ACIT (2012) 54 SOT 84 (URO)(Hyd.)(Trib.)

S. 201 : Deduction at source - Failure to deduct or pay - Salary - VRS - Bonafide - Assessee cannot be held as assessee in default - Not liable for interest [S. 10(10C), 192, 201(1A)]

Assessee has deducted the tax at source in regard to payments in excess of that permitted under Rule 2BA, assessee acted in a bonafide manner and could not be treated as assessee in default. The department has accepted in assessments of employees that they are entitled to exemption under section 10(10C), in respect of amounts received under the VRS and assessee having deducted tax at source. Assessee cannot be held as assessee in default. (A.Y. 2002-03)

CIT v. Maruti Udyog Ltd. (2013) 350 ITR 81 / (2012) 66 DTR 201 / 204 Taxman 649 (Delhi)(HC)

Editorial:SLP dismissed . CIT v. Maruti Udyog Ltd (SLP (c) no 3778 of 2012 dt 3-12- 2012)(2013) 216 Taxman 206 (Mag.) (SC)

S. 201 : Deduction at source - Failure to deduct or pay - Assessee in default - Salary - Perquisite - Concessional education - Assessee is liable to pay interest - Income-tax Rules, 1962, Rule 3(5) [S. 201(1A)]

While computing the perquisite value of free /concessional education provided by assessee towards its teachers / staff, the cost of education per student exceeds Rs. 1000/- per month, entire perquisite value shall be reckoned in the hands of recipient and the assessee deducted tax at source considering only Rs. 1000/- per month per child in determining the such perquisite there occurred a resultant short deduction of tax at source, hence the assessee is liable to be treated as assessee in default under section 201(1) and interest under section 201(1A). (A.Y. 2003-04)

CIT v. Director, Delhi Public School (2012) 66 DTR 149 / 247 CTR 308 / (2011) 202 Taxman 318 (P&H)(HC)

S. 201 : Dedcution at source - Failure to deduct or pay - Assessee in default - Limitation of four years - Order of Tribunal set aside to decide in accordance with law

Assessee did not deduct the tax as required under section 192 of the Act for the A.Y. 1994-95 to 1997-98. Assessing Officer passed the order under section 201(1) and 201(1A) on 20th December, 2005. On appeal the Commissioner(Appeals) dismissed the appeal of assessee. On further appeal to Tribunal the Tribunal held that Assessing Officer was not empowered to issue a show cause notice after a period of four years from the end of the F.Y. Accordingly the Tribunal quashed the order. On appeal by revenue the Court held that "It is true that a principle has been laid down in State of Gujarat v. Patil Raghav Natha (1969) 2 SCC 187, while dealing with suo motu revisional jurisdiction that though there is no period of limitation prescribed of that power, still such a power must be exercised with in reasonable time. The said judgment has been applied in matters relating to section 6 of the Land Acquisition Act in a large number of cases, which were all referred to in recently in Ram Chand v. UOI (1994) 1 SCC 45. In our view, this line of cases can not ordinarily apply to monies withheld by a defaulter, who holds them in trust". The Court held that in the absence of limitation period prescribed for taking action under section 201, Tribunal erred in holding that period of four years was the reasonable period to issue of show cause under section 201 by the Assessing Officer to assessee. The Court set aside the order of Tribunal. (A.Y. 1995-96)

CIT v. H. M. T. Ltd. (2012) 340 ITR 219 / 248 CTR 103 / 67 DTR 405 (P&H)(HC)

S. 201 : Deduction at source - Failure to deduct or pay - Limitation - For initiating proceedings under section 201, issuance of notice beyond reasonable time period of 4 years, barred by limitation

Even if no period of limitation is mentioned or prescribed, the statutory power must be exercised within reasonable period. Therefore, notice under section 201 and 201(1A) issued beyond the reasonable period of four years were barred by limitation. (A.Y. 1992-93, 1993-94/1996-97)
CIT v. Satluj Jal Vidyut Nigam Ltd. (2012) 71 DTR 145 / 250 CTR 113 (HP)(HC)
CIT v. Satluj Jal Vidyut Nigam Ltd. (2012) 345 ITR 552 (HP)(HC)

S. 201 : Deduction at source - Failure to deduct or pay - Assessee in default - Once certificate is issued under section 197(1), assessee cannot be held to be assessee in default [S. 195, 197(1), 201(1A)]
The assessee is a private Limited company having business of project and construction management. The assessee made application under section 197 in respect of not deducting the tax in respect of payment to be made to non-resident in terms of section 195. The Assessing Officer issued the certificate under section 197, the payments were made only after receipt of certificate from the Assessing Officer. The Assessing Officer thereafter treated the assessee in default and levied the tax and interest. In appeal order of Assessing Officer was confirmed .On appeal to the Tribunal the Tribunal held that the assessee cannot be held to be assessee in default hence levy of interest under section 201(IA) was held to be not justified, however the Tribunal confirmed the finding of lower authorities and held that the payments which were made by the assessee not being reimbursement the assessee ought to have deducted the tax at source. Revenue has filed an appeal against the order of Tribunal and the assessee has filed the cross objection on merit sating that the payment made was reimbursement and not in the nature of a fee for managerial services. The Court held that once a certificate is issued under section 197 there is no obligation on the part of the payer to deduct tax at source; even if tax is payable under the Act, the payer cannot be treated as an assessee in default. As the Court has decided the issue on section 197, it has not decided the issue on merit (A.Y. 2003-04 to 2005-06)
CIT v. Bovis Lend Lease (India) (P) Ltd. (2012) 73 DTR 31 / 208 Taxman 168 (Karn.)(HC)
Bovis Lend Lease (India) (P) Ltd. v. CIT (2012) 73 DTR 31 / 208 Taxman 168 (Karn.)(HC)

S. 201 : Deduction at source - Failure to deduct or pay - Assessee in default - Tax paid by payee - Such vicarious liability cannot be invoked to make good short fall of tax collection, when tax liability is discharged by recipient of income [S. 191]
By the virtue of insertion of Explanation to section 191 w.e.f. 1st June 2003, a person can be treated as an assessee in default under section 201(1), only when there is lapse in deduction at source on his part and in addition to this lapse, the recipient of income has also failed to pay such tax directly. The reasons are not difficult to fathom. Proceedings under section 201(1) are not penal proceedings. These are vicarious proceedings to make good the shortfall in tax collection and when the tax liability is duly discharged by the recipient of income embedded in payment, such vicarious liability cannot be invoked. Unlike section 271C, 201(1) is not of penal in nature. (A.Y. 2006-07 to 2009-10)
Chhattisgarh State Electricity Board v. ITO (2012) 65 DTR 1 / 143 TTJ 151 / 14 ITR 91 / 50 SOT 33 (Mum.)(Trib.)

S. 201 : Deduction at source - Failure to deduct or pay - Assessee in default - Appeal - Commissioner(Appeals) - Appeal is maintainable [S. 246A]
The Commissioner(Appeals) held that the Assessing Officer has passed an order levying the interest under section 201 hence the appeal is not maintainable. The Tribunal held that order passed under section 201 is appealable. (A.Y. 2007-08 to 2009-10)
Canara Bank v. Dy. CIT (TDS) (2012) 134 ITD 1 / 67 DTR 391 / 144 TTJ 668 (Luck.)(Trib.)

S. 201 : Deduction at source - Failure to deduct or pay - Limitation - Extended time limit in section 201(3) Proviso does not save proceedings initiated before 1-4-2010 even if order passed after that date, hence the orders were barred by limittaion

Pursuant to a search conducted on 11.09.2007, the Assessing Officer passed an order dated 27.4.2010 under section 201(1) / 201(1A) for F.Y. 2002-03, 2003-04 and 2004-05 in respect of TDS on salary & perquisites of expatriate employees. The assessee relied on CIT v. NHK Japan Broadcasting Corporation (2008) 305 ITR 137 (Delhi)(HC) & CIT v. Hutchison Essar Telecom Ltd. (2010) 323 ITR 230 (Delhi) (HC) & argued that as the order was passed after 4 years from the end of the F.Y., it was barred by limitation. The Assessing Officer relied on the Proviso to section 201(3) inserted by the F.A. 2009 w.e.f. 1-4-2010 which provides that an order for a financial year commencing on or before 1.4.2007 may be passed at any time on or before 31.3.2011. The CIT(A) allowed the appeal on the ground that one had to see the law as of the date of initiation of proceedings and held that the order was beyond limitation. On appeal by the department, Held dismissing the appeal:

Section 201(3) inserted by the F.A. 2009 w.e.f. 1.4.2010 imposes a time limit for the passing of section 201 orders. The Proviso to section 201(3) provides that an order for a F.Y. commencing on or before 1.4.2007 may be passed at any time on or before 31.3.2011. In the present case, the proceedings were initiated after the search on 16.11.2009. On this date, the amended provisions of section 201(3) had not come into force. Accordingly, the law prevailing as on that date as per NHK & Hutchison applied where it was held that an order under section 201 could not be passed after the expiry of 4 years from the end of the F.Y. The section 201 order was consequently beyond limitation. Orderes were held barred by limitation [CIT(TDS) v. H.M.T. Ltd. ITA Nos. 524 to 527 of 2009 dt. 14-7-2011 (2012) 67 DTR 405 (P&H)(HC) & Bhura Exports Ltd. v. ITO(TDS) (2011) 202 Taxman 88 (Cal.)(HC) not followed]. (A.Y. 2003-04 to 2005-06)

ACIT v. Catholic Relief Services (2012) 18 ITR 430 / (2013) 55 SOT 405 (Delhi)(Trib.)

S. 201 : Deduction at source - Failure to deduct or pay - Payment of tax by recipient - Before assessing the assessee to be in default under section 201 for TDS Liability, Assessing Officer to show that recipient has not paid the tax [S. 194C]

The Assessing Officer has passed an order under section 201 in which he held the assessee to be in default for failure to deduct TDS under section 194C on payments made to contractors. The assessee's argued that in view of Hindustan Coca Cola Beverages (P) Ltd. v CIT (2007) 293 ITR 226 (SC), the tax could not be recovered from it as it must have been recovered from the recipient was rejected on the ground that the onus was on the assessee to prove that the recipient had paid the taxes. On appeal by the assessee to the Tribunal, held, allowing the appeal: In view of the judgment of the Allahabad High Court in Jagran Prakashan Ltd. v. Dy. CIT (TDS) (2012) 345 ITR 288 (All.)(HC), there is a paradigm shift in the manner in which recovery provisions under section 201(1) can be invoked. Section 201 is intended to make good the loss of revenue suffered by the revenue as a result of non-deduction of tax. However, the question of making good the loss arises only when the recipient of income has not paid tax and, therefore, the department has to establish that the recipient of income has not paid due taxes thereon. The non payment of taxes by the recipient is a condition precedent to invoking section 201(1) & the onus is on the Assessing Officer to demonstrate that the condition is satisfied. The assessee has to submit all such information about the recipient as he is obliged to maintain under the law. Once this information is submitted, it is for the Assessing Officer to ascertain whether or not the taxes have been paid by the recipient of income. (A.Y. 2005-06, 2006-07, 2008-09)

Ramakrishna Vedanta Math v. ITO (2012) 18 ITR 603 (Kol.)(Trib.)

S. 201 : Deduction at source - Failure to deduct or pay - Assessee in default - Recipient has paid the tax

The Act provides for three different consequences for lapse on account of non deduction of tax at source viz., penal provisions [section 271C], and interest provisions [section 201(1A)] and recovery provisions [section 201(1)]. As far as the matter under the later two provisions were concerned, the former provides for levy of interest in case of any delay in recovery of such taxes and the later provisions seek to make good any loss to revenue on account of lapse by the assessee tax deductor. The Tribunal added that the question of making good the loss of revenue arises only when there is indeed a loss of revenue and the loss of revenue can be there only when recipient of income has not paid tax. Therefore, it held that recovery provisions under section 201(1) can be invoked only when loss to revenue is established, and that can be established when it is demonstrated that the recipient of income has not paid due taxes thereon. (A.Y. 2005-06, 2006-07, 2008-09)
Ramakrishna Vedanta Math v. ITO (2012) 18 ITR 603 (Kol.)(Trib.)

S. 201 : Deduction at source - Failure to deduct or pay - Reimbursement of expenses [S. 195]
Reimbursement of relocation related expenses of employees had no element of income embedded in such payments. No mark up has been made and the disputed payments are purely reimbursement of actual expenses incurred. As there is no obligation to deduct tax at source, Assessee could not be treated as an assessee in default under section 201(1). (A.Y. 2007-08)
Global E-Business Operations (P) Ltd. v. Dy. CIT (2013) 151 TTJ 19 / (2012) 76 DTR 106 / 52 SOT 457 (UO)(Bang.)(Trib.)

S. 201 : Deduction at source - Failure to deduct or pay - As the provision was made without making specific entries into the accounts of the parties and the payee was not identifiable, the TDS provisions are not applicable - Once the amount has been disallowed under section 40(a)(i) for non-deduction of tax, it cannot be subject to TDS provisions again so as to make the assessee liable to pay the tax under section 201 & interest under section 201(1A) [S. 40(a)(ia), 194C to 194J]
The assessee made a provision for Rs. 10 crores in respect of payment due to various parties but did not deduct TDS thereon. The provision was made without making specific entries into the accounts of the parties. The assessee disallowed the expenditure in respect of the said provision under section 40(a)(i) & 40(a)(ia). Next year the entire provision of expenses was written back and the actual amounts paid to the respective parties were credited to their respective accounts after deducting TDS. The Assessing Officer held that despite such disallowance, the assessee was liable under section 201 as an assessee-in-default for failure to deduct TDS. On appeal by the assessee, held by the Tribunal:
(i) As the provision was made without making specific entries into the accounts of the parties and the payee was not identifiable, the TDS provisions are not applicable. The whole scheme of TDS proceeds on the assumption that the person whose liability is to pay an income knows the identity of the beneficiary or the recipient of the income. The TDS mechanism cannot be put into practice until identity of the person in whose hands it is includible as income can be ascertained [IDBI v. ITO (2007) 107 ITD 45 (Mum.) followed];
(ii) Once the amount has been disallowed under section 40(a)(i) for non-deduction of tax, it cannot be subject to TDS provisions again so as to make the assessee liable to pay the tax under section 201 & interest under section 201(1A). If the Assessing Officer's view was accepted that the assessee was liable to pay the TDS not deducted, then a disallowance under section 40(a)(i) and 40(a)(ia) cannot be made and those provisions may become otiose. (A.Y. 2007-08)
Pfizer Ltd. v. ITO (2013) 55 SOT 277 (Mum.)(Trib.)

S. 201 : Deduction at source - Failure to deduct or pay - Interest - Amount of tax deducted at source would be treated as paid to Govt. when said amount is actually credited and actually paid to Govt. of India

Levy of interest under section 201(1A) is mandatory in nature and time taken for clearance of cheques and Govt. holidays and any reasonable cause were not reasons which could be considered while levying interest under section 201(1A). Amount of TDS would be treated as paid to Govt. when said amount is actually credited and actually paid to Govt. of India. Since assessee had not deposited TDS within prescribed time, assessee was liable for interest under section 201(1A). (A.Y. 2008-09)
G. M. MPRRDA, PIU v. ITO (2012) 53 SOT 268 (Agra)(Trib.)

S. 201 : Deduction at source - Failure to deduct or pay - Payment of interest by partners to firms - Losses incurred by firms - Penalty - Interest is not payable if no tax is payable by firm - Penalty is leviable id no tax is payable by firm - Matter remanded [S. 194A, 201(1A)]
Contention of the assessee that the position of legal relationship between the partners and the partnership firms as prevailing under the partnership Act should be applied for the purposes of section 194A also cannot be accepted. Income-tax Act recognizes a partner and a partnership firm as different persons despite the legal position of inter se relationship between them under Partnership Act. Further, section 194A provides exemption from the obligation imposed under that section only in respect of interest paid/credited by a firm to its partner and not in respect of interest paid/credited by a partner to the firm. If the partnership firms have declared losses in their returns, there is no question of liability for tax or tax due in the hands of the said firms. Therefore, assessee are not to be treated as assessees in default under section 201(1) subject to verification of fact of filing of returns by the respective firms by duly including the interest paid by the assessee. Hence, the orders of the CIT(A) on this issue are set aside and the matter is restored to Dy. CIT(TDS) to verify the claim of the assessee. As regards interest under section 201(1A), it is well settled that if any interest is chargeable under the Act, same can be charged only if the Govt. is deprived of its funds or any loss is caused to the Govt. Since interest is compensatory in nature. In the instant case, even if the assessee had deducted and remitted the TDS amount on the interest paid to the partnership firms, the same is to be refunded to the said firms as there is no tax liability in their respective hands. Hence, assessee are not liable to pay interest under section 201(1A) if the recipients of interest viz. Partnership firms are not liable to pay tax. It is not known whether the returns filed by the partnership firms have been accepted as it is by the Revenue or not. Hence, these facts require verification. Therefore, orders passed by the CIT(A) on the issue of levy of interest under section 201(1A) are also set aside and the matter is restored to Dy. CIT to verify whether or not the recipients of the interest i.e. partnership firms, were liable to pay tax and then take appropriate decision about chargeability of interest under section 201(1A) in the hands of the assessee. (A.Y. 2005-06 to 2007-08)
Thomas Muthoot v. Dy. CIT (2012) 80 DTR 33 / 150 TTJ 665 / (2013) 21 ITR 133 (Cochin)(Trib.)
Thomas Johan Muthoot v. Dy. CIT (2012) 80 DTR 33 / 150 TTJ 665 / (2013) 21 ITR 133 (Cochin)(Trib.)
Thomas Geroge Muthoot v. Dy. CIT(2012) 80 DTR 33 / 150 TTJ 665 / (2013) 21 ITR 133 (Cochin)(Trib.)

S. 201(1A) : Deduction at source - Failure to deduct or pay - Assessee in default - Salaries - Perquisites - Validity of rule 3 [S. 17(2), 192, 201, Income-tax Rules, 1962 - Rule 3]
Respondent association challenged validity of amended rule 3 by filing writ petition before High Court. High Court admitted writ petition and granted interim relief by its order dated 20-2-1996. In view of such interim relief ONGC, being employer, did not comply with TDS obligation in respect of salaries it paid to its officers. In meanwhile Supreme Court in Arun Kumar v. UOI (2007) 1 SCC 732 upheld the validity of Rule 3, In view thereof High Court dismissed writ petition and, consequently interim relief granted by it was vacated vide an order dated 15-3-2010. High Court gave three months to ONGC to comply with TDS obligation under section 192 read with Rule 3. ONGC however denied its TDS obligation. Moment writ petition was dismissed and interim relief was vacated on 15-3-2010,

parties were to revert back to position they had on 20-2-1996 when interim relief was granted .therefore, ONGC could not deny its TDS obligation, however, during period when interim relief was in force (20-2-1996 to 15-3-2010) ONGC could not be held to be assessee-in-default and, therefore, no interest under section 201(1A) could be charged from ONGC for said period ,however, since ONGC did not comply with directions of High Court, it would be deemed to be an assessee-in-default with effect from 16-3-2010 and accordingly, would be liable for charge of interest under section 201(1A) from 16-3-2010.

Regional Director ONGC Ltd. v. Association of Scientific &Technical Officers of ONGC Ltd. (2012) 211 Taxman 593 /(2013) 354 ITR 156/ 84 DTR 460(SC)

Editorial:- From the judgment of Bombay High Court WP No. 155/1996 dated 15-3-2012, NM No. 364 /2010 in RP No. 43/2010 in WP No. 155/1996 dated 26-7-2010.

S. 206AA : Requirement to furnish Permanent Account Number - Deduction at source - PAN law read down to not apply to assessees without taxable income [S. 139A, Constitution of India, 1950, Art. 14, 226]

The assessee, whose income was below taxable limit, filed Form 15G and requested that no TDS be deducted on the interest on fixed deposit. However, she was informed that in view of section 206AA inserted by FA 2009, TDS would have to be deducted in the absence of PAN. The assessee filed a writ petition to challenge section 206AA as being arbitrary and unconstitutional to the extent that it compelled persons with no taxable income to obtain a PAN. Held upholding the challenge:

Under section 139A, only persons whose income is chargeable to tax are required to obtain a PAN. However, section 206AA compels even persons without a taxable income to obtain a PAN to avoid TDS. This creates difficulty for poor and illiterate persons who make small investments and discourages them to invest money. Section 206AA runs counter to section 139A and is discriminatory. Though the Legislature's intention is to bring maximum persons under the income-tax net, it may not insist that even persons whose income is below the taxable limit have to compulsorily obtain a PAN. If any tax avoidance is detected, that can be taken care of by penal provisions. Accordingly, section 206AA is read down as being inapplicable to persons whose income is less than the taxable limit. Banks & financial institutions should not insist upon PAN from such small investors. It continues to apply to persons whose income is above the taxable limit.

A. Kowsalya Bai (Smt) v. UOI (2012) 346 ITR 156 / 208 Taxman 208 / 74 DTR 193 / 251 CTR 150 (Karn.)(HC)

S. 206C : Collection at source - Licence fee - Purchase price - Licence fee for liquor business did not form purchase price hence not required to collect tax at source

Licence fee is the auction money which is offered by a buyer in an auction at the fall of hammer in an auction. It is a fee charged by the Govt. for granting exclusive privilege of selling by retail any country liquor or foreign liquor in the shop. Said privilege is a permission to carry on the liquor business. There is no sale or purchase of that right as it does not relate to a merchandise goods. It is merely a sort of leave and licence to carry on the business in liquor. Element of 'sale' as conceptually understood is not involved while charging licence fees. Therefore, it was held that the licence fee did not form part of purchase price of the liquor and assessee was not required to collect tax at source on the licence fee. (A.Y. 1989-90 to 1997-98)

CIT v. District Excise Officer, Muzaffar Nagar & Anr. (2012) 254 CTR 442 / 209 Taxman 386/(2013) 353 ITR 48 (All.)(HC)

S. 206C : Collection at source - Scrap - Importer and dealer - Importer and dealer in recycled ferrous and ferrous metals - Not liable to pay tax

Assessee, an importer and dealer in recycled ferrous and non ferrous metals, was not liable to collect tax at source under section 206C from the sale of said recycled metals to manufacturers and to other

traders as the scrap sold is not the scrap as defined in Explanation (b) to section 206C, since scrap sold was neither generated from the manufacture or mechanical working of materials. The scrap was neither sold nor usable as such. In view of the matter Commissioner(Appeals), was not justified in upholding the orders under sections 206(6) / 206(7) passed by the Assessing Officer directing the assessee to pay the tax. (A.Y. 2009-10 & 2010-11)

Nathulal P. Lavti v. ITO (2012) 65 DTR 133 / 143 TTJ 509 (Rajkot)(Trib.)

S. 206C : Collection at source - Scrap - Manufacture - Manufacture Fluorine and Refrigerant - Scrap not connected with manufacture section 206C(6) is not attracted

The assessee is engaged in the manufacture of fluorine and other refrigerant gases. It had received payments on account of sale of scrap. The assessee had not collected tax at the time of receipt of the sale proceeds or at the time of debiting the account of purchasers. The Assessing Officer issued a show cause notice to the assessee to raise the demand for tax under section 206C(6) and interest under section 206C(7). The assessee submitted that the scrap sold by the assessee was plastic, drums, wooden scrap generated in the assessee's premises did not raise from manufacturing of product dealt with by the company and therefore provisions of section 206C were not attracted. The Assessing Officer did not agree with the submission of assessee and held that the provision is applicable, which was confirmed in appeal by Commissioner(Appeals). On appeal, the Tribunal held that the scrap sold by the assessee was not connected with manufacturing or mechanical working of material of fluorine and other refrigeration gasses, hence the provision of section 206 is not applicable hence no interest could be charged under section 206C(7), accordingly the appeal of assessee was allowed. (A.Y. 2009-10, 2010-11)

Navine Flourine International Ltd. v. ACIT (2011) 139 TTJ 248 / 45 SOT 86 / 56 DTR 273 / (2012) 14 ITR 481 (Ahd.)(Trib.)

S. 206C : Collection at source - Auction of parking lot - No contract executed - Tax at source to be collected as oral contract is a valid contract as per contract Act [Contract Act,1872. S. 2(h), 10]

Assessee, city development authority, auctioned for running of parking lots and allotted same to different person. As assessee defaulted in collecting taxes at source, Assessing Officer raised demand under section 206C(1C) along with interest. The assessee contended that though auction was held for parking lots, but no contract was executed. Thus, it was held that as an agreement could be oral in view of section 2(h) and section 10 of Contract Act, plea of assessee was to be rejected. Hence, order of Assessing Officer was upheld. (A.Y. 2007-08 & 2009-10)

Agra Development Authority v. ACIT (2012) 138 ITD 127/(2013) 85 DTR 296 (Agra)(Trib.)

S. 215 : Advance tax - Interest payable by assessee - Amount of cash seized - Question not answered, Civil appeal of revenue was dismissed

In instant case, assessment order did not give effect to amount seized in calculation of tax payable at end of A.Y. Further, there was no demand notice and there was no basis for claiming interest on advance tax due, in view of aforesaid vagueness, question of law raised by revenue was to be left open.

CIT v. Gold Tex Furnishing Industries (2012) 211 Taxman 108 (SC)

S. 220 : Collection and recovery - Assessee deemed in default - Stay - Stay has to be granted when assessed income is more than 47 times of income declared

Income assessed by the Assessing Officer was 47 times of income declared by assessee. Therefore instruction No. 95 dated 21st August, 1969 holds the field. Therefore assessee cannot be treated as assessee in default. (A.Y. 2008-09)

Maheswari Agro Industries v. UOI (2012) 346 ITR 375 / 246 CTR 113 / 65 DTR 129 / (2012) TLR Vol. 42 Feb. 168 / 206 Taxman 375 (Raj.)(HC)

S. 220 : Collection and recovery - Assessee deemed in default - Stay - Guidelines - Guidelines laid down on how stay applications should be dealt with

The assessee, a mutual fund, was a beneficiary of a trust named India Corporate Loan Securitisation Trust which was set up for securitising a loan of Rs. 300 crores by issue of Pass through Certificates (PTCs). The assessee had subscribed to the PTCs and its beneficial interest was proportionate to the PTCs subscribed. The Trust received interest of Rs. 21.49 crores in respect of a loan and distributed the income to its beneficiaries in their respective shares. The Assessing Officer passed an assessment order on the trust in the capacity of an Assessing Officer. Though a stay application was filed, the Assessing Officer, without disposing of the stay application, demanded that 50% of the demand be paid. He also directed the assessee to pay Rs. 9.63 crores on the ground that it was a member of the Assessing Officer (Trust) and was jointly and severally liable in respect of the demand against the Assessing Officer. The assessee filed a stay application which was disposed of by the Assessing Officer on 9.3.2012 (received by the assessee on 13.3.2012). On 12.3.2012, the Assessing Officer attached the assessee's bank account under section 226(3). The assessee filed a Writ Petition pointing out that the action had been in pursuance of the CBDT Chairman's letter dated 7.2.2012 promising postings commensurate with tax recovery. Held by the High Court:

The Revenue has made an unfortunate and hasty attempt to make a recovery of the demand without enabling the assessee to take reasonable recourse to the remedies available in law. The assessee filed a stay application before the Assessing Officer on 7.3.2012 and moved the CIT on 9.3.2012. Before service of the order rejecting the stay application, the assessee's bank account was attached on 12.3.2012. Administrative directions for fulfilling recovery targets for the collection of revenue should not be at the expense of foreclosing remedies which are available to assessees for challenging the correctness of a demand. The sanctity of the rule of law must be preserved. The remedies which are legitimately open in law to an assessee to challenge a demand cannot be allowed to be foreclosed by a hasty recourse to coercive powers. Assessing Officers & appellate authorities perform quasi-judicial functions under the Act. Applications for stay require judicial consideration. Rejecting such applications without hearing the assessee, considering submissions and indicating at least brief reasons is impermissible. In KEC International (2005) 251 ITR 158 guidelines regard to the manner in which applications for stay should be disposed of have been laid down. Unfortunately these guidelines are now being breached by the Revenue. In Coca Cola India (2006) 285 ITR 419 the conduct of the Revenue was deprecated. In attaching bank accounts even before communicating the order passed the following guidelines should be borne in mind for effecting recovery:

1. No recovery of tax should be made pending

(a) Expiry of the time limit for filing an appeal;

(b) Disposal of a stay application, if any, moved by the assessee and for a reasonable period thereafter to enable the assessee to move a higher forum, if so advised. Coercive steps may, however, be adopted where the authority has reason to believe that the assessee may defeat the demand, in which case brief reasons may be indicated.

2. The stay application, if any, moved by the assessee should be disposed off after hearing the assessee and bearing in mind the guidelines in KEC International;

3. If the Assessing Officer has taken a view contrary to what has been held in the preceding previous years without there being a material change in facts or law, that is a relevant consideration in deciding the application for stay;

4. When a bank account has been attached, before withdrawing the amount, reasonable prior notice should be furnished to the assessee to enable the assessee to make a representation or seek recourse to a remedy in law;

5. In exercising the powers of stay, the ITO should not act as a mere tax gatherer but as a quasi judicial authority vested with the public duty of protecting the interest of the Revenue while at the same time balancing the need to mitigate hardship to the assessee. Though the Assessing Officer has made an assessment, he must objectively decide the application for stay considering that an appeal lies against his order: the matter must be considered from all its facets, balancing the interest of the assessee with the protection of the Revenue.

UTI Mutual Fund v. ITO (2012) 345 ITR 71 / 249 CTR 190 / 69 DTR 306 / 206 Taxman 341 (Bom.)(HC)

S. 220 : Collection and recovery - Assessee deemed in default - Power - Reduction of period - Power under section 220(1) proviso to reduce period for payment of tax to be exercised after application of mind and recording reasons [S. 281B]

The Assessing Officer has passed an order under section 143(3) on 9.3.2012 raising a demand of Rs. 36.56 crores and directed the assessee to pay the entire demand within 7 days even though the period specified in 220(1) is 30 days. The assessee filed a stay application under section 220(6) on 12.3. 2012 which was rejected on the ground that it did not fall within the guidelines framed in the CBDT's instruction No. 1914 issued by the CBDT. The assessee approached the CIT pointing that there was no justification to demand payment within 7 days while section 220(1) granted 30 days and that as there was already a provisional attachment, there was no determinant to the revenue. The CIT rejected the application and the Assessing Officer attached the assessee's mutual fund investments section 226(3). The assessee filed a Writ Petition. Held by the Court:

The Proviso to section 220(1) which empowers the Assessing Officer to demand payment within a period lesser than 30 days with the prior approval of the JCIT cannot be exercised casually and without due application of mind. The Assessing Officer & JCIT must apply their mind on how it would be detrimental to the interests of the Revenue to allow the full period of 30 days and record reasons. The reasons & approval must be made available to the assessee if he seeks them. On facts, as there was already a provisional attachment under section 281B attaching the assessee's mutual funds to the extent of Rs. 36.54 crores, there would have been no basis for forming the reason to believe that allowing the period of 30 days would be detrimental to the Revenue. Merely because the end of the financial year is approaching that cannot constitute a detriment to the Revenue. The detriment to the Revenue must be akin to a situation where the demand of the Revenue is liable to be defeated by an abuse of process by the assessee. There is absolutely no justification for the Assessing Officer to demand payment in 7 days and his action is highhanded and contrary to law.

Firoz Tin Factory v. ACIT (2012) 71 DTR 185 / 209 Taxman 458 / 250 CTR 225 (Bom.)(HC)

S. 220 : Collection and recovery - Assessee deemed in default stay - Reasoned order - Assessing Officer must pass reasoned order to deal with stay applications

The Assessing Officer passed an assessment order raising a demand of Rs. 5.76 Crores. The assessee filed a stay application stating that the CIT(A) had heard the appeal and stay of demand be granted till the order on the appeal. The Assessing Officer rejected the stay application and directed that the demand be paid without giving any reasons. The assessee approached the Addl. CIT who noted that as the Assessing Officer had already started recovery proceedings, there was no point before him to consider. The assessee's bank accounts were attached under section 226(3). The assessee filed a Writ Petition. Held by the Court:

In several judgments of this Court, the parameters for the exercise of jurisdiction under section 220(6) of the Act have been spelt out. In KEC International Ltd. v. B. R. Balakrishnan (2001) 251 ITR 158, the importance of reasoned orders being passed on the stay applications was emphasized. The Assessing Officers consistently refuse to follow the law laid down in the judgment of this Court. The Assessing Officer & the appellate authorities are duty bound to act in accordance with binding

precedent and there is no reason or justification to act in the manner in which the applications for stay have been disposed of in this case. (A.Y. 2008-09, 2009-10)
Tata Toyo Radiators Pvt. Ltd. v. UOI (2012) 71 DTR 5 / 250 CTR 11 (Bom.)(HC)

S. 220 : Collection and recovery - Assessee deemed in default - Stay - Guidelines - Assessing Officer and Appellate authorities are not mere tax gatherers; have duty to be fair to the assessee
The assessee, a professional, offered income of Rs. 19.41 crores. The Assessing Officer passed an assessment order under section 143(3) assessing the total income at Rs. 22.43 crores and raised a demand of Rs. 1.18 crores. The assessee filed a stay application before the CIT(A) who directed that a refund of Rs. 78 lakhs due for a subsequent year be adjusted and the balance of Rs. 41 lakhs be paid. The CIT(A) held that considering "the financial status and affairs" of the assessee, the payment of the balance demand would not cause financial hardship. The assessee filed a Writ Petition to challenge the rejection of the stay application. Held by the Court allowing the petition:
The power which is vested in the Assessing Officer under section 220(6) and on the CIT(A) to grant a stay of demand is a judicial power. It is necessary for both the Assessing Officer as well as the appellate authorities constituted under the Income-tax Act to have due regard to the fact that their function is not merely to act as tax gatherers, but equally as quasi judicial authorities, they owe a duty of fairness to the assessee. This seems to be lost sight of in the manner in which the authority has acted in the present case. The parameters for the exercise of the jurisdiction to grant a stay of demand has been set out in several judgments of this Court, including in KEC International v. B. R. Balakrishnan (2001) 251 ITR 158. The assessee's submissions on merits require consideration. The CIT(A) ought to have devoted a more careful consideration to the issue as to whether a stay of demand was warranted. As out of a total demand of Rs. 1.18 crores, Rs. 78 lakhs has been adjusted, the balance has to be stayed. (A.Y. 2009-10)
Nishith Madanlal Desai v. CIT (2012) 345 ITR 545 / 72 DTR 169 / 250 CTR 412 (Bom.)(HC)

S. 220 : Collection and recovery - Assessee deemed in default - Power - Guidelines - Assessing Officer reminded that he is not mere "tax gatherer" and cautioned to follow guidelines for recovery of tax
The assessee, a public charitable trust, filed a ROI returning Nil income. The Assessing Officer passed a section 143(3) assessment order holding that the assessee was not eligible for section 11 exemption on the ground that the receipt of donations by it amounted to a commercial activity and assessed its total income at Rs. 3.51 crores. The assessee filed an application for stay under section 220(6). Without dealing with the stay application, the Assessing Officer directed the assessee to pay the demand within 3 days and threatened coercive proceedings in the event of failure. The assessee filed an application before the DIT who directed it to pay 50% of the demand by March, 2012 and the balance in installments. No reasons were given on why the stay application was not acceded to. The assessee filed a Writ Petition to challenge the direction: Held by the High Court:
In the present case, as in several cases which have come up before this Court and particularly in the month of March, it is evident that the Assessing Officer & DIT have both had scant regard to the parameters which have been laid down by this Court for disposal of stay applications in KEC International Ltd. (2001) 251 ITR 158 & UTI Mutual Fund. No reasons are indicated. The orders do not contain a prima facie evaluation of the issues which would arise in appeal. In UTI Mutual Fund, this Court was constrained to issue a cautionary observation to the effect that Assessing Officers and Appellate Authorities, when they dispose of applications for stay, act as quasi judicial authorities and not merely as tax gatherers of the Revenue. While they have a duty of protecting the interests of the Revenue, they need to mitigate the hardship to the assessee and applications for stay must be considered objectively. The assessee does have serious issues to be urged before the CIT(A) and the

Assessing Officer & DIT ought to have granted a complete stay of demand under section 220(6). (A.Y. 2009-10)

Rajasthani Sammelan Sarvoday Balika Vidyalaya and another v. ADIT (2013) 350 ITR 349 / (2012) 209 Taxman 493 (Bom.)(HC)

S. 220 : Collection and recovery - Assessee deemed in default - Power - Extralegal steps - Assessing Officer should not adopt "extra legal steps" of threatening or inducing the assessee for tax recovery

The assessee won Rs. 25 lakhs in "Kaun Banega Crorepati". On receipt of the prize money by the assessee from Star Plus, the Assessing Officer issued a notice under section 208 directing her to pay advance-tax. Though the assessee claimed that the prize was not taxable, the Assessing Officer deputed an Inspector and wrote a letter in which he threatened the assessee that 300% penalty would be levied and prosecution launched and that the assessee would have no defence. He also assured that upon receiving clarification from the CBDT, the advance-tax would be refunded with interest. Based on the threats of the Assessing Officer, the assessee paid advance-tax of Rs. 7.55 lakhs. In the section 143(3) order, the Assessing Officer held that the prize money was taxable under section 2(24)(ix) even though the amendment to tax TV game shows was inserted w.e.f. 1.04.2002. The CIT(A) accepted that section 2(24)(ix) did not apply but held that the prize money was chargeable as "income from other sources". The Tribunal upheld the Assessing Officer's stand that the winnings were taxable under section 2(24)(ix). The High Court remanded the matter to the Tribunal for reconsideration pursuant to which the Tribunal allowed the assessee's appeal and dismissed the department's appeals. The department filed an MA before the Tribunal which was also dismissed and no further appeal was filed by the department. In giving effect to the Tribunal's order, the Assessing Officer treated the winnings as "income from other sources" despite the Tribunal decision that the assessee's appeals were allowed. The assessee filed a Writ Petition to challenge the Assessing Officer's effect order. Held:

The Assessing Officer's action of assessing the award as income shows utter disregard to the order of the Tribunal and lacks judicial propriety which is not expected from the Assessing Officer who is subordinate to the Tribunal. The Assessing Officer's action of threatening the assessee with penalty and prosecution and deputing his inspector to collect the advance-tax is certainly not a healthy practice. In order to gain faith of the assessees and create confidence in the minds of the tax payers and for smooth administration of tax law, the Revenue authorities must act in a fair and legal manner. Every action of the State and its instrumentality should be fair, legitimate and above board and without any affection or aversion. The Government cannot be permitted to play dirty games with the citizens of this country to coerce them in making payments which the citizens were not legally obliged to make. If any money is due to the Government, the Government should take appropriate steps, but it should not take extra legal steps or adopt the course of maneuvering. Because of discontentment, it is necessary to provide guidelines for just exercise of the power of Revenue authorities. To prevent the abuse of power and to see that it does not become a new despotism, courts are gradually evolving the principles to be observed while exercising such power. New problems call for new solutions. (A.Y. 2001-02)

Lopamudra Misra v. ACIT (2011) 337 ITR 92 / 243 CTR 66 / 202 Taxman 437 / 59 DTR 257 / (2012) Vol.42 Tax L R 121 (Orissa)(HC)

S. 220 : Collection and recovery - Commissioner(Appeals) - Powers - Assessee deemed in default - Stay - Prima facie case - If prima facie case is in favour Of the assessee, full demand should be stayed [S. 251]

The Assessing Officer raised a demand under section 201 on the ground that the assessee ought to have deducted TDS under section 194-I instead of under section 194C. The assessee filed a stay application before the CIT(A) who observed that the there was "enough strength in the plea of the

assessee for stay of demand" but directed that 30% of the demand be paid. The assessee file a Writ Petition on the ground that as the CIT(A) had formed a prima facie opinion in favour of the assessee, he ought to have stayed the entire demand and not directed deposit of 30% thereof. Held by the High Court:

While it is true that on merely establishing a prima facie case, interim order of protection should not be passed, if on a cursory glance it appears that the demand raised has no leg to stand, it would be undesirable to require the assessee to pay full or substantive part of the demand. As the CIT(A) had himself expressed opinion in the order that there is enough strength in the plea of the assessee for stay of the demand, there was no occasion to direct for deposit of 30 percent. The assessee is entitled to stay on furnishing adequate security [Asstt. Collector of CE v. Dunlop India Ltd. (1985) 154 ITR 172 (SC) & Pennar Industries Ltd. v. State of AP dated 9-2-2009 (SC) followed]

LG Electronics India Pvt. Ltd. v. CIT (2012) 209 Taxman 536 (All.)(HC)

S. 220 : Collection and recovery - Appeal to Commissioner(Appeals) - Stay - Direction was given for expeditious disposal of appeal and stay of demand till disposal of appeal

For the A.Y. 2003-04, 2004-05, 2005-06 the Assessing Officer accepted the contention of the assessee that it was an agent of the Government of India for the Navi Mumbai project. However for the A.Y. 2006-07 the Assessing Officer has changed the stand and held that it is liable to be assessed in respect of all the projects including Navi Mumbai project and raised the demand on assessee. The assessee filed an appeal before the Commissioner(Appeals) which was pending. The application for recovery of stay was rejected. The assessee filed a writ petition before the High Court. High Court stayed the recovery proceedings and directed the Commissioner(Appeals) to for expeditiously disposal of appeal. (A.Y. 2006-07)

CITY and Industrial Development Corporation of Maharashtra Ltd. v. ACIT (2012) 343 ITR 102 / 72 DTR 226 / 250 CTR 415 (Bom.)(HC)

S. 220 : Collection and recovery - Assessee deemed in default - Stay - Commissioner is directed to pass a reasoned order

The Court held that when a prayer is made to commissioner to stay the demand he has to pass the reasoned order. The Court held that one of the salutary requirement of natural justice is spelling out reasons for the orders made. On the facts the court set aside the order of Commissioner and directed him to pass a speaking order.

Idea Cellular Ltd. v. CIT (2012) 75 DTR 105 (MP)(HC)

S. 220 : Collection and recovery - Assessee deemed in default - Stay of demand

Order of the CIT(A) rejecting stay petition without considering all the submissions of the petitioner and also failing to point out even briefly in the order as to why the interim payment of 50 percent of Rs. 6.36 crores is necessary in the facts of the present case is liable to be set aside. Revenue's interests also needs to be protected and the petitioner's undertaking not to dispose off, alienate, encumber, part with possession of or create any third party right, title and/or interest in respect of the immovable property, is accepted. (A.Y. 2004-05 to 2007-08)

Balaji Universal Tradelink (P) Ltd. v. UOI (2012) 76 DTR 132 (Bom.)(HC)

S. 220 : Collection and recovery - Assessee deemed in default - Stay of recovery - Adjustment of refund against current demand - ITAT has power to stay recovery and not permit adjustment of refund [S. 245]

Each A.Y. is treated as separate and independent under the Act, section 245 of the Act permits the Revenue to recover the demand of one year which is pending by adjusting the refund due for another year. Adjustment under section 245 of the Act is a method of recovery. Section 220(6) which permits the Assessing Officer to treat the assessee as not in default is not applicable when an appeal is

preferred before the Tribunal, as it applies only when an assessee has field an appeal under section 246 or section 246A. As per Circular No. 1914, dated Dec. 2, 1993, the Assessing Officer may reserve a right to adjust, if the circumstances so warrant. In a given case, the Assessing Officer may not reserve the right to refund. Further, reserving a right is different from exercise of right or justification for exercise of a discretionary right/power. Moreover, the circular is not binding on the Tribunal. (A.Y. 2006-07)

Maruti Suzuki India Ltd. v. Dy. CIT (2012) 347 ITR 43 / 246 CTR 176 / 204 Taxman 48 / 65 DTR 110 (Delhi)(HC)

S. 220 : Collection and recovery - Condition precedent - Demand Notice not received by assessee, recovery proceeding held to be not valid [S. 156]

The Court held that on a plain reading of sub-section (4) of section 220 of the Income-tax Act, 1961, it is apparent that a person can be said to be an assessee in default, (i) if he does not pay the amount specified in a notice under section 156 within the time limited under sub-section (1), viz., 35 days of the service of notice, or (ii) if he does not pay the amount specified in a notice under section 156 within the time extended under sub section (3) at the place and to the person mentioned in the notice. Thus, before invoking the provisions of section 220 of the Act, a notice is required to be served upon the assessee, specifying the amount as well as the place and the person to whom such amount is to be paid. In the absence of any demand notice under section 156 of the Act being served upon the assessee, the time to make payment under sub section (1) would not start running. On facts, no demand notice, as contemplated under section 156 of the Act was served upon the petitioner. The petitioner at the earliest point of time, upon receipt of the recovery notice had objected to the initiation of the recovery proceedings as it had not received copies of the assessment order and demand notice. Thus, in the absence of service of a demand notice under section 156 of the Act on the petitioner, which was a basic requirement for invoking the provisions of section 220 of the Act, the Petitioner could not have been treated to be an assessee in default. The subsequent proceedings under section 220 to 226 of the Act were without jurisdiction. (A.Y. 1985-86)

Saraswati Moulding Works v. CIT & Ors. (2010) 236 CTR 121 / 46 DTR 25 / (2012) 347 ITR 161 (Guj.)(HC)

S. 220 : Collection and recovery - Assessee deemed in default - Interest under section 220(2) - Waiver or reduction under section 220(2A) - Conditions precedent

It is for the CIT or the CCIT to consider with reference to facts on record as to whether all the three conditions stated in section 220(2A) are satisfied and if so, to grant partial or full waiver. In fact, waiver can be directly proportionate to the extent of satisfaction of conditions. In the instant case, for 16 years after completion of assessment, Department did not try to trace the partners of the defunct/defaulter firm and for the first time notice of demand was served on the assessee in 2005 by virtue of his liability as partner of dissolved firm under section 189(3). Within one month from date of service of notice, the assessee made full payment, Therefore, on facts there is nothing irregular, illegal or improper on the part of the single Judge to direct Revenue to grant full waiver of interest. (A.Y. 1987-88)

CCIT v. Dr. K. M. Mehaboob (2012) 78 DTR 34 (Ker.)(HC)

S. 220 : Collection and recovery - Interest - Quantification - Date from which chargeable - Interest is chargeable from the appellate order as the notice of demand was served after the appellate order [S. 140A(3), 156]

Assessee submitted his self assessed returns of income, quantifying at Rs. 1,44,74,480/-. Assessees income was assessed at Rs. 1,45,40,721/- under section 143(3) of the IT Act 1961. On 29th Sept., 1976, this return was subjected to proceeding under section 148 and ex-parte order was passed on 29th March, 1982 which was vacated on 8th July, 1982 and the case was reopened under section 146. Then

the assessee submitted another return of income of Rs. 1,96,91,399/- on 12th Jan., 1984. After several rounds of appeals, etc., ultimately the tax liability of the assessee was determined by the appellate order dated 24th March, 1992. The issue involved in this tax appeal was only whether the assessee. Who himself submitted revised returns of self-assessment of his income under section 140A of the Act of 1961, was liable to pay interest from the date of his filing revised returns, i.e. from 12th Jan., 1984, or was liable to pay interest when his tax liability was finally determined by the appellate order dated 24th March, 1992. It was held that Demand notice under section 156 having been issued to the assessee after determination of tax liability as per appellate order dated 24th March, 1992, assessee was liable to pay interest under section 220(2) from that date and not from 12th Jan., 1984 when the assessee had field return.

CIT v. Late Misrilal Jain Through Executor Gyanchand Jain (2012) 254 CTR 554 / 80 DTR 140 (Jharkhand)(HC)

S. 220 : Collection and recovery - Assessee in default - Stay - Reasoned order and opportunity of being heard must be given

The use of the expressions "discretion" and "subject to such conditions as he may think fit to impose in the circumstances of the case" in section 220(6) imply that Assessing Officer is under a duty to apply his mind and after taking into account the necessary and appropriate circumstances, pass the most suitable order as may be warranted on the facts before him. The instructions relied upon only reinforce the element of discretion; by no means can it be construed as limiting the choice of the Assessing Officer who may have a greater latitude in taking into account other circumstances depending on the facts of the given case. It is a cardinal principle of construction that when a legislation confers power, its amplitude cannot be cut down by instructions or rules or regulations made by subordinate authorities. Instructions and rules can only supplement but can never supplant or limit the width of the statutory powers. In this case, the Assessing Officer as is evident from a reading of the impugned order has not applied his mind at all to the facts much less considered what are the circumstances which either justify the grant of relief or its refusal. Hence, order of Assessing Officer was quashed. (A.Y. 2009-10)

Virgin Mobile India (P) Ltd. v. ACIT (2012) 80 DTR 409 / 211 Taxman 227 (Delhi)(HC)

S. 220 : Collection and recovery - Interest - Assessment set aside - Interest is payable by assessee from the date of fresh assessment order

The original assessment has been set aside by the CIT(A), but on further appeal, the Tribunal set aside the order of CIT(A) and issue was restored back to the Assessing Officer. In the fresh assessment, the Assessing Officer repeated the addition raising the same demand but interest under section 220(2) was levied from the date of demand notice issued as per the original assessment order. In an appeal before the Tribunal the assessee contended that in view of Board Circular dated No. 334 dated 3-4-1982, the interest could be charged only from the date when the demand became due as per the fresh assessment order and not from the date of original assessment order. The Tribunal accepted the contention and held that interest payable is to be computed from the date of fresh assessment order. Accordingly the appeal of assessee was allowed. (A.Y. 1996-97)(ITA No. 3360/Mum/10, dt. 19-10-11)

Narad Invt. and Tdg. P. Ltd. v. Dy. CIT (2012)BCAJ Pg. 35, Vol. 43 B Part 4 January, 2012 (Mum.)(Trib.)

S. 220(2A) : Collection and recovery - Waiver or reduction - Genuine hardship - The Commissioner has power to waive the interest in respect of amounts already paid, accordingly the order was set aside and directed the commissioner to pass the order in accordance with the law

The legal heir of deceased assessee filed application under section 220(2A) for waiver of application of interest levied amounting to Rs. 1,95,570/-. The Commissioner has waived an interest of Rs. 24,408/- which was balance amount due from the deceased assessee. The Assessee filed the writ petition, the Court held that Taxation laws (Amendment) Act, 1984 has conferred the power on the CCIT or the CIT to reduce or waive the amount of interest already paid, therefore the there is no reason to restrict the waiver to the amounts remaining due payable, accordingly the order of Commissioner was set aside for reconsideration. (A.Y. 1989-90).

E. M. Joseph v. CCIT (2012) 342 ITR 379 / 67 DTR 86 (Ker.)(HC)

S. 222 : Collection and recovery - Auction - Certificate proceedings –Attachment and sale of property- Stay by Commissioner - Writ was dismissed [Rule 86 of Second Schedule]

Respondent No. 3 had income tax dues, non-payment of which led to department issuing public notice holding auction of his immovable properties. Auction was held, in which, petitioner offered highest price and he also deposited 25 per cent of bid amount on spot. Before remaining amount could be deposited, Commissioner in an appeal filed by respondent No. 3, granted stay against any further proceedings. Eventually such appeal came to be allowed. Petitioner filed instant petition contending that Commissioner could not allow appeal of respondent No. 3 without giving him an opportunity of being heard. Merely being highest bidder in a public auction, petitioner did not get any vested right in property. Even otherwise, in view of fact that when respondent No. 3 approached Commissioner auction was not even conducted, in such a situation, there was no question of making petitioner a party in those proceedings. In view of above, instant petition was to be dismissed, In favour of revenue.Auction purchaser was entitled to refund of his deposit with interest

Jadeja Jitendrasinh Chandrasinh v. Tax Recovery Officer (2012) 211 Taxman 215/(2013) 90 DTR 148/ 261 CTR 306 (Guj.)(HC)

S. 226 : Collection and recovery - Modes of recovery - Garnishee proceedings - Attachment - Search and seizure - Fixed deposit of third parties attachment is held not to be not valid [S. 132, 222, 281B, Art. 226]

Assessee was searched and articles were seized. Articles were released on bank guarantee on basis of fixed deposits receipts of third parties. Department issued garnishee proceedings against bank and attached the fixed deposits under section 226(3). Department passed the provisional attachment under section 281B. Department invoking the bank guarantee encashed the fixed deposit. The Assessee challenged the order by way of Writ, the Court held that the encashment of the fixed deposit was unjustified. The Court held that the fixed deposits did not belonging to assessee hence attachment of fixed deposit receipts were not valid.

Gopal Das Khandewal & others v. UOI (2012) 340 ITR 235 / (2010) 235 CTR 253 / 45 DTR 47 / 192 Taxman 54 (All.)(HC)

S. 226 : Collection and recovery - Modes of recovery - Garnishee proceedings - Assessee can approach the Assessing Officer against garnishee proceedings and request for withdrawal, writ is not the remedy

Against the garnishee proceedings the assessee filed a writ petition on the ground that once the money is recovered under garnishee order the revocation of the notice will be of no consequences. The Court held that such a presumption is without any legal base because of the reasons that with the withdrawal of the notice of garnishing, the action taken in furtherance of garnishing order falls down and possession of the property is required to be restored to the assessee and if the Assessing Officer by exercising power under sub-clause (vii) of sub-section (3) of section 226 of the said Act obtains money from the payee of the assessee, he has been given power to withdraw the notice and it cannot be interpreted to mean that notice can be withdrawn only before giving effect to the garnishing order and receiving the money by the Assessing Officer. Otherwise the words at any time or from time to

time will be of no consequence in sub-clause (vii) of sub-section (3) of the said Act. The Court held that the assessee is free to challenge the order of non-revocation of the garnishee order under sub-clause (vii) of sub-section (3) of section 226. Commissioner was directed to hear the appeal expeditiously.

Central Coal Fields Ltd. v. CIT (2012) 249 CTR 523 / 70 DTR 177 (Jharkhand)(HC)

S. 226 : Collection and recovery - Modes of recovery - Prohibitory order - Assessee has shown bona fides the court stayed the prohibitory order

The appeal of the assessee is pending before the Commissioner(Appeals). The Recovery Officer issued the prohibitory order against the creditors. The assessee filed writ petition. The High Court stayed the prohibitory order considering the bonafide of assessee on the condition of paying the tax on installments. (A.Y. 2007-08, 2008-09)

Nickunj Eximp Enterprises P. Ltd. v. Addl. CIT (2012) 346 ITR 78 (Bom.)(HC)

S. 234A : Interest - Default in furnishing return of income - Charge - Assessment order - Interest, though mandatory, is not payable if Assessing Officer does not direct it to be charged in assessment order [S. 234B, 234C]

The Assessing Officer passed assessment order under section 143(3) in which he omitted to direct that interest under section 234A, 234B & 234C should be levied. The Tribunal, relying on CIT v. Ranchi Club Ltd. (2001) 247 ITR 209 (SC) held that in the absence of a specific direction, interest was not leviable. Before the High Court, the department relied on the larger bench decision in CIT v. Anjum M. H. Ghaswala and Ors. (2001) 252 ITR 1 (SC) and argued that as interest under section 234A, 234B & 234C was mandatory, there was no need for the assessment order to specifically direct that interest should be charged. Held dismissing the appeal:

In CIT v. Ranchi Club Ltd. (2001) 247 ITR 209 (SC) it was held that the order of the Assessing Officer in the assessment order to charge interest has to be specific and clear and the assessee must be made to know that the Assessing Officer after applying his mind has ordered charging of interest. In Anjum M. H. Ghaswala (2001) 252 ITR 1 (SC), it was held, in the context of whether the Settlement Commission could waive interest, that the levy was mandatory and could not be waived. Subsequently, in Insilco Ltd. (2005) 278 ITR 1 (SC), the Supreme Court remanded the matter to decide whether the law laid down in Ranchi Club had been changed by Anjum M. H. Ghaswala or not. Ranchi Club Ltd. has not been expressly overruled nor has a different view been taken in Anjum M. H. Ghaswala's case. There is also no force in the department's argument that even if assessment order or computation sheet does not provide for interest, since interest is mandatory, it can be charged in the demand notice which is signed by the Assessing Officer Even if a provision of law is mandatory and provides for charging of tax or interest, the view taken in Ranchi Club Ltd. is that such charge by the Assessing Officer should be specific and clear and assessee must be made to know that the Assessing Officer has applied his mind and has ordered charging of interest. The mandatory nature of charging of interest and the actual charging of interest by application of mind and the mention of the proviso of law under which such interest is charged are two different things. Consequently, if the assessment order is silent, interest under section 234A, 234B & 234C cannot be levied.

CIT v. Deep Awadh Hotels (P) Ltd. (2013) 350 ITR 185 / (2012) 72 DTR 307 / 214 Taxman 60 (Mag.)(All.)(HC)

S. 234A : Interest - Default in furnishing return of income - Tax paid before due date of filing return - Interest cannot be levied in respect of tax paid before due date of filing of return. [S. 234A, 234C]

The return was due on 30th August, 1996. The assessee has paid self assessment tax of Rs. 10 lacs under section 140A on 30th August, 1996. The return was filed on 27th March, 1998. The assesse's tax

was Rs. 14, 82,941/- after adjusting the tax deducted at source. The revenue demanded interest on entire amount of Rs. 14,82,941/- though the assessee had deposited the self assessment tax of Rs. 10,0000 before due date of of filing the return. The Assessee challenged the action of revenue authorities in determining the interest under section 234A and 234C of the Income-tax Act. The court held that permitting the revenue to collect interest on the entire amount, though admittedly tax of Rs. 10 lacs was already paid before due date of filing of return would render the provisions of section 234A penal in nature and expose it to challenge of its vires, therefore the interest could be charged only on Rs. 4,82,941/- and not entire tax of Rs. 14,82,941/-. Accordingly the petition was allowed. (A.Y. 1996-97)

Bhartbhai B. Shah v. ITO (2012) 74 DTR 68 / (2013) 255 CTR 278 (Guj.)(HC)

S. 234A : Interest - Default in furnishing return of income - Adavnce tax - Search and seizure - Cash seized from third party - Tribunal directed the Assessing Officer to adjust the cash seized against advance tax liability [S. 132, 234B, 234C]

A search and seizure was carried out at the premises of the assessee and cash was seized. Assessee requested that the seized cash be treated as advance tax paid and adjust it against cash liability. However the Assessing Officer has not adjusted the cash seized. The Tribunal held that the cash seized from third party was found to be the cash of the assessee and this fact was not disputed. Therefore, the cash seized from the third party or the cash seized from the assessee would retain the same character and did not affect processing of such seized cash. Accordingly the Tribunal directed the Assessing Officer to adjust the seized cash against advance tax liability from the date of seizure itself. (A.Y. 2008-09)

Ram S. Sarda v. Dy. CIT (2012) 13 ITR 457 / 50 SOT 121 (URO)(Rajkot)(Trib.)

S. 234B : Interest - Advance tax - Minimum alternative tax - Interest cannot be charged on the brought forward tax credit balance [S. 115JA]

The question before the Court was whether the department is entitled to charge interest under section 234B of the Income-tax Act, 1961, on the bringing forward the tax credit balance into the year of account relevant year.

Following the case in CIT v. Tulsyan NEC Ltd. (2011) 330 ITR 226 (SC), the civil appeals of the department were dismissed. (A.Y. 2001-02)

CIT v. Sage Metals Ltd. (2012) 210 Taxman 582 / 254 CTR 455 / 79 DTR 355/(2013) 354 ITR 675 (SC)

S. 234B : Interest - Adavnce tax - Waiver or reduction - Income-tax authorities - Instructions to subordinate authorities - Due to financial difficulties there was delay in payment of advance tax, interest levied under section 234B and 234C cannot be waived [S. 119, 234C, Constition of India. Art. 14]

The assessee was acting as a real estate agent. Due to financial difficulties, there was delay in payment of advance tax. The assessee filed application for waiver of interests levied, which was rejected . The assessee filed writ petition against the said order, and contended that it had made out a case for grant of waiver / refund and the same had been declined by misinterpretation and / or narrow interpretation of the order F. No. 400/29/2002 - IT(B) dated 26-6-2006 (Said order) issued by the Central Board of Direct Taxes (CBDT). In the alternative, it was contended that paragraph 3 of the said order, to that extent it declined the benefit of waiver of interest charged under section 234B, and 234C to the class or classes referred to in paragraphs 2(a) and 2(d) of the said order dated 26-6-2006, was arbitrary and unequal and was in violation of Article 14 of the Constitution of India. The High Court held that said order specifically mentioned that it would not apply to sections 234B and 234C, in view of above, the assessee was not entitled to any waiver / reduction of interest. Accordingly the writ petition was dismissed. (A.Y. 2008-09)

De Souza Hotels (P.) Ltd. v. CCIT (2012) 207 Taxman 84 / 78 DTR 135 / 253 CTR 541 (Bom.)(HC)
Editorial:- SLP of assessee was rejected. De Souza Hotesls Pvt. Ltd. v. CCIT [SLP (Ciivil) CC No. 13729 of 2012, dated 21-8-2012 (2012) 210 Taxman 96(Mag.) (SC)

S. 234B : Interest - Advance tax - Waiver of interest - Not mentioning in the assessment order - Interest is mandatory and can be levied even if assessment is silent [S. 234A]
The Court held that as held in CIT v. Anjum M.H.Ghaswala and others (2001) 252 ITR 1 (SC), interest under section 234A, 234B and 234C is mandatory and interest under section 234B / 234C is mandatory in nature and there is no need to specifically recite in the assessment order that the said interest shall be levied. The order of High Court and Tribunal was set aside and directed the Tribunal to consider whether the assessee is eligible for waiver of interest as per notification No. F. No. 400/234/95 - IT(B) dated May 23, 1996 (C.A. No. 1937 of 2007 dated 6-9-2012)
Karanvir Singh Gossal v. CIT (2012) 349 ITR 692 / 210 Taxman 241 / 254 CTR 96 / 79 DTR 5 (SC)

S. 234B : Interest - Advance tax - Assessment - Reassessment - Interest is payable from original order of assessment [S. 143(3), 147]
Original order of assessment was dated 24-6-1991 and order of reassessment was on 28-1-1994. The interest under section 234B was payable from original order of assessment.
Vijay Kumar Saboo (HUF) and another v. ACIT (2012) 340 ITR 382 / (2011) 201 Taxman 366 (Karn.)(HC)

S. 234B : Interest - Advance tax - Book profit - Company - Assessee cannot be charged interest under section 234B and 234C, for the A.Y. 2001-02 and 2002-03, prior to amendment of section 115JB by the Finance Act, 2002
The assessment was done by applying the provisions of section 115JB and the interest was charged under section 234B and 234C of the Income-tax Act. The assessee contended that the provisions of sections 234B and 234C are not applicable, which was rejected by the Assessing Officer and allowed by the Commissioner(Appeal) and Tribunal. On appeal to High Court by the revenue, the Court held that prior to amendment of section 115JB by the Finance Act, 2002, the advance tax was payable on book profit which is deemed to be total income. As the assessee was under no obligation on the date of the alleged default to pay tax at that particular rate for F.Y. 2000-01 and 2001-02. The Court held that though assessee was liable to pay advance tax as per amended provisions of section 115JB for the A.Y. 2001-02 and 2002-03 assessee could not be charged interest under section 234B and 234C on differential amount of pre-amended total income and post amended deemed total income. (A.Y. 2001-02, 2002-03)
CIT v. Jupiter Bio-Science Ltd. (2012) 67 DTR 91 / (2011) 202 Taxman 80 / (2013) 352 ITR 113 (Karn.)(HC)

S. 234B : Interest - Advance tax - Specific direction - Without specific order interest cannot be levied
If the assessment order or computation sheet does not provide for interest, no interest can be levied, even if any provision of law is mandatory and provides for charging of tax or interest, such charge by the Assessing Officer should be specific and clear and assessee must be made to know that Assessing Officer has applied his mind.
CIT v. Deep Awadh Hotels (P) Ltd. (2013) 350 ITR 185 / 214 Taxman 60 (Mag.) / (2012) 72 DTR 317 (All.)(HC)

S. 234B : Interest - Advance tax - Specific direction - No interest can be levied through a notice of demand, in the absence of any specific direction in the assessment order

The Court following the ratio of judgment in CIT v. Ranchi Club Ltd. (2001) 247 ITR 209 (SC), held that in absence of any specific direction giving reference to the section charging interest in the assessment order, no interest can be levied through a notice of demand. Accordingly the appeal of revenue was dismissed. (A.Y. 1991-92)

ACIT v. S. K. Patel Family Trust (2012) 251 CTR 427 / 74 DTR 317 (Guj.)(HC)

S. 234B : Interest - Advance tax - Matter set aside - Held to be justified

The Court held that the Tribunal was justified in remitting to the matter to the Assessing Officer with a direction to examine and decide the issue of levy of interest under section 234B. (A. Y. 2004-05)

CIT v. Kotak Securities Ltd. (No. 2) (2012) 346 ITR 352 (Bom.)(HC)

S. 234B : Interest - Advance tax - Deduction at source - When entire income was subject to deduction of tax at source, interest under section 234B could not be charged from him for non-payment of advance tax

Where assessee had no liability to pay advance tax in view of fact that his entire income was subject to deduction of tax at source, interest under section 234B could not be charged from him for non-payment of advance tax.

CIT v. Robert Michael Arthey (2012) 209 Taxman 482 (Delhi)(HC)

S. 234B : Interest - Advance tax - Deduction at source - Royalty and Fees for technical services - Interest under section 234B is to be computed after reducing amount of tax deductible at source in relation to royalty and fees for technical services from advance tax payable

Interest under section 234B cannot be charged where tax is deductible at source in relation to royalty and FTS, therefore, interest under section 234B is to be computed after reducing amount of tax deductible at source in relation to royalty and FTS from advance tax payable. (A.Y. 2008-09)

De Beers UK Ltd v. Dy. DIT (IT) (2012) 53 SOT 319 (Mum.)(Trib.)

S. 234B : Interest - Advance tax - Deduction at source - Non-resident - Income subject to deduction at source no liability to pay advance tax under section 208 [S. 208, 234C]

Entire income of the assessee, a non-resident, being subject to deduction at source under section 195 and the payer having obtained certificate under section 195(2) from the Assessing Officer, there was no liability to pay advance tax under section 208 hence interest under sections 234B and 234C could not be charged. (A.Y. 2007-08)

National Petroleum Construction Company v. ADIT (2012) 80 DTR 65 / (2013) 151 TTJ 47 / 20 ITR 545 (Delhi)(Trib.)

S. 234B : Interest - Advance tax - Book profit - Retrospective amendment - Interest not leviable

Where advance tax paid by assessee fell short on account of retrospective amendment made by Finance Act, 2008 inserting section 115JB(2), Explanation 1(h) which provided that book profit be increased by amount of deferred tax with effect from 1-4-2001, interest under section 234B could not be charged. (A.Y. 2005-06, 2006-07)

Dy. CIT v. Indo Rama Textiles Ltd. (2012) 53 SOT 515 (Delhi)(Trib.)

S. 234B : Interest - Advance tax - Book profit - While calculating interest under sections 234B and 234C no credit of MAT including surcharge and education cess could be given [S. 234C]

The Tribunal held that while calculating, interest under sections 234B and 234C no credit of MAT including Surcharge and education cess could be given. (A.Y. 2010-11)

Richa Global Exports (P.) Ltd. v. ACIT (2012) 54 SOT 185 (Delhi)(Trib.)

S. 234C : Interest - Deferment of advance tax - Waiver of interest - Failure to pay advance tax due to not releasing of FDRs, hence the assessee is entitled to waiver of interest [S. 119]

There was search and seizure action against the assessee on 10-12-1998 and FDRs of Rs. 29 crores were seized. The assessee had not paid the advance tax. The Assessing Officer levied the interest under section 234C. The assessee moved application to Commissioner to waiver of interest. Commissioner rejected the application for waiver. The assessee filed a writ petition against the said order. The Court held that the assessee requested for release of FRDs to make the payment of advance tax, however the same was released latter. The assessee has paid the tax after release of FDRs, therefore the assessee would be entitled to waiver of interest under section 234C in view of Board notification dated 23-5-1996, para. 2(b). The matter was decided in favour of assessee. (A.Y. 1999-2000, 2000-01)

Super Cassettes Industries Ltd. v. CCIT (2012) 207 Taxman 153 / 79 DTR 99 / 254 CTR 521 (Delhi)(HC)

S. 234D : Interest on excess refund - Regular assessment - Date on which the regular assessment order has been passed

The Court held that since the regular assessment had been completed on March 30, 2004 and section 234D came in to operation on and from June 1, 2003, which was prior to the completion of the regular assessment, the assessee was liable to pay interest on the excess refund amount received as contemplated under section 234D of the Act. It is not the year of assessment that falls for consideration in such circumstances, but the date on which the regular assessment order has been passed. (A.Y. 2001-02)

CIT v. Infrastructure Development Finance Co. Ltd. (2012) 340 ITR 580 (Mad.)(HC)

S. 234D : Interest on excess refund - Payable by assessee - Applies even to refunds granted prior to 1.6.2003

Questions of law admitted before High Court was "whether the Tribunal was right in holding that interest under section 234D is chargeable from the A.Y. 2004-05 only and it could not be charged for earlier A.Y. even though regular assessments for such earlier A.Y. are framed after 1-6-2003"? The argument that as in CIT v. Bajaj Hindustan Ltd. ITA No. 198 of 2009 dated 15-4-2009 it had been held that section 234D did not apply to refunds granted prior to 1.6.2003, the Explanation to section 234D inserted by the FA 2012 w.e.f. 1.6.2003 (which provides that section 234D shall also apply to assessment years commencing pre 1.6.2003) did not apply to the assessee is not acceptable because Explanation 2 is a declaratory/clarificatory amendment. The alternate argument, relying on CIT v. Kerala Chemicals & Proteins Ltd. (2010) 323 ITR 584 (Ker.) that interest can be charged only from 1.6.2003 is also not acceptable in view of the language of Explanation 2 to section 234D. The question of law was answered in the negative i.e. in favour of the appellant revenue and against the respondent-assessee. (A.Y. 2002-03)

CIT v. Indian Oil Corporation Ltd. (2012) 78 DTR 361 / 210 Taxman 466 / 254 CTR 113 / 2012 Vol. 114 (5) Bom. L.R. 3289 (Bom.)(HC)

S. 234D : Interest on excess refund - Applicable only from A.Y. 2004-05

Interest charged by Assessing Officer under section 234D for A.Y. 2001-02 was to be deleted as the provision came into force on 1-6-2003 and, therefore, was applicable only from the A.Y. 2004-05. (A.Y. 2001-02)

CIT v. EDS Electronic Data Systems (India) (P.) Ltd. (2012) 211 Taxman 133 (Delhi)(HC)

S. 234D : Interest on excess refund - Explanation 2 - Assessee is held to be liable to pay interest

The Tribunal held that Explanation 2 having been inserted in section 234D by Finance Act, 2012, with retrospective effect from June 1, 2003, clarifying that the provisions of section 234D shall also apply to the A.Y. commencing June 1, 2003, if the proceedings in respect of the A.Y. are completed after that date and the proceedings in respect of the A.Y. 2003-04 having been completed on November 30, 2005, the assessee was liable to pay interest under section 234D. (A.Y. 2003-04)

Kotak Mahindra Capital Co. Ltd. v. ACIT (2012) 138 ITD 57 / 18 ITR 213 / 75 DTR 193 / 148 TTJ 393 (SB)(Mum.)(Trib.)

S. 234D : Interest on excess refund - Regular assessment - Interest is payable by assessee only on completion of assessment and not when original refund is granted

Occasion for charging of interest under section 234D can arise only on completion of assessment and not when original refund is granted. However, date of original grant of refund is relevant for purpose of calculation of amount of interest under this section as interest is payable by assessee form the date of grant of refund to date of regular assessment. (A.Y. 2001-02)

ITO v. Strides Arcolab Ltd. (2012) 138 TD 323 / (2013) 85 DTR 128 (Mum.)(Trib.)

S. 234D : Interest on excess refund - Finance Act, 2002 - Assessment - Levy of interest after insertion of application held to be justified

The Tribunal held that in view of Explantion 2 to section 234D inserted by the Finance Act, 2012 with retrospective effect from 1st June, 2003, the provisions of section 234D are also applicable to an A.Y. commencing before the 1st day of June, 2003 if the proceedings in respect of such A.Y. are completed after the said date. (A.Y. 2003-04, 2005-06)

RBS Equities (India) Ltd. v. ACIT (2012) 79 DTR 51 / (2013) 151 TTJ 165 / 55 SOT 20 (URO)(Mum.)(Trib.)

S. 237 : Refunds - Refund of Income-tax and Wealth tax - General principles - Article 265 of the Constitution of India

The Income-tax Act and wealth tax Acts provide for levy assessment, recovery, refund, appeals and all incidental /ancillary matters. For an assessee to claim refund, he must satisfy the statutory requirements and article 265 of the Constitution of India is not violated if an assessee does not claim refund in accordance with the provisions of the Act or when the "wrong" assessment or any other "wrong" order becomes. An assessment order or an order quantifying the income or taxable wealth can be rectified or modified in the proceedings as contemplated by the enactment. The assessment order or the order quantifying the income or taxable wealth cannot be challenged on the merits while the authorities examine the question of refund. The authorities can not go beyond the assessment order or the order qualifying net wealth/income. The Court held that the refund provisions should be interpreted in a reasonable and practical manner and when warranted liberally in favour of the assessee. If there is substantial compliance with the provisions for refund, it may not be denied because it is not strictly in the form or prescribed manner. Accordingly the Court allowed the petition for granting refund. For the A.Y. 1999-2000 the assessee had filed the return and had deposited self assessment tax and return filed by the assessee was accepted. The Court observed the the assessee has the right to file a revision under section 25 of the wealth tax Act, however, the period for filing for the revision had expired and the assessee did not take steps to invoke the power hence the assessee is not entitled to refund. (A.Y. 1994-95, 1999-2000)

Indglonal Investment and Finance Ltd. v. ITO (2012) 343 ITR 44 / (2011) 243 CTR 542 / 200 Taxman 271 / 60 DTR 337 (Delhi)(HC)

Taksal Theatres Private Ltd. v. ACIT (2012) 343 ITR 44 (Delhi)(HC)

S. 237 : Refunds - Setp-off - Credits for tax deducted at source - CBDT - High Court seeks to end TDS & Refund harassment by Department [S. 199, 245]

One Anand Parkash, FCA, addressed a letter dated 30.4.2012 to the High Court in which he set out the numerous problems being faced by the assesses across the Country owing to the faulty processing of the Income Tax Returns and non-grant of TDS credit & refunds. He claimed that because of the department's fault, the assessees were being harassed. The High Court took judicial notice of the letter, converted it into a public interest writ petition and directed the CBDT to answer each of the allegations made in the letter and certain other queries that the Court raised. The Court also appointed eminent senior counsel to assist it. The department accepted that tax payers are facing difficulties in receiving credit of TDS & refunds on account of adjustment towards arrears. As an interim measure to provide immediate relief to the assessees, the Court passed the following order:

(i) The problem is apparent, real and enormous. It has escalated because of Centralized Computerization and problems associated with incorrect and wrong data which is uploaded by both the deductors or payees and the Assessing Officers. The issue is of general governance, failure of administration, fairness and arbitrariness. The magnitude of the problem and the number of tax payers adversely affected thereby is apparent from the fact that 43% and 39% of the returns in Delhi zone for the F.Y. 2010-11 and 2011-12 were defective. Huge demands are created on this count. Every attempt possible has to be made to redress the grievance of the tax payers. The tax payers should not be made to run around, make repeated visits to deductor or the Assessing Officer. Rejection of TDS, which has been deducted and paid, hurts the assessee and puts him to needless inconvenience, harassment and costs. It gives bad name to the Revenue. The problems faced by tax payers can be broadly classified into two categories. First, failure and difficulties in getting credit of TDS paid and second, adjustment of past demands or arrears of tax from refunds payable.

(ii) As regards the first problem of failure of taxpayers to get credit for TDS on account of (a) incorrect entries/ mismatch in Form 26AS and (b) failure of the deductor to correctly upload the TDS return, the department's response is unconvincing and unsatisfactory. It expresses complete helplessness on the part of the Revenue to take steps and seeks to absolve them from any responsibility. Denying benefit of TDS to a tax payer because of fault of the deductor, which is not attributable to the deductee, is a serious matter and causes unwarranted harassment and inconvenience. Revenue cannot be a silent spectator and wash their hands or express helplessness. This problem is normally faced by the small taxpayers including senior citizens as they do not have CAs on their pay roles. The marginal amount involved compared to the efforts, costs and frustration, makes it an unviable and a futile exercise to first approach the deductor and then the Assessing Officer. The CBDT should examine the issue and take appropriate steps to ameliorate and help small tax payers and senior citizens;

(iii) If there are small and insignificant mismatches in the TDS details, they should be condoned or ignored. After all tax has been paid or credited in the name of the assessee. Once the amount is correctly and rightly reflected in Form AS26, small or technical mismatch in the return should not be a ground to deny credit of the amount paid. If the Assessing Officer still feels that benefit of TDS reflected in AS26 should not be given, he should issue notice to the assessee to revise or correct the mistake and only if the necessary rectification or correction is not made, an order under section 143(1) should be passed and demand should be raised. An interim direction to this effect is issued;

(iv) As regards the second problem, CPC has stated in letter dated 21.8.2012 that refunds to the extent of Rs. 4800 crores have been adjusted against arrears at the section 143(1) stage by the CPU. The department's action of adjusting the refunds without giving prior intimation to the assessee is contrary to section 245. In a few cases where prior intimation is given and the assessee approaches the Assessing Officer, he is told to approach the CPC, Bengaluru, and when he approaches the CPC, he is told to approach the Assessing Officer. The department should file an affidavit stating whether prior intimation is sent or not and set out the procedure followed if an assessee objects to the adjustment. In the meanwhile, the department shall not adjust the refunds against the demands at the section 143(1) stage without giving the assessee an opportunity to file a reply. The Assessing Officer should deal

with the reply and communicate his findings to the CPC before processing the refund or adjustment of demand. (A.Y. 2011-12)
Court on its Own Motion v. CIT(2012) 210 Taxman 452 (Delhi)(HC)

S. 237 : Refunds - Delay and laches by Assessee
Petitioner has not explained why he remained silent from the date of filing of return from 1st Sept., 2003 till July, 2008 when he made representation. Petitioner has also not explained why it belatedly approached the Court in Oct., 2011. Assessing Officer had written a letter dated 1st June, 2004 requiring certain clarifications from the assessee regarding interest income and contract work receipt in relation to which TDS certificate had been submitted. Where there is a dispute as to the entitlement of assessee to get refund, the Assessing Officer has to cause necessary enquiry and after giving opportunity to the assessee shall come to a conclusion- Though there is no specific provision empowering the Assessing Officer to investigate such a claim, such a power is implicit and inherent in the Assessing Officer as would be evident from a plain reading of section 237. Therefore, assessee is direct to appear before the Assessing Officer with supporting documents about his entitlement to get refund. (A.Y. 2003-04)
Santuka Agencies v. ITO (2012) 78 DTR 1 / 254 CTR 434 (Orissa)(HC)

S. 237 : Refunds - Revised return - Intimation - Claim of refund in revised return held to be valid - Refund ordered with interest.till the date of paument [139(5), 143(1)(a), 244A]
The assessee made claim for refuns by filing the revised retrun after inti mation under section 143(1)(a). The Assessing Oficer refused the grant the refund on the ground the revised return was not valid after intimation. The Petitioner filed the writ petition the Court held that an intimation under section 143(1)(a) would not constitute assessment and the revised retun being valid the assessee was held to be entitled to refund with interest. Petition was allowed and directed the Assessing Officer to grant the refund to the assessee with in three monrhs from the date of certified copy of order along with interest @ 12 percent till the making of payment to him. (A.Y. 2005-06)
Tarsem Kumar v. ITO (2013) 256 CTR 116 / 214 Taxman 70 (Mag.) / (2012) 80 DTR 164 (P&H)(HC)

S. 240 : Refunds - Annul of assessment - Adjustment of tax paid - Assessee was entitled to refund, in respect of taxes adjusted
The assessee has not paid the tax along with the return declared in the block return. The Assessing Officer adjusted of tax paid under the VDIS and the refund due to the assessee for other A.Y. Though the assessment was annulled the Assessing Officer refused to grant the refund. In appeal the Commissioner(Appeals) confirmed the order of Assessing Officer. The Tribunal held that the assessee is entitled to refund. On appeal to High Court the Court held that it cannot be held that the assessee has paid taxes and accordingly, in terms of proviso to section 240 to deny refund to the assessee. Order of Tribunal up held. (Block period 1998-99 to 1998-99)
CIT v. Micro Labs Ltd. (2012) 348 ITR 75 / 254 CTR 81 / 78 DTR 326 / 211 Taxman 15 (Mag.)(Karn.)(HC)

S. 244 : Refunds - Interest - Advance tax - Interest payable by government - Tax deducted at source - Aggregate of advance tax / TDS paid exceeds the assessed tax, advance tax or tax deducted at source loses its identity as soon as it is adjusted against the liability created by the assessment order and becomes tax paid pursuant to the assessment order hence the Judgement of Sandvik Asia requires reconsideration. [S. 195, 195A, 214, 219, 237, 243]
Issue under consideration before the Apex Court was whether interest is payable by the Revenue to the assessee if the aggregate of installments of Advance Tax / TDS paid exceeds the assessed tax. The assessee relied upon Sandvik Asia Limited v. CIT (2006) 280 ITR 643 (SC) where it was held that the

assessee was entitled to be compensated by the Revenue for delay in paying to it the amounts admittedly due. The Apex Court doubting the correctness of Sandvik Asia (supra) held that the judgement in Modi Industries Ltd. and others v. CIT (1995) 216 ITR 759 (SC) correctly laid down that advance Tax or TDS loses its identity as soon as it is adjusted against the liability created by the assessment order and becomes tax paid pursuant to the assessment order. If Advance Tax or TDS loses its identity and becomes tax paid on the passing of the Assessment Order, then, is the assessee not entitled to interest under the relevant provisions of the Act? The Apex Court thus held that the view taken in Sandvik Asia was not correct and thus, directed the Registry to place this matter before Hon'ble the Chief Justice on the administrative side for appropriate orders.

CIT v. Gujarat Flouro Chemicals (2012) 348 ITR 319 / 76 DTR 74 / 252 CTR 237 / 210 Taxman 583 (SC)

S. 244A : Refunds - Interest - Search and seizure - Assessee is entitled to interest on excess cash retained excess of liability [S. 132, 132B(4)]

During a search at the business and residential premises of the petitioner on September 4, 1992, cash of Rs. 1,60,000/- was seized by the Department. On 24-12-1992 order under section 132(5) was passed determining provisional tax liability of Rs. 3,34,492/- and the cash seized was apportioned. On regular assessment after giving effect to the Order of Commissioner(Appeals), the tax payable was only Rs. 1,654. On 19-8-1996 the assessee applied for refund of Rs. 1,60,000/- with interest. On 2-12-1996, the sum of Rs. 1,60,000/- was refunded to him without interest. The assessee filed writ petition seeking interest under section 132B(4) and 244A of the Act. The Court held that last assessment was 4-7-1996, excess amount was retained hence, the assessee is entitled the interest from 5-7-1996 till 2-12-1996. The Court also held that if the interest is not paid within three months the assessee is entitled to interest till the receipt interest, under section 244A(1)(b). (A.Y. 1993-94)

Sitram through legal LRs v. CIT (2012) 341 ITR 549 / 68 DTR 230 / 248 CTR 180 / 208 Taxman 376 (Bom.)(HC)

S. 244A : Refunds - Interest - Entitled interest till date of refund

Certain additions made by the Assessing Officer were set aside by the Appellate Tribunal and the matter remanded to the Assessing Officer. The order of the Assessing Officer pursuant to the remand resulted in a refund to the assessee. The Assessing Officer granted the refund without interest on the ground that the delay was attributable to the assessee. The Commissioner(Appeals) was of the view that the assessee did not produce the required evidence during the assessment proceedings and failed to do so even during the appellate proceedings and that the assessee was not entitled to interest for the period when it had failed to discharge such responsibility. However, since the Assessing Officer had taken more than six years to complete the assessment for which delay the assessee was not responsible, the Commissioner(Appeals) directed the Assessing Officer to allow the interest on the excess tax paid by the assessee from the date of the receipt of the order of the Tribunal setting aside the assessment till the date of giving effect to such order. On further appeal by the assessee, the Tribunal held that the proceedings before the Assessing Officer, the Commissioner(Appeals) and the Tribunal were a continuous process. There was no cogent basis to hold that the assessment proceedings got delayed due to the assessee's failure to submit the details before the Assessing Officer and the Commissioner(Appeals). The assessee should be granted interest on refund also from the date of payment of tax to the date of Tribunal order. (A.Y. 1994-95, 1995-96)

Metso Minerals (I) P. Ltd. v. Dy. CIT (2012) 20 ITR 494 / (2013) 57 SOT 53 (URO)(Delhi)(Trib.)

S. 244A : Refunds - Interest - Deposit - Refund - If delay is not attributable to the assessee, the petitioner was entitled to receive interest on the amount which was refunded to it on various dates for relevant A.Y. from date of actual deposit to the date of actual refund [S. 156]

A look at the scheme of the Act clearly demonstrated that at initial stage of any proceedings under the Act, any refund will be dependent on whether any tax has been paid by an assessee in excess of tax actually payable by him. The ambit and scope of section 244A has been explained in Departmental Circular No. 549 dated October 1989, which supports the view that interest on refund amount is due from the date of actual payment under section 244A(1)(b) to the date of refund. It was held except making bald statement, it was neither pleaded nor proved with the help of cogent material that the delay was attributable to petitioner. The petitioner was entitled to receive interest on the amount which was refunded to it on various dates for relevant A.Y. from date of actual deposit to the date of actual refund. (A.Y. 1992-93, 1993-94 & 1994-95)

Prayag Udyog P. Ltd. v. UOI (2012) 348 ITR 217 / 80 DTR 25 (All.)(HC)

S. 244A : Refunds - Interest - Interest on interest - Tax paid cannot be presumed against interest - Interest under section 244A is also payable on interest portion of tax demand

On final assessment the assessee was found eligible to have income tax refund. Revenue denied to pay interest under section 244A on the ground that part payment deposited earlier by assessee was towards discharge of interest liability and no interest was payable on interest. The Assessee filed a writ petition before the High Court. The Court held that where the treasury challans filed by the assessee shows that part payment was towards income-tax, revenue was not entitle to draw the inference or presumption that amount was not deposited as tax but interest. The Court also held that nevertheless, even if such payment was to be presumed to be as interest, interest under section 244A was payable on interest portion of tax demand. Accordingly the writ petition was allowed. (A.Y. 1993-94)

Lohia Starlinger Ltd. v. CIT (2012) 209 Taxman 484 / 78 DTR 265 / 254 CTR 280 (All.)(HC)

S. 244A : Refunds - Interest - Computation - Without reducing interest granted earlier

Interest under section 244A on the refund due to the assessee is to be calculated without reducing the interest under section 244A which is a part of the refund earlier granted from the refund due. (A.Y. 1996-97)

Abu Dhabi Commercial Bank Ltd. v. ADIT (IT) (2012) 138 ITD 83 / 78 DTR 234 / 150 TTJ 85 (Mum.)(Trib.)

S. 245C : Settlement Commission - Settlement of cases - Conditions

While granting immunity from prosecution and imposition of penalty it is incumbent upon the Settlement Commission to examine as to whether the criteria prescribed under section 245C is wholly complied or not; Settlement Commission having granted immunity from prosecution and penalty without recording any finding as to whether there is deliberate concealment of income or not, other of the Single Judge remanding the matter for de novo adjudication does not suffer from any material irregularity or illegality so as to warrant any interference by the Court in its appellate jurisdiction. (A.Y. 1994-95 to 1997-98)

ING Vysya Bank Ltd. v. CIT (2012) 208 Taxman 511/76 DTR 193/(2013) 255 CTR 311 (Karn.)(HC)

S. 245C : Settlement Commission - Application - Maintainability - Case - Merely because return was accepted under section 143(1), case of assessee cannot be deemed to be pending for assessment only because final order of assessment under section 143(3) was not passed - Assessments had become time-barred without any notice under section 143(2) and even final

time-limit for passing orders, even if such notices were issued, had expired - Assessee's application was not maintainable [S. 143(1), (143(2), 245A(b), Art. 226 of Constitution of India]

The assessee filed an application before the Settlement Commission for settlement of his case for A.Y. 2005-06 to 2011-12. He also voluntarily paid tax as per his computation of the settlement. The revenue raised preliminary objection to the maintainability of the application for settlement. The Settlement Commission turned down such preliminary objection ground that the applicant had satisfied the conditions laid down under section 245C. Against the order of admission the Commissioner filed the writ petition. The Court held that, from the statutory provisions, one can immediately gather that with effect from 1-6-2007, significant changes were made in the definition of the term 'case' defined under section 245(b). Previously, the definition of such term was much wider and included vast number of situations where not only the original assessment would be pending before the Assessing Officer, but would also cover the cases of assessment or re-assessment under section 147 and included the proceedings which would be pending by way of appeal or revision in connection with such assessment or re-assessment which may be pending before an income-tax authority on the date on which the application under section 245(C)(1) was made. After 1-6-2007, such definition was made more restrictive. After such amendments, the term 'case' would cover any proceedings for assessment under the Act in respect of an A.Y. or years which may be pending before an Assessing Officer on the date on which the application under section 245C(1) is made. Thus, large number of other proceedings, such as, arising out of assessment or re-assessment under section 147 or appeal or revision pending before the income-tax authorities would no longer be governed by the newly introduced definition of the term 'case'. Therefore, the newly introduced definition of the term 'case' would cover only those situations where an assessment is pending before the Assessing Officer or it is still possible for him to pass any order of assessment. Undoubtedly, acceptance of the return filed under section 143(1) cannot be categorized as an order of assessment. Under such a situation, obviously mere acceptance of the return under section 143(1) would not exclude an assessee's case from the definition contained in section 245(b). However, to contend that till the final order of assessment is passed, whether the revenue takes a particular case in scrutiny or not, the assessment should be deemed to be pending, would be stretching the language used in the definition, as also providing something which is not stated in the language. Accepting such a contention would lead to strange results. In a given case, if the assessment of an assessee is not taken in scrutiny and the revenue never desired to take the same in scrutiny, for long number of years, the assessee could contend that since no final order of assessment has been passed, his case for assessment can be stated to be pending before the Assessing Officer within the meaning of clause (b) of section 245A. Surely, the legislature never desired to bring about such anomalous situation. Accepting the proposition that even where by efflux of time, it is not open for the Assessing Officer to pass an order of assessment, merely because the return was accepted under section 143(1), the case of the assessee should be deemed to be pending for assessment only because the final order of assessment under section 143(3) was not passed, would run counter to the statutory amendments made in section 245A(b). In the present case, the facts are not in dispute at all. For the A.Y. 2005-06 to 2008-09, assessments had become time barred without any notice under section 143(2) and even final time limit for passing the orders even if such notices were issued had expired by the time the assessee filed his application for settlement before the Commission. The assessee's application qua these years, therefore, was not maintainable. Thus the Settlement Commission erred in holding to the contrary in the impugned order. (A.Y. 2005-06 to 2008-09)

CIT v. Income-tax Settlement Commission & Ors. (2012) 210 Taxman 529 / 80 DTR 354 /(2013) 259 CTR 329(Guj.)(HC)

S. 245D : Settlement Commission - Procedure - Application - Jurisdiction - Cash credits - Penalty - Settlement Commission pass an order on any other matters which are not covered by the application [S. 68, 245H, 271(1)(c), 274]

Petitioner filed the writ petition against the order of settlement commission where in it urged that they have in their petition had made disclosure of only Rs. 10 lakhs each in two A.Y. and since the Commissioner was not in a position to determine either the genuineness or the authenticity of the alleged transaction, entered into by the petitioner with two companies, the settlement Commission acted outside the jurisdiction in entering upon the genuineness of the transactions in impossible to accept. The Court held that the parliament intended that the entire assessment is before the Settlement Commission. The commission complete the assessment as part of the settlement of the case. Untill the Settlement Commission is seized of proceedings, there is no parallel assessment contemplated in law .Comprehensiveness, finality, and conclusiveness are three attributes of function assigned to Commission. That object is achieved when the entire assessment is completed, as part of the jurisdiction to settle the case. To dilute this position would defeat the object which Parliament intended to achieve. Once an assessee moves the Settlement Commission, the statute expressly mandates that the application cannot be withdrawn. Unless the Commission in given case decides to reject the application, it is entitle to resolve the case by settlement. An assessee who moves the Settlement Commission cannot be allowed to be anything other than fair and candid. Nor can he assert an unqualified right that the Settlement Commission should either accept what he discloses or leave him to another round of assessment before Assessing Officer, therefore the Settlement commission can pass orders on matters covered by the application and on any matter relating to the case which is referred to in the report of the Commissioner though not covered by application; it is not constricted from proceeding further where the Commissioner does not submit report at all. As regards addition under section 68 in respect of share premium of two companies, settlement commission considered all the material on record and given the finding that transaction is not genuine hence the provision of section 68 rightly applied to facts of the case. As regards levy of penalty under section 271(1)(c), the Court held that the assessee has offered only Rs. 10 lakhs in each of the two A.Y. in question based on the story of having earned such income without producing the records and without touching upon the real issues for which it was being pursued by the revenue and the settlement commission having found on the basis of totality of evidence that the assessee had not genuinely received the huge share premiums as claimed by it, it was justified in coming to the conclusion that the settlement proceedings was an attempt on the part of the assessee merely to shut out further investigation and therefore, levy of penalty under section 271(1)(c) by the settlement commission after furnishing a reasonable opportunity of hearing to the assessee on merits no interference was called. Accordingly the Court dismissed the petition of the petitioner. (A.Y. 2008-09, 2009-10)

Major Metals Ltd. v. UOI (2012) 251 CTR 385 / 69 DTR 274 / 207 Taxman 185 (Bom.)(HC)

S. 245N : Advance rulings - Definitions - Binding - AAR Rulings can be challenged but not directly in the Supreme Court [S. 245S, Constitution of India - Arts. 136, 226, 227]

AAR exercises judicial power and is a "tribunal" whose rulings can be challenged under Articles 136 and 227 of the Constitution. Binding nature of the AAR ruling does not affect the jurisdiction of the Court to entertain a challenge to the ruling under Article 136 or under Articles 226 and 227 of the Constitution. The ruling should in the first instance be challenged before the High Court. Ordinarily, an aggrieved party should not be encouraged to appeal directly to the Supreme Court unless it appears to the Court that the SLP raises substantial questions of general importance or a similar question is already pending before it for decision.

Columbia Sportswear Company v. DIT (2012) 346 ITR 161 / 75 DTR 33 / 251 CTR 353 / 210 Taxman 42 / (283) E.L.T. 321 (SC)

Editorial:- From the Ruling of Columbia Sportswear Company, In re (2011) 337 ITR 407 / 243 CTR 42 / 59 DTR 233 / 201 Taxman 214 (AAR)

S. 245I : Settlement Commission - Order - Conclusive - Commission having accepted the income disclosed and granted, Immunity against prosecution, and waiver of penalty, applicant cannot thereafter plead that application be rejected

The petitioner not being person subject to search filed application for settlement. The Commission substantially accepted the surrender of income made by the petitioner and granted immunity from penalty and prosecution. It was held that the petitioner could not insist and claim that its application should have been dismissed on the ground that it had failed of the manner in which income was earned. Further, the petitioner could not challenge and question the order of settlement commission being the beneficiary order. Observation of Settlement Commission that immunity was not available to third persons whose income had been discovered, the applicant cannot ask that those observations be expunged. The Court also observed that litigant cannot and should not be allowed to urge the reverse of what was pleaded before the statutory forum/Court. (A.Y. 2005-06, 2007-08, 2008-09, 2009-10)

Gupta Perfumers P. Ltd. v. Income Tax Settlement Commission & Ors. (2012) 348 ITR 86 / 253 CTR 573 / 209 Taxman 539 / 78 DTR 87 (Delhi)(HC)

S. 245R : Advance rulings - Procedure - Application - Mere filing of Return of Income disbars an advance ruling application [S. 139(1)]

For A.Y. 2009-10, the assessee filed a return of income under section 139(1) on 31.3.2010. On 17.06.2010, it filed an application before the AAR seeking a ruling in respect of the transactions that had been entered into in that year. The AAR rejected the application on the ground that as the assessee had filed a ROI, the questions raised in the application were "*already pending*" before an income-tax authority and so the application was not maintainable under the proviso to section 245R(2). The assessee filed a Writ petition contending that (a) the mere filing of a ROI did not mean that all possible questions were "pending" if the Assessing Officer had not raised the issue and (b) as the AAR had in the past admitted applications even though ROIs were filed, it could not change its stand. Held dismissing the Petition:

Upon a return of income being filed, the matter is "pending", in the sense that the Assessing Officer has the right to take such steps, including issuance of notice. The rationale for the bar in the Proviso to section 245R(2) is that if the applicant wishes to plan its affairs and transactions in advance, it is free to do but once it proceeds to file a return, the AAR's jurisdiction to entertain the application for advance ruling is taken away, because the Assessing Officer would then be seized of the matter, and would possess a multitude of statutory powers to examine and rule on the return. The fact that in the past the AAR followed a different practice is irrelevant because there is no estoppel against a statute. (A.Y. 2009-10)

Netapp BV v. Authority for Advance Rulings & Ors. (AAR) (2012) 76 DTR 145 / 253 CTR 164 (Delhi)(HC)

Sin Oceanic Shipping ASA v. Authority for Advance Rulings & Ors. (2012) 76 DTR 145 / 153 CTR 164 (Delhi)(HC)

S. 245R : Advance rulings - Procedure - Applicant - Subsidiary of government company [Finance Act, 1994 S. 96A, 96C]

Petitioners being step down subsidiary companies of a Government company are covered within the definition of the "applicant" in terms of section 96A(b) of Finance Act, 1994, and therefore, the applications filed by the petitioners before the AAR under section 96C are maintainable.

GSPL India Transco Ltd. v. UOI (2012) 77 DTR 441 / (2013) 255 CTR 287 (Guj.)(HC)

GSPL India Gasnet Ltd. v. UOI (2012) 77 DTR 441 / (2013) 255 CTR 287 (Guj.)(HC)

S. 245R : Advance rulings - Procedure - Application - Rejection of application - Similar application by holding company

Questions raised in the applications filed by the Petitioners were not pending in the petitioners own case before any Central Excise Officer, Tribunal or any court; further, petitioners having sought advance ruling in respect of activity/service which has not yet started, it could not be inferred that the proposed transaction of the petitioners would be identical to that undertaken by their holding company merely because the proposed business of the petitioners would be similar to that of the holding company and, therefore, the applications of the petitioners could not be rejected on the ground that the ruling might result in incompatible decisions on an identical question.
GSPL India Transco Ltd. v. UOI (2012) 77 DTR 441 / (2013) 255 CTR 287 (Guj.)(HC)
GSPL India Gasnet Ltd. v. UOI (2012) 77 DTR 441 / (2013) 255 CTR 287 (Guj.)(HC)

S. 245R : Advance rulings - Procedure - Application - International transaction - Pendency of proceedings - Application is not maintainable [S. 44BBB, 195]
The applicant is a public sector company. It has entered in to an offshore services contract with Atomstroy Export Russia (ASE) for setting up a power plant in the State of Tamil Nadu. According to the applicant, the income from such contracts is taxable under section 44BBB of the Act. It had entered in to four contracts with ASE. The applicant stated that it was assessed to tax for the years 2006-07 and 2007-08 pursuant to the directions of the Dispute Resolution Panel and it was held that payments received by ASE, under off shore services are covered by section 44BBB. The applicant approached the Authority for a ruling on the question "whether ASE is chargeable to tax as per the Act or under the Double Avoidance Convention between India and Russia in respect of the payment made by NPCIL to ASE under off shore supply contracts". The Authority held that since the question whether the payment made under the transaction was chargeable to tax under the Act was pending before the authorities under the Act arising out of an assessment against, before the applicant approached the Authority seeking ruling to know its Tax deducted at source obligations, hence the application is barred by clause (i) of the proviso to section 245R(2).
Nuclear Power Corporation of India Ltd. (2012) 343 ITR 220 / 65 DTR 99 / 246 CTR 165 / 204 Taxman 181 (AAR)

S. 245R : Advance rulings - Procedure - Application - International transaction - Pendency of proceedings - Deduction at source - Application is not maintainable [S. 40(a)(i), 195]
When the issue is pending in appeal, application for Advance Ruling is not maintainable. On facts it was found that the decision of Assessing Officer whether tax to be deducted on payment to non-resident was challenged before the Authorities and was pending hence the Authority held that application is not maintainable.
Foster Pty. Ltd. (2012) 340 ITR 246 / (2011) 243 CTR 534 / 202 Taxman 155 / 61 DTR 54 (AAR)

S. 245R : Advance rulings - Procedure - Application - International transaction - Pendency of proceedings - Rectification of mistake - Dismissed the application [S. 245Q]
Application of the assessee was not admitted on the ground that return filed by assessee and therefore matter pending before Assessing Officer. Assessee filed the rectification application based on certain observation in the hand book published by the Authority for Advance Rulings. The Authority for Advance Rulings held that Hand Book cannot control the rendering a decision with reference to the relevant provisions. It also clarified that the Hand Book referred the situation where a notice is issued calling upon the applicant to file a return. It does not deal with a situation where a return has been filed within time allowed under section 139(1). Accordingly the Authority has not entertained the application for rectification of mistake and dismissed the application.
Sepco III Electronic Power Construction (No. 2) (2012) 340 ITR 231 / (2011) 245 CTR 374 / 204 Taxman 66 / 63 DTR 402 (AAR)

S. 245R : Advance rulings - Procedure - Application - Return filed - Application after filing of return - Date of filing of return is the relevant date to consider the applicability of the proviso to section 245R(2) hence, application was held to be barred

The applicant filed the return of income under section 139(1) of the Act on 30th September, 2009. The transaction based on which rulings on various questions are sought, was entered into on 24th Nov., 2008. The application for advance ruling was filed on 21st May 2010. The Authority for advance ruling held that by filing a return, an assessee invites adjudication on all the questions arising out of that return and, therefore if the answer to the question arising before the Authority for advance ruling is involved in the return filed or would arise out of return, bar of proviso to section 245R(2) is attracted, hence the date of filing of return is the relevant date to consider the applicability of the proviso to section 245R(2), accordingly the application was held to be barred and dismissed.

Wave Field Inseis ASA, In re. (2012) 343 ITR 136 / 248 CTR 27 / 68 DTR 27 (AAR)

S. 245R : Advance rulings - Application - Return filed - Admissibility of the application to the Authority after filing return of income is held as barred hence the application rejected

Application was made by the applicant to reconsider the view in the case of SEPCO III Electric Power Corporation (2012) 340 ITR 225 (AAR), that upon filing the return of income, it cannot consider the question where return has been filed.

It was stated by the authority that the fixing of the date of notice under section 143(2) / 142(1) of the Act by the income-tax authority as the starting point, would result in vagaries and to the use of different yardsticks to different applicants. A jurisdiction cannot depend on such vagaries. It is, therefore, necessary to have a fixed common point or event for determining the existence or absence of jurisdiction. Applying that test it is held that the definite point should be the date of filing of the return juxtaposed with the filing of the application before this Authority. Thus the application is rejected.

Also it may be noted that in the instant case the applicant has approached the authority more than four years after the transaction giving rise to the application was entered into and even assessments for two years were already completed. (A.Y. 2007-08, 2008-09, 2009-10, 2010-11)

Red Hat India Private Limited (2012) 349 ITR 398 (AAR)

S. 245R : Advance rulings - Procedure - Application - Filing of a return of income is considered as matter pending before Income Tax authority which debars the taxpayer from approaching the AAR [S. 195]

The taxpayer, a Norwegian company, had earned income in India under a sub contract from another foreign company. Based on this sub contract, the taxpayer entered into an agreement with a third foreign company to hire a vessel. The taxpayer withheld taxes on the payments for hiring the vessel under Section 195 and filed its return of income. Subsequently, it filed an application with the AAR on various issues. The AAR dismissed the taxpayer's application on the grounds that since the taxpayer had filed its return of income, the questions arising in the application are already pending before the Revenue, and therefore, the application was barred under clause (i) of the proviso to Section 245R(2). The AAR was of the opinion that when a taxpayer files a return of income, multiple questions arise out of the return of income such as computation of total income, exclusions and exemptions, acceptance or non acceptance of any revenue expenditure, computation of income chargeable to tax and tax due thereon. The arising of the question from a return of income filed cannot depend upon the volition, vagaries, diligence, care or lack of care on the part of the Assessing Officer. If a return of income is accepted with or without being subjected to an audit, it would only mean that the contention of the taxpayer has been accepted and not that the question has not arisen before the Assessing Officer. (AAR No. 932, 933 dt. 03.02.12)

GTB Invest ASA (AAR)

S. 245R : Advance rulings - Procedure - Application - Precedent - AAR is not bound by its own ruling - Foreign company is liable for MAT - Transfer pricing and return of income filing provisions would apply despite no income [S. 2(17), 115JB, 139(1), Art. 226, 227 Constitution of India]

In the instant case, the AAR had to consider whether as the Applicant had no income chargeable to tax in India (a) the Transfer pricing provisions were applicable to its (b) Section 115JB (MAT) was applicable to it and (c) it was liable to file return of income. The AAR was also to consider whether it was bound by its own earlier rulings. It was held that the theory of precedents does not have strict application to the AAR. It is bound by the decisions of the Supreme Court. The decisions of High Courts have only persuasive value. The AAR is not subordinate to any High Court for even Article 227 of the Constitution to apply and there are grave doubts whether the jurisdiction under Article 226 will be attracted to the AAR. While the AAR should be slow in disagreeing with the propositions of law laid down in earlier rulings, it should not be deterred from taking a contrary view if its convinced that the earlier view is not correct. And thus, on the basis of the above principle and correct legal position determined, it was held that transfer pricing and return of income filing provisions would apply despite no income. (A.Y. 1988-89)

Castelton Investment Ltd. (2012) 348 ITR 537 / 211 Taxman 282 / 252 CTR 131 (AAR)

Editorial:- Refer Columbia Sportswear Company v. DIT (2012) 346 ITR 161 (SC) AAR is subject to the High Court's jurisdiction.

S. 245R : Advance ruling - Jurisdiction - Validity of transaction - Capital gains - Gift to subsidiary - DTAA - India-Singapore - Gift by company to subsidiary appears to be dubious tax avoidance scheme - Application dismissed [S. 45, 47(i), 47(iii), 48, 56(2)(viia), 82, Companies Act - Art. 13)

The applicant a Singapore company "gifted" the shares of Bharath Wind farm Ltd., an Indian company, to its 99.61% subsidiary Orient Green Power Ltd., another Indian Company. As the gift was made prior to the enactment of section 56(2)(viia) and there was no consideration received, it was claimed that there was no taxable income and that the transfer pricing provisions did not apply. The AAR held that under section 82 of the Companies Act, shares in a company is moveable property transferrable in the manner provided by its Articles of Association. The applicant has not shown the gift was authorized by its Articles. It is difficult to imagine the Articles of Association of a company providing for gifting away of the assets in the company to another company of shares in a public company, unless it be one which has been set up for some purpose. The Authority has the right and duty to consider the reality of the transaction and genuineness of the transaction, in addition to its validity. When such transactions are entered in to involving substantial assets, the applicant has to prove to the hilt the factum, genuineness and validity of the transaction, the right to enter into the transaction and the bonafides of the transaction. To postulate that a corporation can give away its assets free to another even orally can only be aiding dubious attempts at avoidance of tax payable under the Act. The Assessing Officer is in a better position to make a proper enquiry in to the question of the genuineness and validity of the transaction. Hence ruling is denied. Matter remanded.

Orient Green Power Pte Ltd. (2012) 346 ITR 557 / 75 DTR 297 / 210 Taxman 339 / 252 CTR 123 (AAR)

Editorial:- G.T.O. v. Venesta Foils Ltd. (1980) 124 ITR 660 (Cal.)(HC), where it was held that transfer of assets to a 100% subsidiary at an undervaluation was not a "gift" since the transferor held the shares of the transferee.

S. 245R : Advance rulings - Procedure - Rectification of mistakes [S.195, 197,Authority for Advance Rulings(Procedure)Rules, 1996. Rule 19]

An application was made by the Revenue under Rule 19 for rectification of mistakes in the order. It was held that, the objection that the ruling has been given effect to by the Assessing Officer cannot be

fully accepted. An order under section 195 or section 197 has been understood only as a provisional order subject always to a regular assessment and therefore, modification of the certificate granted to the company by the Assessing Officer pursuant to the advance ruling cannot stand in the way of the application for rectification of the ruling being entertained on merits.
Ruling of the Authority to the effect that the income from offshore supplies is not liable to tax in India being a ruling inconsistent with its finding that the assessable unit is an Assessing Officer, mistake is apparent from record and the same is required to be corrected; that part of the ruling which rules that the amount received/receivable by the applicant (member of Assessing Officer) for offshore supplies in terms of the contract is not liable to tax in India is reopened and the main application is posted for fresh hearing.
CTCI Overseas Corpn. Ltd. (2012) 76 DTR 282 / 253 CTR 11 / 210 Taxman 633 / (2013) 350 ITR 174 (AAR)

S. 245R : Advance rulings - Procedure - Application - Rejection of application
Applicant and TM Ltd. having entered into a share purchase agreement for allotment of TM's share in applicant's name at the time when TM Ltd. was under an outstanding obligation to issue shares to another company under a multi-party agreement which stood in the way of a public issue, and TM Ltd. having subsequently made a public issue, the circuitous arrangement was made evidently to circumvent cl. 2.6.1. of the SEBI Guidelines, 2000, and, therefore, advance ruling is declined on the aforesaid transaction.
Mahindra-BT Investment Company (Mauritius) Ltd., In Re (2012) 76 DTR 125 / 252 CTR 460 / 210 Taxman 638 (AAR)

S. 245R : Advance ruling - Procedure - Application - Application was Rejected for failure to produce consortium agreement
Applicant has been granted some rights or privileges by a Sri Lankan company SLT based on an agreement. To understand what passes to the applicant under that agreement, it is necessary to know the rights of the grantor. Rights of SLT spring from a consortium agreement. An understanding of the terms and effect of that document is essential for giving ruling on the questions raised by the applicant is a satisfactory manner. Applicant has not produced the consortium agreement despite numerous adjournments, hence, ruling is declined on the questions formulated in the application.
Dishnet Wireless Ltd., In Re (2013) 212 Taxman 451 / (2012) 76 DTR 302 / 253 CTR 187 (AAR)

S. 245R : Advance ruling - Rectification of apparent mistake - Modification of certificate granted to the company by Assessing Officer under section 195 or 197 cannot prevent the Authority from rectifying an apparent mistake [S. 195, 197, Authority for Advance Rulings(Procedure)Rules, 1996. Rule 19]
Application was made by the Revenue under Rule 19 of the Authority for Advance Rulings (Procedure) Rules, 1996 for amending its initial order with a view to rectifying a mistake apparent from the record. According to the Revenue, in AAR 854 of 2009, Authority had held that the taxable unit in respect of the transaction relied on by the applicant was an Assessing Officer. However, the Authority has gone on to rule that the transaction put forward by the applicant related to offshore supply of equipments and is not taxable in the country, proceeding as if the applicant alone is the assessee under the Act. According to the Revenue, this is an error apparent on the face of the record or a mistake coming within the purview of Rule 19 and the ruling in that regard requires to be corrected. It should be noted that subsequent to the initial ruling, the Officer dealing with withholding tax, has given effect to the Order by modifying the withholding tax Order under section 195.
Authority observed that where it is clear from it's order that it had not considered the impact of a finding by it on its ruling, there is a mistake apparent from record in the ruling. An order under section 195 or 197 has been understood only as a provisional certificate subject to regular assessment.

Therefore, modification of certificate granted to the company by Assessing Officer under section 195 or 197 cannot prevent the Authority from rectifying an apparent mistake.
CTCI Overseas Corpn. Ltd. (2012) 76 DTR 282 / 253 CTR 11 / 210 Taxman 633 / (2013) 350 ITR 174 (AAR)

S. 246 : Appeal - Commissioner(Appeals) - Appealable orders - Company whose name struck off from the register by ROC the director of erstwhile company is authorized to sign Form 35 and file an appeal
In case of a company whose name has been struck off the register by the Registrar of Companies can file an appeal under Section 246 and in that situation the Director of erstwhile company is authorized to sign the requisite form. (A.Y. 2006-07)
Ajay Ispat (P.) Ltd. v. ITO (2012) 136 ITD 145 / 73 DTR 16 / 147 TTJ 367 (Ahd.)(Trib.)

S. 246A : Appeal - Commissioner(Appeals) - Appealable orders - Maintainability - Merger - Revision is not maintainable [S. 264]
Once the assessee approaches commissioner under section 264 and order is passed, the assessment order merges with the order of revision, hence the assessee cannot file an appeal before the Commissioner(Appeals) under section 246A, as the appeal filed after rejection of petition under section 264 is not maintainable. (A.Y. 2006-07)
Orissa Rural Housing Development Corporation Ltd. v. ACIT (2012) 343 ITR 316 / 66 DTR 73 / 247 CTR 137 / Vol. 42 Tax L R 219 / 204 Taxman 673 (Orissa)(HC)

S. 246A : Appeal - Commissioner(Appeals) - Additional ground - Capital gain - Legal issue - Benefit of proviso to section claimed was first time before Commissioner(Appeals) held justified in allowing the claim [S. 112(1)]
In the return of income filed by the assessee the assessee has shown the long term capital gains taxable at 20%., which was accepted by the Assessing Officer. The assessee has not filed revised return. The assessee filed an appeal before the Commissioner(Appeal) and contended that by mistake the capital gain was offered at 20%. As per proviso the long term capital gain is assessable for the relevant year was at 10%. The assessee also filed an application under Rule 46A(1)(c)/(d) of the IT Rules. The Commissioner(Appeals) has admitted the claim and allowed the appeal. Revenue has filed an appeal before the Tribunal. The Tribunal allowed the appeal following the Goetze (India) Ltd. v. CIT (2006) 284 ITR 323 (SC). On an appeal to the High Court by assessee the Court held that the Assessee is entitled to raise the legal issue before the first Appellate Authority, which possessed co terminus power similar to Assessing Officer. The High Court set aside the order of Tribunal and restored the order of Commissioner(Appeals). (A.Y. 2001-02.)
Raj Rani Gulati (Smt) v. CIT (2012) 346 ITR 543 / 249 CTR 51 / 69 DTR 122 (All.)(HC)

S. 246A : Commissioner(Appeals) - Appealable orders - Penalty for failure to furnish annual information is appealable before Commissioner(Appeals) and Tribunal [S. 253(1)(c), 271, 271FA]
Section 246A(1)(q) provides for appeals before the CIT(A) against an order of penalty passed under Chapter XXI. Section 271FA admittedly falls within Chapter XXI. Therefore, appeal against an order passed by Director of IT, an officer of the rank of CIT under section 271FA is maintainable before CIT(A). Merely because orders under section 271 and 272A passed by an officer of the rank of CIT are appealable before the Tribunal under section 253, it cannot be held that an order under section 271FA passed by an officer of the rank of CIT should also be appealable before the Tribunal. Though orders of penalty under section 271 and 272A fall under Chapter XXI, appeals there from stand excluded before the CIT(A) under the general provisions of section 246A(1)(q) by virtue of the

specific provision under section 253(1)(c). Consequently, an order under section 271FA is appealable under section 246A(1)(q).
DIT v. Ravi Vijay & Anr. (2012) 252 CTR 228 / 75 DTR 202 / 209 Taxman 498 (Raj.)(HC)
DIT v. Balu Ram & Anr. (2012) 252 CTR 228 / 75 DTR 202 / 209 Taxman 498 (Raj.)(HC)

S. 246A : Appeal - Commissioner(Appeals) - Appealable orders - Deduction at source - Interest - Assessee in default - Appeal is maintainable [S. 201]
The Commissioner(Appeals) held that the Assessing Officer has passed an order levying the interest under section 201 hence the appeal is not maintainable. The Tribunal held that order passed under section 201 is appealable. (A.Y. 2007-08 to 2009-10)
Canara Bank v. Dy. CIT (TDS) (2012) 134 ITD 1 / 67 DTR 391 / 144 TTJ 668 (Luck.)(Trib.)

S. 246A : Appeal - Commissioner(Appeals) - Appealable orders - Income-Salary -Performance incentive - Same income cannot be assessed twice, and claim of assessee has to be allowed as mistake apparent on record, though the income was offered by assessee in the return of income, the appeal is maintainable [S. 4, 139, 154]
The assessee while filing the return for the A.Y. 2007-08 in addition to regular income also admitted a sum of Rs. 4,28,750/- as performance incentive from his employer. The assessment was completed under section 143(3), which was accepted by the assessee. In the A.Y. 2008-09 after going through the TDS certificates, the assessee realized that the correct A.Y. should be A.Y. 2008-09 and offered for taxation in the A.Y. 2008-09, which was accepted by the tax department. The assessee filed an appeal to Commissioner(Appeals) for the A.Y. 2007-08, which was dismissed by Commissioner in limine as appeal is not maintainable. The assessee preferred an appeal before the Tribunal. As there was difference of opinion the matter was referred to third member. The third member held that the Act does not authorize levy of tax on same amount more than once, therefore, when amount of performance incentive had been assessed for A.Y. 2008-09, assessment of same amount for impugned A.Y. 2007-08 was a mistake apparent on records. Accordingly the claim of assessee was allowed. (A.Y. 2007-08)
R. Natarajan v. ACIT (2012) 135 ITD 55 / 70 DTR 249 / 146 TTJ 315 (TM)(Chennai)(Trib.)

S. 246A : Commissioner(Appeals) - Appealable orders - Order giving effect to revision order under section 264 [S. 264]
CIT having passed order under section 264 keeping the contentious issues alive by sending the matter back to the Assessing Officer without deciding the same, it cannot be said that the issue have attained finality vide order under section 264 and therefore, assessee was entitled to agitate such issues in the appeal against the fresh assessment made by the Assessing Officer pursuant to the order of the CIT. (A.Y. 1999-2000)
Jasbir Singh v. ITO (2012) 76 DTR 36 / 149 TTJ 81 (Amritsar)(Trib.)

S. 249 : Appeal - Form of appeal and limitation - Admitted tax - If admitted tax is not paid the appeal is not maintainable - If admitted tax is paid thereafter the Commissioner(Appeals) can entertain the appeal
The assessee admitted the income as per return of income. He did not pay the admitted tax on returned income. The Assessing Officer made certain additions. The Assessee filed an appeal before the Commissioner(Appeals). The Commissioner(Appeals) rejected the appeal in limine under section 249(4). Thereafter the assessee paid the admitted tax liability and filed an application before the Commissioner(Appeals) seeking recall of the earlier order. The Commissioner(Appeals) rejected the said application. On appeal to the Tribunal the Tribunal remitted the matter back to the Commissioner(Appeal) to verify whether the entire admiite tax was paid and if so he should decide

the case on merit. On appeal to the High Court by revenue the Court held that if admitted tax is not paid which fall sunder clause (a) of sub-section (4) of section 249, Commissioner(Appeals) is not vested with any power to waive payment of such admitted tax and entertain appeal, in such a case, order of dismissing appeal is automatic and justified. However, if after such dismissal, if assessee pays admitted tax and requests appellate authority to recall order dismissing appeal in limine and to consider appeal on merits under aforesaid provision or under any other provision of Act, there is no prohibition or legal impediment for appellate authority to recall its earlier order and entertain appeal and decide same on merits. Accordingly the appeal of revenue was dismissed and the order of Tribunal was up held. (A.Y. 2007-08)

CIT v. K. Satish Kumar Singh (2012) 209 Taxman 502 (Karn.)(HC)

S. 249 : Appeal - Commissioner(Appeals) - Form of appeal and limitation - Payment of tax due on returned income mandatory, however no time limit is prescribed for the same

Only requirement of section 249(4) is payment of tax due on returned income. There is no such time limit is prescribed for payment of such taxes. If an appeal has been filed has been filed after making payment, it cannot be said that the requirement of section 249(4) has been complied with. (A.Y. 1996-97)

ITO v. Ankush Finstock Ltd. (2012) 136 ITD 168 / 149 TTJ 502 (Ahd.)(Trib.)

S. 249 : Appeal - Commissioner(Appeals) - Form of appeal and limitation - Appeal can be filed by the director of erstwhile company, whose name was struck-off the register by the Registrar of company [S. 140, 246, Companies Act, 1956, S. 560]

The assessee filed an appeal against the levy of penalty order. The Commissioner(Appeal) noticed that the company was wound up and the name of the company was struck off from the register of ROC. He opined that "in the absence of existing company, there cannot be any director who can sign the verification for the filing of appeal. There cannot be any appeal by a company which is not in existence. In view of this, the appeal is treated as invalid and accordingly dismissed." Being aggrieved by the said order the assessee filed an appeal before the Tribunal. The Tribunal held that a company whose name has been struck-off the register by the ROC can file an appeal under section 246 and in that situation the director of the erstwhile company is authorized to sign the requisite forms. Accordingly, it was held that the appeal is maintainable. (A.Y. 2006-07)

Ajay Ispat (P) Ltd. v. ITO (2012) 136 ITD 145 / 73 DTR 16 / 147 TTJ 367 (Ahd.)(Trib.)

S. 250 : Appeal - Commissioner(Appeals) - Procedure - Additional Ground - Legal [S. 254]

Ground raising the claim for exemption under section 10(23C) of the Act being a legal ground can be raised for the first time before the appellate authority.

CIT v. St. Mary's Malankara Seminary (2012) 348 ITR 69 / 71 DTR 153 / 250 CTR 294 / 206 Taxman 429 (Ker.)(HC)

S. 250 : Appeal - Commissioner(Appeals) - Procedure - Additional evidence - CBDT circular cannot be treated as additional evidence [Income-tax Rules, 1962 - Rule 46A]

Circular issued by CBDT cannot be termed as an additional evidence in appeal and, therefore, it cannot be said that Commissioner(Appeals) was not justified in admitting circular No. 723, dt. 19th September, 1995 and considering the same without affording opportunity of hearing to the Assessing Officer. (A.Y. 2005-06)

ACIT v. Minpro Industries (2012) 65 DTR 113 / 143 TTJ 331 (Jodh.)(Trib.)

S. 250 : Appeal - Commissioner(Appeals) - Additional evidence - Document not produced the same before Assessing Officer while replying to relevant query assessee is not entitled to produce the documents before CIT(A) [Icome –tax Rules,1962.Rule 46A]

Assessee though in possession of the document, having not produced the same before Assessing Officer while replying to relevant query made by Assessing Officer, Assessee is not entitled to produce the same in appeal before CIT(A) either under sub-Rule (1) or sub-Rule (4) of Rule 46A. (A.Y. 2007-08)

Sagar Sarhadi v. ITO (2012) 135 ITD 153 / 148 TTJ 86 / 73 DTR 192 (Mum.)(Trib.)

S. 250 : Appeal - Commissioner(Appeals) - Procedure - Opportunity of hearing to Assessing Officer - Matter set aside

On an appeal filed by assessee, the CIT(A) as a quasi-judicial authority, must provide an opportunity of hearing to Assessing Officer as mandated by section 250. In case Form ITNS 51 is not returned to CIT(A) by Assessing Officer, CIT(A) is not justified in presuming that the Assessing Officer or his representative is not interested in appearing before CIT(A). ITNS 51 though served on Assessing Officer having not been received back by CIT(A), appeal decided by CIT(A) without informing the next date of hearing to Assessing Officer was in violation of principles of natural justice. Matter remanded to CIT(A) for decision afresh after affording opportunity of hearing to Assessing Officer. (A.Y. 2007-08)

ACIT v. Himanshu Gandhi (2012) 137 ITD 244 / 79 DTR 47 / 150 TTJ 133 (Mum.)(Trib.)

S. 250(5) : Appeal - Commissioner of Income-tax(Appeals) - Additional ground - Retrospective amendment of law - Additional ground in view of retrospective amendment could be raised before the Commissioner of Income-tax(Appeals)

Before the Commissioner of income-tax(Appeals), the assessee raised an additional ground praying for allowability of expenditure in respect of which TDS was paid before due date of filing of return in view of the retrospective amendment in law amending section 40(a)(ia). The Commissioner of Income-tax(Appeals), rejected the claim relying on Goetze (India) Ltd. v. CIT (2006) 284 ITR 323 (SC). The Tribunal held that in view of retrospective amendment of law additional ground could be raised before the CIT(A) and directed the CIT(A) to entertain the claim. (A.Y. 2005-06)

Nitin M. Panchamiya v. Addl. CIT (2012) 73 DTR 202 / 148 TTJ 96 / 50 SOT 468 (Mum.)(Trib.)

S. 251 : Commissioner(Appeals) - Powers - Stay - Recovery - Commissioner(Appeals) has the power to stay the recovery [S. 220]

Commissioner(Appeals) have inherent implied and ancillary powers to grant stay against recovery of disputed demand of tax while the appeal filed before them under section 246 or 246A is pending. The Court observed that all the first appellate authority in cases of other appellant assessee within State of Rajasthan also would entertain stay applications filed before them during the pendency of appeals and would decide the same on their own merits in future. (A.Y. 2008-09)

Maheswari Agro Industries v. UOI (2012) 346 ITR 375 / 246 CTR 113 / 65 DTR 129 / (2012) TLR Vol. 42 Feb. 168 / 206 Taxman 375 (Raj.)(HC)

S. 251 : Commissioner(Appeals) - Powers - New source of income - Remand - Assessing Officer cannot travel beyond the specific issue contained in remand order [S. 115J]

The Assessing Officer is not empowered to travel beyond the specific issues contained in the order of remand passed by the Commissioner of Income-tax(Appeals) (A.Y. 1988-89)

Dy. CIT v. Surat Electricity Co. Ltd. (2012) 67 DTR 181 / (2011) 337 ITR 271 / 202 Taxman 562 (Guj.)(HC)

S. 251 :Commissioner(Appeals) - Powers - Change of status - In appeal the Commissioner(Appeals) has no power to modify the status of assessee from Assessing Officer to BOI

The Assessing Officer issued the notice under section 148 to assesse in the status of Assessing Officer comprising of three persons. The assessment order passed in pursuance of notice under section 148 was challenged before Commissioner(Appeals). The Commissioner(Appeals) changed the status from Assessing Officer to BOI consisting of two persons. The Order of Commissioner(Appeals) was upheld by the Tribunal. On appeal by the assessee to High Court the Court held that if the status of the assessee is to be modified, the only option available to the Assessing Officer is to assess the income in the appropriate status, if permitted by law, by issuing a notice to the assessee in that particular status. Commissioner(Appeals) was not justified in modifying the status from Assessing Officer to BOI. The question was answered in favour of assessee. (A.Y. 1972-73)

Gutta Anajaneyulu & Co. v. CIT (2012) 347 CTR 135 / 249 CTR 106 / 69 DTR 181 (AP)(HC)

S. 251 :Commissioner(Appeals) - Powers - New claim before Commissioner(Appeals) - Assessee entitled to raise claims not made in ROI before appellate authorities [S. 139]

The assessee filed a ROI in which it omitted to make a claim for payment of SEBI fees. The claim was made by a letter during the assessment proceedings. The Assessing Officer rejected the claim on the ground that he had no authority to allow any deduction which had not been claimed in the ROI. The assessee raised the claim before the CIT(A) who allowed and this was confirmed by the Tribunal. The department filed an appeal to the High Court claiming that as per Goetze (India) Ltd. v. CIT (2006) 284 ITR 323 (SC), the assessee was not entitled to make an additional claim for deduction other than by filing a revised return. Held by the High Court dismissing the appeal:

It is well settled that an assessee is entitled to raise not merely additional legal submissions before the appellate authorities, but is also entitled to raise additional claims before them. The appellate authorities have the discretion whether or not to permit such additional claims to be raised. It cannot, however, be said that they have no jurisdiction to consider the same. That they may choose not to exercise their jurisdiction in a given case is another matter. The exercise of discretion is entirely different from the existence of jurisdiction. Goetze was confined to a case where the claim was made only before the Assessing Officer and not before the appellate authorities. The Court did not lay down that a claim not made before the Assessing Officer cannot be made before the appellate authorities. The jurisdiction of the appellate authorities to entertain such a claim has not been negated by the Supreme Court in this judgment. On facts, there was nothing to show that the claim entertained by the CIT(A) / ITAT was improper CIT v. Jai Parabolic Springs Ltd. (2008) 306 ITR 42 (Delhi)(HC) referred. (A.Y. 2004-05)

CIT v. Pruthvi Brokers & Shareholders Pvt. Ltd. (2012) 349 ITR 336 / 74 DTR 321 / 208 Taxman 498 / 252 CTR 151 (Bom.)(HC)

S. 251 : Commissioner(Appeals) - Powers - Enhancement - Commissioner(Appeals) has power to consider such items which was considered by the Assessing Officer and enhance assessment

Items considered by the Assessing Officer but no addition made. It was held that commissioner appeal has power to consider such items and enhance assessment. Accordingly addition made by the Commissioner(Appeals), on the basis of analyzing the documents which was confirmed by the Tribunal was held to be proper. (Block Period 1990-91 to 2001-02)

Gurinder Mohan Singh Nindrajog v. CIT (2012) 348 ITR 170 / (2013) 213 Taxman 33 (Mag.)(Delhi)(HC)

S. 251 : Commissioner(Appeals) - Powers - Withdrawal - After filing appeal could not at his option or at his discretion withdraw said appeal to prejudice of revenue [S. 245C, 245D]

When the appeal was pending before the Commissioner(Appeals) the Assessee moved the settlement Commission under section 245C. The Assessee made an application before the Commissioner(Appeals) to withdrawal of appeal. The Commissioner(Appeals) based on the letter of the assessee dismissed the appeal as in fructuous. The Settlement Commission thereafter passed an

order that since the appeal was withdrawn after the date of filing of the petition for settlement, the petition itself was not maintainable hence the petition was dismissed. The Assessee against the order of the Commissioner(Appeals) filed an appeal before the Tribunal. The Tribunal held that as the order of Commissioner(Appeals) dismissing the appeal as in fructuous was justified, hence no cause of action arose for the assessee to file an appeal before the Tribunal. In an appeal before the High Court the Court held that after filing an appeal the assessee could not at his option or at his discretion withdraw said appeal to prejudice of revenue. However, in considering question as to withdrawal of appeal from file of Commissioner(Appeals), objection or no objection from revenue for such withdrawal could not play any role. The assessee now took plea that appeal filed before Commissioner(Appeals) should not have been rejected and same should be continued to completion. It was held that the order passed by Commissioner(Appeals) allowing withdrawal of appeal was not justified even if revenue had not objected to same, therefore, assessment should be considered by Commissioner(Appeals) on merits. The order of Tribunal was set a side and matter restored back to the file of Commissioner(Appeals) for considering the assessment on merits. (A.Y. 1992-93, 1993-94, 1996-97)

M. Loganathan v. ITO (2012) 209 Taxman 508 / (2013) 350 ITR 373 (Mad.)(HC)

S. 251 : Commissioner(Appeals) - Powers - Set aside order - Commissioner(Appeals) has the power to remand the matter even after amendment to section 251(1)(a) with effect from 1-6-2001

In the set aside proceedings by the Tribunal the Assessing officer rejected the higher rate of depreciation, without granting sufficient time. On appeal Commissioner(Appeals) held that the Assessing Officer has failed to carry out the requirements of the orders earlier passed by the Tribunal restoring the issue to the file of the Assessing Officer accordingly set aside the matter to the Assessing Officer to pass a fresh order after verifying the facts. The department challenged the order of Commissioner(Appeals), the Tribunal confirmed the order of Commissioner(Appeals). On appeal be revenue the Court held that, even if the amendment in the clause (a) of section 251(1) has been made so as to provide that the Commissioner(Appeals) may not set aside the assessment and refer the case back to the Assessing Officer for making fresh assessment with a view to help brining an early finalization of the assessment, it cannot be assumed that the Commissioner(Appeals) is divested of the power to annul the assessment and then to pass appropriate consequential order. Accordingly the appeal filed by the revenue was dismissed. (A.Y. 1979-80 to 1981-82)

CIT v. Hindustan Zinc Ltd. (2012) 209 Taxman 519 / (2013) 83 DTR 231 / 257 CTR 22 (Raj.)(HC)

S. 251 : Commissioner(Appeals) - Powers - Where Commissioner(Appeals) relied upon information which was furnished by assessee in view of direction given by Commissioner(Appeals) for effective disposal of appeal, there was no violation of rule 46A [Income-tax Rules, 1962 - Rule 46A]

The revenue contended that the Commissioner(Appeals) relied on additional documents i.e. books of account produced before the Commissioner(Appeals) for the first time which is contrary to Rules 46A. The Court held that where Commissioner(Appeals) relied upon information which was furnished by assessee in view of direction given by Commissioner(Appeals) for effective disposal of appeal, there was no violation of Rule 46A. (A.Y. 1996-97)

CIT v. Sanu Family Trust (2012) 209 Taxman 529 (Karn.)(HC)

S. 251 : Appeal - Commissioner(Appeals) - Powers - Additional ground - Raised first time before Commissioner(Appeals) - Additional ground admitted

Assessee did not claim deduction under section 80C in the return but took up the claim by way of a letter without revising the return. Assessing Officer disallowed the claim. On appeal

Commissioner(Appeals) also did not allow the claim. The Tribunal held that the Appellate Authority still has the power to entertain the claim, accordingly the order of Commissioner was set aside and matter remitted to the file of the Assessing Officer, with a direction to consider the claim. (A.Y. 2006-07)

Pradeep Kumar Harlalka v. ACIT (2012) 65 DTR 157 / 143 TTJ 446 (Mum.)(Trib.)

S. 251 : Appeal - Commissioner(Appeals) - Powers - Admission of additional evidence is held to be justified [Income-tax Rules, 1962,Rule 46A]

Assessee had already filed requisite details before Assessing Officer and further detail was to be filed before Assessing Officer, but latter refused to accept same. Such new evidence that was to be filed by assessee was from Government agency and same was essential for disposal of appeal. The Tribunal observed that the CIT(A) had considered the new evidence and the facts and circumstances of the case in entirety and after recording reasons admitted the new evidences. Hence, admission of new evidence by CIT(A) was justified. (A.Y. 2006-07)

ITO v. Bhagwan Dass (2012) 137 ITD 120 / 17 ITR 446 (Chd.)(Trib.)

S. 251 : Commissioner(Appeals) - Powers - Power of first appellate authority is co-terminus with that of Assessing Officer

Power of first appellate authority is co-terminus with that of Assessing Officer and he is required to look into issue and examine same which has not been properly dealt with by Assessing Officer. Tribunal held that the Commissioner(Appeals) was justified in acquiring the jurisdiction for making the enhancement of the income where Assessing Officer allowed the credit of Tax deducted at source of entire amount claimed by assessee without considering the corresponding receipts received by assessee. (A.Y. 2007-08)

Ratan J. Batliboi v. ACIT (2012) 138 ITD 355 / 80 DTR 425 / (2013) 152 TTJ 164 (Mum.)(Trib.)

S. 253 : Appeals - Appellate Tribunal - Non-payment of admitted tax - Stay - Appeal is maintainable before the Tribunal - Assessee has shown a prima facie, an arguable case, stay was granted with certain conditions [S. 220(6), 249(4)]

In an appeal filed by the assessee the revenue contended that as the admitted tax was not paid by the assessee the appeal is not maintainable. The appellate Tribunal after refrying the Judgment of supreme Court in CIT v. Pawn Kumar Laddha (2010) 324 ITR 324 (SC), held that the appeal is maintainable because the provisions of section 249(4) in chapter XX-A relating to filing of appeal before the Commissioner(Appeals) cannot be read in to section 253(1)(b) in Chapter XX-B of the Income-tax Act which relating to filing of an appeal before the Tribunal Accordingly, the Tribunal held that the appeal is maintainable. On the facts the Tribunal has found that the Assessing Officer has raised huge demand by passing and order under section 201(1) and 201(IA) when the bank accounts of assessee was attached. The Tribunal also found that for fraction of F.Y. 2011-12 demand was raised, which is not permissible. Accordingly the Tribunal granted stay with certain conditions. (A.Y. 2010-2011 to 2012-13)

Kingfisher Airlines Ltd. v. ACIT (2012) 73 DTR 257 / 148 TTJ 113 (Bang.)(Trib.)

S. 253 : Appeals - Appellate Tribunal - Right of respondent [Income-tax Appellate Tribunal Rules, 1963 - Rules 27]

Assessee respondent having not appealed against the order o the first appellate authority, is not entitled to contend the question of jurisdiction of the assessment in a departments appeal before the Tribunal. A cross objector has a legal right to support an order o the first appellate authority but no right is enshrined under Rule 27 of ITAT Rules to attack that judgment. In the present case, though the first appellate authority has decided the issue of the applicability of the provisions of section 153C which was one of the grounds of appeal raised by the assessee before CIT(A), but even after an

adverse decision of the CIT(A) on the said legal ground, no appeal was preferred by the assessee. Because of this reason, the Tribunal is not empowered to pass an order "thereon" on the subject matter which is not in appeal as per the appeal memo to be adjudicated upon. (A.Y. 2002-03)
Dy. CIT v. Sandip M. Patel (2012) 137 ITD 104 / 78 DTR 260 / 150 TTJ 338 (Ahd.)(Trib.)

S. 253 : Appeals - Appellate Tribunal - Tax effect less than Rs. 3 lakhs - Revenue appeal not maintainable
In view of Instruction No. 3 dated 9-2-2011, where tax effect involved in revenue's appeal was less than Rs. 3 lakhs, same was to be dismissed being non-maintainable. (A.Y. 2005-06)
I. J. Tools & Castings (P.) Ltd. v. ACIT (2012) 139 ITD 414 (Amritsar)(Trib.)

S. 253 : Appeals - Appellate Tribunal - Powers - Condonation of delay - Delay of 921 days, not explained satisfactorily hence not condoned [S. 12A]
Assessee State Tourism Promotion Board filed application for grant of registration under section 12A. Commissioner however, granted registration from A.Y. 2009-10 and not from A.Y. 2007-08, as claimed by assessee in terms of provisions of section 12A(2). Assessee filed appeal before Tribunal against said order after a delay of 921 days and sought condonation by contending that such inordinate delay in filing appeal was attributed to assessee's non-understanding of difference of year of grant of registration. Since assessee was a Government concern administered by competent persons and guided by chartered accountants in its tax matter, it could not be believed that it took 921 days to understand simple fact that registration was granted with effect from A.Y. 2009-10, therefore, delay could not be condoned. (A.Y. 2007-08, 2008-09)
Punjab Heritage & Tourism Promotion Board v. ITO (2012) 54 SOT 433 (Chd.)(Trib.)

S. 253(2) :Appeals- Appellate Tribunal - Maintainability - Small tax effect - Instruction No. 5 of 2007 dt. 16-7-2007
Appeal can be filed where the tax effect is small provided the department places material before the appellate Tribunal, and falls within the expected category. The tax effect in the present case was less than 2 lakhs.
CIT v. Unitara Finance Ltd. (2012) 72 DTR 401 / 251 CTR 166 (MP)(HC)

S. 253(2) :Appeals- Appellate Tribunal - Power - Small tax effect - CBDT instruction no 5 dt. 15th May, 2008 is applicable prospectively-After setting off the loss the assessed income was nil, departmental appeal was dismissed
Revenue has filed an appeal before the Tribunal in respect of excess claim of depreciation of Rs. 4,09,769/- and disallowance of interest of Rs. 14,57,534/-. Assessee contended that the assessed income was nil after setting off the carried forward losses. As the returned income and assessed income being nil, instruction No. 2 dt. 24th October, 2005 is applicable as the tax effect is less than 2 lkahs appeal of department is not maintainable. The Tribunal accepted the contention of assessee and dismissed the appeal of revenue. (A.Y. 2002-03)
ITO v. Speciality Coatings & Lamination Ltd. (2012) 138 ITD 244 / 144 TTJ 532 (Delhi)(Trib.)

S. 253(3) :Appeals- Appellate Tribunal - Reference to special Bench - Entire appeal for consideration - Order of the President of the Tribunal referring the entire appeal for consideration by the Special Bench as against the questions referred by special bench cannot be questioned
The Tribunal held that order of President of the Tribunal referring the entire appeal for consideration by the Special Bench as against the questions referred to by the division bench cannot be questioned. The preliminary objections raised by the Departmental Representative was not accepted. Order of the

President of the Tribunal referring the entire appeal for consideration by the Special Bench as against the questions referred by special bench cannot be questioned. (A.Y. 2001-02)
Sardar Sarovar Narmada Nigam Ltd. v. ACIT (2012) 138 ITD 203 / 149 TTJ 809 / 78 DTR 172 / 19 ITR 133 (SB)(Ahd.)(Trib.)

S. 254(1) : Appellate Tribunal - Orders - Validity of search - Tribunal has power to decide the legality and propriety of search under section 132, accordingly the matter was set aside to the Tribunal to decide afresh[S.132]
The assessee has filed the writ petition challenging the validity of search under section 132 of the Income-tax Act, 1961. When the matter was pending before the Tribunal, the Tribunal held that it cannot go into the question because the issue is pending before the High Court. The assessee made a prayer to withdraw the writ petition and purse the matter before the Tribunal. The Court held that in view of judgment in CIT v. Chitra Devi Soni (Smt.) (2009) 313 ITR 174 (Raj.), where in the SLP of department was also dismissed (2009) 313 ITR (St) 28, the appeal was set aside and remanded the appeal to the Tribunal to decide on merits strictly in accordance with the law.
Badri Ram Choudhary v. ACIT (2012) 67 DTR 83 / 247 CTR 461 / (2013) 355 ITR 223 (Raj.)(HC)
Editorial:- Refer Tribunal order Badri Ram Choudhary v. ACIT (2010) 128 TTJ 339 / 34 DTR 335 (Jodh.)(Trib.), was set aside. (ITA No. 55/Jd/2006 dated 29th January, 2009)

S. 254(1) : Appellate Tribunal - Orders - Duty - Reasoned order - Block assessment - Tribunal has to deal with factual findings of Assessing Officer and give reasons for its conclusion, order of Tribunal set aside[S.132]
Pursuant to a search under section 132, the Assessing Officer passed a block assessment order under section 158BC. The Tribunal allowed the assessee's appeal on the ground that (i) the search warrant did not mention the assessee's name and (ii) the assessment was not based on material found during the search. The department filed an appeal claiming that (a) the search warrant & panchnama did refer to the assessee's name and (b) the detailed assessment order exposing the assessee's modus operandi had not been dealt by the Tribunal. Held by the High Court allowing the appeal:
The Tribunal recorded a wrong factual finding that the search warrant did not include the assessee's name. The Tribunal has not specifically referred to and dealt with the findings of the Assessing Officer, which are detailed, specific & with reference to several factual aspects, documents, etc. The Tribunal is required to deal with the factual findings recorded by the Assessing Officer and give its factual conclusions. The factual conclusion should be based upon reasons and should be outcome of analysis and discussion. The Tribunal being the final fact finding authority cannot merely record its conclusions without discussing the factual matrix, evidence and material. Merely stating that the papers etc. do not pertain to the assessee and the contents of the document cannot be utilized, is the conclusion or the final inference which is not sufficient in the light of what has been held by the Assessing Officer in the block assessment order. The fact that the assessee filed a detailed written synopsis does not mean that the order of the Tribunal meets the legal requirement. The law mandates that the Tribunal should give reasons which are discernible and apparent from the order. What weighed with the Tribunal cannot be assumed in the absence of discussion.(A.Y. 2004-05).(ITA no 308/2007 dt 30-04-2012)
CIT v. Promain Ltd. (Delhi)(HC) www.itatonline.org

S. 254(1) : Appellate Tribunal - Orders - Sufficient cause - Adjournment - Despite "Last Chance" appeal should be adjourned if there is sufficient cause [Income-tax (Appellate Tribunal) Rules, 1963 - Rule 32]
The department's appeal was adjourned at the assessee's request to 9.02.2010 and it was made clear that it would be the "last opportunity". The assessee's counsel filed an application for adjournment on

8.02.2010 on the ground that he was going to Mumbai for some urgent work. On 9.2.2010, no one appeared for the assessee and so the Tribunal rejected the adjournment application and allowed the department's appeal. On appeal by the assessee to the High Court Held:
Ordinarily, it is not incumbent on the Tribunal to adjourn the case when a last opportunity had already been granted to the assessee. However, there may be number of circumstances where adjournment becomes necessary in the interest of justice. If Counsel for assessee had to go for some urgent work to Mumbai and an application for adjournment was moved in advance, then in the interest of justice, a short adjournment should have been granted. If number of opportunities had already been afforded to the Counsel for assessee, then adjournment could have been granted, on payment of cost. The Tribunal has not assigned any reason as to whether reason mentioned in the application for adjournment, constituted sufficient cause for adjournment or not. Even if a last opportunity is granted and case is fixed for hearing and sufficient cause is shown on the date fixed for hearing, then the case can be adjourned and it should be adjourned, in the interest of justice. Accordingly, the Tribunal committed an illegality in rejecting the application for adjournment and in deciding the appeal exparte. Appeal remitted to the Tribunal for decision on merits on payment of costs of Rs. 21,000/- by the assessee. (A.Y. 2004-05)
Mehru Electrical & Engg. (P) Ltd. v. CIT (2012) 250 CTR 445 / 72 DTR 29 / 211 Taxman 41 (Mag.)((Raj.)(HC)

S. 254(1) : Appellate Tribunal - Additional evidence - Block assessment - Search and seizure - The Tribunal ought to have remitted the matter to Assessing Officer [S. 132, Income-tax (Appellate Tribunal) Rules, 1963 - Rules, 18(4), 29]
A search and seizure action under section 132 was conducted on assessee. On the basis of statement under section 132(4) undisclosed income was arrived. However, in response to notice under section 158BC, the assessee filed nil return. The Assessing Officer determined the income at Rs. 5,40,07,340/-. On appeal, the Tribunal confirmed five additions under different heads and deleted all other items included by the Assessing Officer. On appeal by the revenue, the High Court, held that the Tribunal had accepted almost ll the documents without any detailed consideration. Rule 29 mandates the Tribunal to satisfy itself as to whether those documents can be entertained, and if entertained, shall, apply its mind to the veracity of those documents. This being a power vested in the Tribunal with certain element of discretion attached to it, such power shall be exercised with great care and caution and not arbitrarily. Merely because the opposite party did not seriously object to those documents, the obligation of the Tribunal under Rule 29 could not be ignored. On the facts the Tribunal ought to have remitted the matter to the Assessing Officer for consideration.
CIT v. Ku. P. A. Krishnan (2012) 345 ITR 38 (Mad.)(HC)

S. 254(1) : Appellate Tribunal - Orders - Reasoned order - Tribunal has to pass a reasoned order
The High Court held that the Tribunal order should contain points for determination and its finding. Order of Tribunal, not containing any reason, is no order in the eyes of law, and cannot be allowed to stand. (A.Y. 1991-92)
Abhyudaya Pharmaceuticals v. CIT (2012) 72 DTR 59 / (2013) 350 ITR 358 (All.)(HC)

S. 254(1) : Appellate Tribunal - Orders - Reasoned order - Tribunal has to pass a reasoned order
In an appeal by revenue the Court held that the Tribunal did not discuss, nor dealt with nor recorded any finding or any of the issue much less on the issue on which the substantial question law was framed. The Court held that mere using the expression "Supreme Court held and various High Courts in the similar circumstances have held" without mentioning much less giving the reference to any citation as what was held in which case and how and what way a particular case has application to the

facts of this case was uncalled for. High Court accordingly remanded the matter to the Tribunal for its fresh consideration for passing a reasoned order. (A.Y. 1991-92)

Dy. CIT v. Rajasthan State Industrial Development & Investment Corporation (2012) 73 DTR 22 (Raj.)(HC)

S. 254(1) : Appellate Tribunal - Power - Tribunal has the power to stay proceedings to give effect to section 263 revision order - Plea as to jurisdiction of Assessing Officer / CIT, even if given up, can always be raised [S. 263]

The CIT passed an order under section 263 by which he set-aside the assessment order and directed the Assessing Officer to frame a fresh assessment. The assessee challenged the section 263 order in a Writ Petition. The Court directed the CIT to pass a fresh order under section 263. The assessee challenged the High Court's verdict in the Supreme Court. In the meanwhile, the CIT passed the section 263 order and so the assessee withdrew the SLP before the Supreme Court and filed an appeal before the Tribunal. The assessee also filed a stay application that a stay may be granted to prevent the Assessing Officer from giving effect to the revision order as there would be multiplicity of proceedings if the Assessing Officer passed a fresh assessment order which would be futile if the appeal was allowed. The Tribunal granted stay of the assessment proceedings pending before the Assessing Officer and also directed production of papers relating to initiation of the section 263 proceedings. The department filed a Writ Petition to challenge the order of the Tribunal on the ground that (a) as the assessee had challenged the initiation of the section 263 proceedings before the High Court & Supreme Court and then withdrawn the challenge (SLP), it was estopped from arguing the point before the Tribunal and (b) the Tribunal has no power to stay the assessment proceedings. Held dismissing the Petition:

(i) Where the jurisdiction of an authority is challenged, neither the question of res judicata nor the rule of estoppel can be invoked so as to restrain the challenge. Neither consent nor waiver can confer jurisdiction upon the Assessing Officer / CIT where it does not exist and so no importance can be attached to the fact that the assessee, in the first round of proceedings, expressly gave up the plea against the erroneous assumption of jurisdiction by the authority. Consequently, even assuming that there was a consent/ waiver by the assessee to the assumption of jurisdiction by the Tribunal, he was still entitled to challenge it before the Tribunal [P. V. Doshi v. CIT (1978) 113 ITR 22 (Guj.)(HC) & other decisions followed];

(ii) It is well settled by the judgment in ITO v. Mohd. Kunhi (1969) 71 ITR 815 (SC) that the Tribunal has the power to ensure that the fruits of success are not rendered futile or nugatory and can pass appropriate orders of stay. The assessment orders pending before the Assessing Officer pursuant to a section 263 order can also be stayed [ITO v. Khalid Mehdi Khan (1977) 110 ITR 79 (AP) followed]. (A.Y. 1999-2000)

CIT v. Income Tax Appellate Tribunal & Ors. (2012) 78 DTR 113 / (2013) 216 Taxman 14 (Mag.)(Delhi)(HC)

S. 254(1) : Appellate Tribunal - Additional grounds of appeal - Reasons for admission must exist [S.144]

A legal issue can be raised at any stage but there should be good reason for admitting the additional ground. The Tribunal allowed the assessee to raise the additional ground in appeal for the first time and then decided the appeal on the merits not only setting aside the order of the Commissioner(Appeals) but setting aside the order of the Assessing Officer. Such approach was neither legal nor proper. The Tribunal had not given the reason for admitting the additional ground and overlooked the fact that the ground did not arise out of the order of the Commissioner(Appeals) which was challenged by both parties. Moreover, the assessment order was passed by the Assessing Officer under section 144 of the Act on the basis of the original return and not on the basis of the revised return. Therefore, the matter was remitted to the Commissioner(Appeals). (A.Y. 1996-97)

CIT v. Sahara India (2012) 347 ITR 331 (All.)(HC)

S. 254(1) : Appellate Tribunal - Additional ground - Tribunal was justified in allowing the claim even though no claim was made in the return of income

Claim for deduction not made in the return. Tribunal was justified in allowing the claim of deduction under section 80IB(10) where no such claim is made by the assessee in the return of income for block period. (Block Period 1-04-95 to 21-02-02)

CIT v. Sheth Developers (P) Ltd. (2012) 77 DTR 249 / 254 CTR 127 (Bom.)(HC)

Editorial:- Followed CIT v. Pruthvi Brokers & Shareholders (P) Ltd. (2012) 74 DTR 321 (Bom.) followed.

S. 254(1) : Appellate Tribunal - Orders - Reasoned order

The Court held that Tribunal is the ultimate fact finding authority and an appeal to the High Court is provided only on a substantial question of law. The finding of fact entered by the Tribunal are normally binding on the High Court. However, if those findings are perverse or are so unreasonable that no person, properly instructed on facts and in law coild have reached the finding findings which the Tribunal did, it is open to the High Court to disregard the findings which Tribunal did, it is open to the High Court to disregard the findings of fact as not binding on it. On the facts the Tribuanl has not adverted to the assessee's conduct before the Assessing Officer nor has referred to the admission made by the assessee before the Assessing Officer that it was indulding in suppression of profits. Where matter is cpmlex and fact intensive, particularly where it is a serch where material or documents have been seized, it would be more appropriate for Tribunal to put findings of departmental authorities to a detailed examination by itself, without merely endorsing conclusions of first appellate authority. Matter was set aside. (A.Y. 2000-01 to 2006-07)

CIT v. Chetan Das Lachman Das (2012) 77 DTR 25 / 211 Taxman 61 / 254 CTR 392 (Delhi)(HC)

S. 254(1) : Appellate Tribunal - Binding - Precedent - Contempt - Tribunal's order is binding and failure to follow it is 'Contempt of Court'

Though the Tribunal in the assessee's own case held that exemption under section 11 was available and the facts were identical, the CIT(A), for a subsequent year, declined to follow it inter alia on the ground that the DR had not advanced arguments before the Tribunal in a 'comprehensive and effective manner'. The assessee filed an appeal demanding exemplary costs under section 254(2B). Held by the Tribunal after a comprehensive review of the law on the subject:

It is well settled that the Tribunal is exercising judicial functions and has all powers of a Court. The proceeding before the Tribunal are deemed to be judicial proceedings. It appears to be the impression / misunderstanding of some tax officials that the orders of the ITAT interpreting the law cannot be binding as it is a fact finding authority. However, this is not correct because the decision of a higher authority in the judicial hierarchy is binding on all the lower authorities below the line. Hence, the Assessing Officer and Commissioner(Appeals) are bound by the decision rendered by the jurisdictional Tribunal. Refusal to follow the order of the ITAT would render that authority guilty of committing contempt of Tribunal for which the concerned authority is liable to be proceeded against. If the decision of the Tribunal is found to be unacceptable to the authorities below, the right course to follow is to carry the matter in appeal to the High Court and to seek suspension of the operation of the order of the Tribunal. A person occupying the chair of CIT(A) is expected to be aware of judicial discipline and the binding nature of the Tribunal's order. To avoid harassment to the assessee and unpleasant circumstances, the CBDT should take appropriate steps to enlighten all officials to ensure that judicial discipline is maintained. Costs under section 254(2B) can be granted only if frivolous appeals are filed and not in a case like this. However, the assessee is free to take proper steps for initiating contempt proceeding against the CIT(A) [Ajay Gandhi and another v. B. Singh and others

(2004) 265 ITR 451 (SC), ITAT v. V. K. Agarwal and another (1999) 235 ITR 175 (SC) & Agarwal Warehousing and Leasing Ltd. v. CIT (2002) 257 ITR 235 (MP) followed](A.Ys. 1997-98, 1998-99, 2005-06 to 2007-08)(ITA nos 152 to 156 /Viz /2011 dt 19-07-2011)

Cargo Handling Private Workers Pool v. Dy. CIT (Vishakha.) (Trib.) www.itatonline.org

S. 254(1) : Appellate Tribunal - Notice - Service of notice mandatory - Non servicing of notice by the department, department's appeal was dismissed owing to 'apathy' in serving notice of hearing

Notice of hearing of the department's appeal could not be served on the assessee through post at the address given in Form 36. The DR was accordingly directed to directly effect service of the notice of hearing on the assessee. On the date of hearing, the DR was unable to say whether service was effected or not. Held by the Tribunal dismissing the appeal:

The department has shown total apathy in the matter of service of notices of hearing. The opportunity of hearing to the other side is essential before adjudicating appeal for which service of notice is condition precedent. It is the established practice and procedure that in case notices of hearing cannot be served on the assessee in revenue's appeals, such notices are got served through Income-tax authorities. This practice is based on considerations of expediency and equity and is fully in conformity with the judicial powers and jurisdiction of the Tribunal and does not run contrary to any provisions of the Statute. It is within the incidental or implied powers of the Tribunal as enunciated in ITO v. M. K. Mohammed Kunhi (1969) 71 ITR 815 (SC) & CIT v. Paras Laminates Pvt. Ltd. (1990) 186 ITR 722 (SC). Accordingly, the Tribunal was within its powers to direct, and it was obligatory on the part of the I.T. authority, to effect service of notice of hearing on the assessee since the service could not be effected by post at the address given by the revenue in the memorandum of appeal since the department, as an executive organization, is well equipped with the requisite staff strength of Notice Server, Income-tax Inspector, etc. for serving various statutory notices on the tax payer. Since the revenue has shown apathy with regard for serving the notices of hearing on the assessee and has also not made any request to get the notice served by alternate way i.e., by way of publication etc as laid down in Rule 20 of CPC, there is no alternative but to dismiss the appeal [Dy. CIT v. Aditya Organisers (P) Ltd. (2004) 91 ITD 342 (Ahd.) followed] (A.Y. 2001-02)

ITO v. Rachana Constructions and Engineers and contractors (2012) 18 ITR 262 (Pune)(Trib.)

S. 254(1) : Appellate Tribunal - Additional ground - Special bench has power and duty to dispose of the entire appeal [Income-tax (Appellate Tribunal) Rules, 1963 - Rule 11]

The Tribunal held that special Bench has not only to answer the specific question for determination in the computation of capital gain. Such computation involves not only ascertaining the full value of consideration but also all other aspects which are germane to such computation. Rule 11 of the Income-tax (Appellate Tribunal) Rules, 1963 empowers the appellant, which is revenue in the instant case to urge any ground not set forth in the memorandum of appeal or taken by leave of the Tribunal provided the affected party has been given an opportunity of being heard on that ground. On the facts the revenue has not only specifically challenged the finding of the Commissioner(Appeals) for ignoring the negative figure of net worth but departmental representative also made submission on this point. The Tribunal not only allowed him to argue on other aspects but also invited the Authorised representative to address on the question of negative net worth held by Commissioner(Appeals) to be taken zero. Thus the Rule 11 is fully satisfied .Further no fresh investigation of facts is required in deciding this question. Thus the Special bench has not only to answer the specific question but also to dispose of the entire appeal. (A.Y. 2006-07)

Dy. CIT v. Summit Securities Ltd. (2012) 135 ITD 99 / 68 DTR 201 / 15 ITR 1 / 145 TTJ 273 (SB)(Mum.)(Trib.)

S. 254(1) : Appellate Tribunal -Binding precedent - Tribunal cannot come to conclusion contrary to earlier order, or alternatively, can refer the matter to larger bench

The Tribunal is to follow the decision of another bench where the facts are same, this is a treaty law. The only other alternative is to refer the matter to larger bench if the Members of this Bench are not willing to follow the earlier order. However, the Bench cannot come to a conclusion contrary to conclusion reached in earlier order of Tribunal. (A.Y. 2003-04 to 2005-06)

ACIT v. Chandragiri Construction Co. (2012) 136 ITD 133 / 73 DTR 20 / 147 TTJ 249 (TM)(Cochin)(Trib.)

S. 254(1) : Appellate Tribunal - Additional ground - Entire law on what is "Additional Ground" & power of Tribunal to admit it reviewed [S. 253(1), Income-tax (Appellate Tribunal) Rules, 1963 - Rule 11]

The assessee filed an appeal before the Tribunal in which it raised the ground (in Form 36) that under section 153A, the Assessing Officer was not entitled to make additions which were not based on incriminating material found during the search. This ground was not raised before the Assessing Officer or the CIT(A). Before the Special Bench, the department argued that as the ground was not raised before the lower authorities, it was an additional ground and could not be entertained. Held by the Special Bench:

(i) The assessee's argument that as the ground was taken in the memorandum of appeal, it was not an "additional ground" for which leave was required from the Tribunal is not acceptable because section 253(1) permits an assessee "aggrieved" to file an appeal. A person can be "aggrieved" only if a ground had been raised and it is decided against him. Section 253(1) bars a ground which was not raised and not decided by the CIT(A) because there can be no grievance in respect of a matter which is not raised at all Pokhraj Hirachand v. CIT (1963) 49 ITR 293 (Bom.) followed;

(ii) On the question whether such a ground can be raised for the first time before the Tribunal, the subject matter of an appeal consist of three elements (a) the grounds taken in the memorandum of appeal, (b) the grounds for which leave is allowed by the Tribunal and (c) grounds taken by the respondent for supporting the order of the CIT(A). The Tribunal is not confined only to issues arising out of the appeal before the CIT(A) but has the discretion to allow a new ground to be raised. If a pure question of law arises for which facts are on record of the authorities below, the question should be allowed to be raised if it is necessary to assess the correct tax liability. The submission that the ground could not be raised earlier as the assessee did not have the services of an advocate at its command is reasonable and bona-fide National Thermal Power Co. Ltd. v. ITO (1998) 229 ITR 383 (SC) followed. (A.Y. 2004-05 to 2009-10)

All Cargo Global Logistics Ltd. v. Dy. CIT (2012) 137 ITD 26 / 72 DTR 1 / 146 TTJ 657 / 16 ITR 38 (SB)(Mum.)(Trib.)

S. 254(1) : Appellate Tribunal - Order - Cost to Assessing Officer - Assessing Officer is awarded cost for not following the direction of Tribunal and for passing the order without following the principle of natural justice [S. 132, 132(4)]

In search under section 132, the assessee's statement was recorded under section 132(4) in which he offered Rs. 1.50 crores as undisclosed income. This was modified / retracted subsequently by stating that the admission was only to the extent of the evidence found during the course of search operation. Despite the retraction, the Assessing Officer passed a section 158BC assessment order in which he determined the total undisclosed income at Rs. 1.50 crores. In the first round of appeal, the Tribunal remanded the matter to the Assessing Officer to make a fresh assessment on the basis of the evidence found in the search and not only on the basis of the retracted / modified statement. The Assessing Officer passed a fresh assessment order in which he again determined the total undisclosed income at Rs. 1.50 crores on the basis of the section 132(4) statement. In the second round, the Tribunal again remanded the matter back to the Assessing Officer for framing a fresh assessment after imposing

costs of Rs. 5,000/- upon the Assessing Officer. The Assessing Officer once again repeated the conclusions drawn in the earlier orders and determined the income at the same figure of Rs. 1.50 crores on the basis of the section 132(4) statement. Held by the Tribunal in the third round:

(i) It is very sad that the Assessing Officer without following the principles of natural justice and inspite of clear findings of the ITAT in the order dated 18.06.2010 has repeated the same orders as was done originally way back in 1998. Inspite of levying cost of Rs. 5,000/- on Assessing Officer there is no change in the attitude of the Revenue with reference to the assessee. By taking up the assessment at the fag end of the time barring period and by denying natural justice and not considering the evidence on record, the assessee was forced to file appeals before the ITAT unnecessarily by incurring heavy cost of not only appeal fees but also engaging Counsels to defend the case. There should be an end to this sorry state of affairs;

(ii) The matter is again remanded to the Assessing Officer to complete the assessment only on the basis of incriminating material, if any, and not only on the basis of the section 132(4) statement. If the Assessing Officer repeats the same order without examining the material on record, the order will be quashed without any further consideration. The Assessing Officer should pay costs of Rs. 35,000/- (20,000 + 15,000) to the assessee for making him come again in appellate proceedings. The Revenue shall decide whether these amounts should be recovered from the officer(s) concerned. As the orders are being approved by a senior officer in the rank of CIT, it is sincerely hoped that the CIT also monitors these assessments and applies his mind while granting the approvals. (Block periods 1987-88 to 1997-98)

Sushila Suresh Malge v. ACIT (2013) 55 SOT 45 (URO)(Mum.)(Trib)

S. 254(1) : Appellate Tribunal - Power - Issues relating to in respect of another A.Y. - Tribunal has no power to decide an issue in respect of A.Y. which are not before it

The issue raised before the third member was whether the Tribunal has power to decide the issue in respect of assessment years which were not before the Tribunal. The third member held that under the Income-tax Act, each assessment year is a separate unit and the decision of Assessing Officer given in a particular year cannot operate as res judicata in the matter of assessment of subsequent years, therefore the Jurisdiction of Tribunal in the hierarchy created by the same Act is no higher than that of the Assessing Officer and hence the Tribunal also to confine to the year of assessment. The Tribunal has no power to decide the issue in respect of A.Y. which are not before it. (A.Y. 2003-04 to 2005-06)

ACIT v. Chandragiri Construction Co. (2012) 136 ITD 133 / 73 DTR 20 / 147 TTJ 249 (TM)(Cochin)(Trib.)

S. 254(1) : Appellate Tribunal - Cross objection - Legal ground in respect of independent and separate issue was not allowed in revenues appeal Rule 27 of Income -tax Appellate Tribunal Rules, 1963 or under cross objection [s. 153C, Income- tax Appellate Tribunal Rules, 1963 , Rule 27]

In revenue's appeal against order of Commissioner(Appeals), assessee filed cross-objections challenging initiation of proceedings under section 153C. Cross-objections were time-barred and, therefore, same were dismissed. Assessee was, however, given liberty to argue same points at time of disposal of departmental appeals. Accordingly, during hearing of appeal before Tribunal, assessee invoked provisions of Rule 27 and challenged initiation of proceedings under section 153C. Held that, when validity of invocation of section 153C was decided by Commissioner(Appeals) in favour of revenue and assessee had not filed appeal on said legal ground, assessee could not be allowed to raise such legal ground in revenue's appeal by invoking Rule 27. If cross-objections were not withdrawn, even then, such a legal issue was beyond scope of adjudication through a cross-objection under section 253(4) because impugned legal issue was altogether an independent as well as a separate issue. (A.Y. 1998-99 to 2003-04)

Dy. CIT v. Sandip M. Patel (2012) 137 ITD 104 / 78 DTR 260 / 150 TTJ 338 (Ahd.)(Trib.)

S. 254(1) : Appellate Tribunal - Remand - Additional evidence - When revenue has not taken the ground in respect of admition of additional evidence violation of Rule 46A, the issue cannot be remanded back to the lower authorities [Income- tax Appellate Tribunal Rules, 1963 ,Rule 46A]

Before Commissioner(Appeals) the assessee filed declaration from the donors confirming the donations were made to corpus, which were admitted by the Commissioner(Appeals). Revenue has not taken any ground ofd appeal before the Tribunal with regard to additional evidence by the Commissioner(Appeals) in violation of Rule 46A. The Tribunal held that when revenue has not taken the ground in respect of admition of additional evidence violation of Rule 46A, the issue cannot be remanded back to the lower authorities. (A.Y. 2000-01)

ITO v. Sardar Vallabhbhai Education Society (2012) 138 ITD 245 / 79 DTR 115 / 150 TTJ 265 (TM)(Ahd.)(Trib.)

S. 254(2) : Appellate Tribunal - Rectification of mistake apparent from the record - Bad debts - Appeal High Court - Writ is maintainable [S. 36(1)(vii), 260A, Constitution of India, Art. 226]

Decision of Appellate Tribunal disallowing for bad debts disregarding the legal position as settled by the Supreme Court and the amendment in law w.e.f. 1st April, 1989 there is an apparent mistake in the order of Tribunal and therefore, Tribunal was not justified in rejecting the miscellaneous application filed by the assessee and not rectifying the said mistake. No appeal lies before the High Court under section 260A against the order passed under section 254(2) and therefore writ petition filed by the assessee against the order of Tribunal rejecting the miscellaneous application cannot be dismissed on the ground that the assessee has alternative remedy by way of appeal under section 260A. (A.Y. 1999-2000)

Madhav Marbles & Granites v. ITAT (2012) 65 DTR 217 / 246 CTR 243 / 2012 Tax L R 465 (Raj.)(HC)

S. 254(2) : Appellate Tribunal - Rectification of mistake apparent from the record - Power - Tribunal cannot recall the entire order

The High Court held that the power conferred under section 254(2) is to amend the order passed under section 254(1) to rectify the mistake which is apparent from the record. While deciding the mistake apparent from the record the recalling of entire order is not proper. (A.Y. 2006-07)

Srinidhi Gold v. ITO (2012) 66 DTR 429 (Karn.)(HC)

S. 254(2) : Appellate Tribunal - Rectification of mistake apparent from the record - Supreme Court decision - Subsequent Supreme Court decision overruling earlier decision held to be mistake apparent from the record and order recalling the order is justified

The Tribunal disposed the appeal following the decision of Supreme Court in Virtual Soft Systems Ltd. v. CIT (2007) 289 ITR 83 (SC), holding that if there is no tax payable as assessment was made at loss figure, penalty under section 271(1)(c) cannot be levied. Larger Bench of Supreme Court in CIT v. Gold Coin Health Food (P) Ltd. (2008) 304 ITR 308 (SC), overruled the earlier decision and had taken a contrary view. Revenue moved an application under section 254(2) dt. 21-10-2008 to seeking the recall of order dated 31st March, 2008. The application was filed within four years. The Tribunal recalled the order following the decision of CIT v. Gold Coin Health Food (P) Ltd. (supra). Assessee has filed Writ petition against the said order of Tribunal. The Court held that where a decision of the Supreme Court overrules an earlier decision, the view expressed in the later decision would have to be regarded as having always been the law. A judicial decision acts retrospectively. Judges not make the law they only discover or find the law. Thus, where a decision of the Supreme Court overrules an earlier decision, the view expressed in the later decision would have to be regarded as having always

been the law. The overruling is therefore retrospective, therefore it has to be regarded as the law as it existed when the order was passed by Tribunal, there is a clear mistake apparent from the record hence order of Tribunal recalling the order held to be justified. (A.Y. 1993-94, 1996-97 & 1997-98)
Lakshmi Sugar Mills Co. Ltd. v. CIT (2012) 73 DTR 25 (Delhi)(HC)

S. 254(2) : Appellate Tribunal - Rectification of mistake apparent from the record - Tribunal cannot recall its order and substitute by new order for not considering the earlier order
The power to rectify an order under section 254(2) is extremely limited. It does not extend to correcting errors of law or re-appreciating factual findings as that would amount to a review. The amendment of an order does not mean obliteration of the order originally passed and its substitution by a new order. The Tribunal's order that it had not considered a decision in the assessee's own case for an earlier year where the facts and circumstances were the same and this was an "apparent mistake" cannot be sustained. (A.Y. 2006-07)
CIT v. Maruti Insurance Distribution Services (2013) 212 Taxman 123 (Mag.)(Delhi)(HC)

S. 254(2) : Appellate Tribunal - Rectification of mistake apparent from the record - Wrongly application of principle laid down by the Jurisdictional High Court, recalling of order is held to be justified
The Tribunal had considered the Judgment of Jurisdictional High Court in Swadeshi Cotton Mills Co. Ltd. v. CIT (1980) 125 ITR 33 (All.)(HC) and allowed the Departmental appeal. Assessee filed the miscellaneous application and contended that the Tribunal has wrongly applied the ratio of the judgment. Tribunal recalled the order under section 254(2). On reference to High Court, the Court held that though the Tribunal had referred to the Judgment in Swadeshi Cotton Mills, but later on, on the application given by the assessee that it wrongly applied the principle of law in Swadeshi Cotton Mills, to the present case, found that there is difference between hypothecation and pledge of the stock. The hypothecation of the goods could not be treated as same as in the case of pledge. The Tribunal realized its mistake in wrongly applying the principle laid down in Swadeshi Cotton Mills and rectified the mistake .In the absence of power of review, where the Tribunal finds that there was apparent mistake in its order, which has caused serious prejudice to the assessee, in view of the judgments in Honda Siel Power Products Ltd. v. CIT (2007) 295 ITR 466 (SC) and CIT v. Saurashtra Kutch Stock Exchange Ltd. (2008) 305 ITR 227 (SC), it could have rectified the mistake, which was apparent on record. The Court held that there is no difference in the circumstances where the Tribunal ignores the judgment of the jurisdictional Court, or wrongly relies upon the principles of law laid down by the jurisdictional High Court; Tribunal was justified in rectifying the order. Reference decided in favor of assessee.
CIT v. Quality Steel Tubes Ltd. (2012) 76 DTR 457 / 253 CTR 298 (All.)(HC)

S. 254(2) : Appellate Tribunal - Rectification of mistake apparent from the record - Recall of order [S. 68]
Assessee having contended that she was not served with notice of appeal, Tribunal was not justified in rejecting the application under section 254(2) for recall of ex-parte order on the ground of delay of four years without examining the correctness of assessee's contention from the material on record. Matter remanded to Tribunal for deciding the application of assessee under section 254(2) afresh. (A.Y. 1997-98)
Santosh Singla v. ITO (2012) 77 DTR 438 / 211 Taxman 42 (Mag.)(Delhi)(HC)

S. 254(2) : Appellate Tribunal - Rectification of mistake apparent from the record - Mere reliance and reference to the reason stated in the decision referred by Tribunal which was not been cited at the time of hearing could not be regarded as a mistake apparent on record

In the instant case, the entire issue was examined on the merits including judgment relied upon by the assessee. After due consider and examining the matter in detail the department appeal was allowed. While allowing the appeal, it also referred to another decision of the Tribunal, which had been not cited at the time of hearing. It was held that mere reliance and reference to the reason stated in the decision could not be regarded as a mistake apparent on record, when the matter was decided on merit.

Geofin Investment (P.) Ltd. v. CIT (2012) 348 ITR 118 (Delhi)(HC)

S. 254(2) : Appellate Tribunal - Order - Rectification of mistake apparent from the record - Additional evidence filed after disposal of appeal rejection of miscellaneous application was justified as the Tribunal has no power to review

Assessee filed a miscellaneous application seeking modification of order of Tribunal so that additional evidence allowed was not restricted to loan confirmations received during pendency of appeal but also to include loan confirmations that were received after disposal of appeal. Tribunal rejected miscellaneous application on ground that it had no power to review its earlier order so as to allow additional evidence received after disposal of appeal. The assessee challenged the order by way of writ, the Court held that once Tribunal had disposed of appeal on merits, it could not review its order, therefore the Tribunal was justified in rejecting the miscellaneous application. Accordingly the writ petition was dismissed. (A.Y. 1998-99)

Indrakumar Patodia v. ITO (2012) 211 Taxman 38 (Mag.) / (2011) 238 CTR 437 / 51 DTR 183 (Bom.)(HC)

S. 254(2) : Appellate Tribunal - Orders - Rectification of mistake apparent from the record - Erroneous opinion - Erroneous opinion cannot be subject matter of rectification under section 254(2)

The Tribunal held that in a miscellaneous application, it is not possible to consider the plea of the assessee that the view expressed by the Tribunal was erroneous. The scope of a miscellaneous application under section 254(2) was only to rectify an apparent mistake in the order of the Tribunal. In a miscellaneous application it is not possible to seek review of the order of the Tribunal. (A.Y. 1997-98)

Reuters Ltd. v. JCIT (2012) 14 ITR 48 / (2011) 62 DTR 322 / 142 TTJ 457 (Mum.)(Trib.)

S. 254(2) : Appellate Tribunal - Orders - Rectification of mistake apparent from the record - Third member - Decision of third member is not a final order disposing of entire appeal as contemplated by section 254(1) and consequently an application would not lie under section 254(2) against third member order [S. 254, 255]

Revenue filed an application under section 254(2) against the order of third member. The assessee raised a preliminary objection for rectification of mistakes apparent from the record stating that rectification application under section 254(2) would not lie against the third member order. The Tribunal held that the decision of the third member order is not a final order disposing of the entire appeal as contemplated by section 254(1), therefore application under section 254(2) would not lie against the order of third member. (A.Y. 1998-99)

Dy. CIT v. Telco Dadajee Dhackjee Ltd. (2012) 49 SOT 549 (TM)(Mum.)(Trib.)

S. 254(2) : Appellate Tribunal - Orders - Rectification of mistake apparent from the record - Shortness of order - Shortness of order cannot be held to be mistake apparent from the record

Assessee has filed an appeal before the Tribunal against the order of Commissioner(Appeals), before the Tribunal. The only disputes before the Tribunal was whether activity of assessee hiring of one of financing loans for interest within the meaning of Interest-tax Act, 1974. The Tribunal decided the matter against the assessee. Before the Tribunal the ground No. 5 was questioning the action of

Commissioner(Appeals) in ignoring evidence and case laws adduced before him. The Tribunal dismissed the ground by observing that the ground is general in nature. Assessee filed application for rectification of mistake. As there was difference of opinion the matter was referred to third member. The Third member held that, while passing the order member should have given reasons why it considered the ground no 5 is general in nature, but it could not be said that the ground no was not disposed of by the Tribunal. On examining the issue as a whole, only question before the Tribunal was whether interest in question is liable to be taxed under Interest-tax Act, 1974. Therefore shortness of order of itself does not negate fact of disposal of issue involved, therefore the ground no 5 should be taken to have been disposed of in effect and substance and Tribunal's order did not require to be recalled, hence miscellaneous application was dismissed. (A.Y. 1994-95 to 1999-2000)

S. E. Investments Ltd. v. ACIT (2012) 134 ITD 81 / 68 DTR 257 / 145 TTJ 329 (TM)(Agra)((Trib.)

S. 254(2) : Appellate Tribunal - Rectification of mistake apparent from the record - Ex-parte order - Non-appearance of Chartered Accountant before the Tribunal due to wrong mentioning of date is a reasonable cause, recalling of order is justified [Income- tax Appellate Tribunal Rules, 1963 , Rule 23]

Assessees-Chartered Accountant has filed an affidavit stating that he did not appear at the time of hearing as he had wrongly recorded the date of hearing in his dairy and also furnished a photocopy of the diary showing the wrong noting, the Tribunal held that it has to be accepted that there was sufficient cause for his non-appearance on the date of hearing. As the Tribunal having effectively decided the matter against the assesee by setting aside the order of the CIT(A), and restoring the matter back to the Assessing Officer, referring the Rule 23 of the ITAT Rules, the ex-parte order of Tribunal is recalled. (A.Y. 2006-07)

Five Star Health Care (P) Ltd. v. ITO (2012) 145 TTJ 537 / 69 DTR 170 (TM)(Delhi)(Trib.)

S. 254(2) : Appellate Tribunal - Rectification of mistake apparent from the record - Application to recall the matter - Hearing conducted in open, transparent manner, giving opportunity to assessee to present argument, hence application rejected on the basis that order under section 254(2) does not have existence de-hors the order under Section 254(1)

The assessee filed the instant application under section 254(2) seeking recall of Tribunal's order contending that impugned order was clearly an incorrect order, passed in violation of rule of law and procedure and inconsistent with maxim Audi Alteram Partem. The Tribunal rejected the application on the basis that it conducted hearing in open and in transparent manner. An order under section 254(2) does not have existence de-hors the order under section 254(1), so that it (re-calls) is impermissible under section 254(2). The court goes on to note the power to recall available under Rule 24 of the rules, observing that under the circumstances as stipulated there in. (A.Y. 2007-08)

Karun Dutt Singh (Alias Rinu Singh) v. ACIT (2012) 135 ITD 514 / 74 DTR 376 / 148 TTJ 126 (Cochin)(Trib.)

S. 254(2) : Appellate Tribunal - Rectification of mistake apparent from the record - Transfer pricing - Company whose financial statement were falsified, directed to be removed from comparable cases in computation of ALP - Only after arriving at the arithmetical means of two ALP, the adjustment of 5% can be done

On miscellaneous application, one of the companies whose financial statement was publicly known to be falsified directed to be removed from comparable cases in computation of ALP but pleas as regards exclusion of certain other companies risk adjustment rejected; only after arriving at the arithmetical means of two ALP, the adjustment of 5% can be done. Matter restored to the file of Assessing Officer (A.Y. 2003-04)

SAP Labs India (P) Ltd. v. ACIT (2012) 134 ITD 253 / 145 TTJ 521 / 15 ITR 506 / 69 DTR 145 (Bang.)(Trib.)

S. 254(2) : Appellate Tribunal - Rectification of mistake apparent from the record - Order cannot be rectified when on merit the decision was taken by Tribunal

The Tribunal having found as a fact that assessee, instead of investing the amount of long term capital gains in purchase of residential house purchased the same with borrowed funds and denied relief under section 54F on that ground. The order of Tribunal cannot be said to be a mistake apparent on record. Application of assessee under section 254(2) was rejected on the ground that review of the said order on merit was not maintainable. (A.Y. 2006-07)

V. Kumuda (Smt) v. Dy. CIT (2012) 147 TTJ 636 / 135 ITD 116 / 72 DTR 249 / (2013) 21 ITR 396 (Hyd.)(Trib.)

S. 254(2) : Appellate Tribunal - Rectification of mistake apparent from the record - Miscellaneous application filed beyond four years was dismissed

Assessee filed miscellaneous petitions on 4-4-2012 which was beyond four years against ex-parte order dated 23-2-2007 of Tribunal. Held that Tribunal was not enshrined with judicial power of entertaining such petition after expiry of relevant period, and condonation of delay was beyond jurisdiction of Tribunal. The miscellaneous application was dismissed. (A.Y. 1997-98)

Agni Briquette (P.) Ltd. v. ACIT (2012) 137 ITD 147 / 149 TTJ 519 / 77 DTR 81 (Ahd.)(Trib.)

S. 254(2) : Appellate Tribunal - Rectification of mistake apparent from the record - Reframing the question - Revenues miscellaneous application was dismissed [S. 255(3)]

In the instant case, revenue filed the miscellaneous application challenging order passed by Special Bench of Tribunal on three grounds i.e. (i) Special bench had formulated a new question which was not referred by President of Tribunal while constituting Special Bench under section 255(3). For the said ground it was held that there was mistake in the wording of question mentioned by revenue and question reframed by the SB was within the parameters of reference made by the President. (ii) Special Bench of Tribunal had not considered certain arguments of revenue while adjudicating the issue. It was held that SB had passed a well reasoned order and there was no apparent mistake in terms of scheme of section 254(2) and (iii) Special Bench without giving an opportunity of being heard had considered provisions of section 63 of Indian Contract Act. As regards this question, it was held that it was apparent that special bench had examined issue from another angle in light of provisions of section 63 of Indian Contract Act, 1872 and said exercise of Tribunal was not beyond question raised before it. (A.Y. 2003-04)

Dy. CIT v. Suzler India Ltd. (2012) 138 ITD 1 / 77 DTR 1 / 149 TTJ 137 / 19 ITR 268 (SB)(Mum.)(Trib.)

S. 254(2) : Appellate Tribunal - Rectification of mistake apparent from the record - Ex-parte order - Notice refused by illiterate employee - Affidavit filed by the assessee - Matter recalled

In the instant case, notice sent by Tribunal was refused by an illiterate employee. On miscellaneous application, Tribunal recalled the matter on the basis that the assessee had filed an affidavit in support of his claim that by refusing notice he was the loser and did not benefit. (A.Y. 2001-02 to 2003-04)

Sudesh Pandey v. ITO (2012) 18 ITR 560 (Indore)(Trib.)

S. 254(2) :Appellate Tribunal -Rectification of mistake apparent from the record - Rectification is not possible even though subsequent year has given contrary conclusion

Tribunal, after considering the entire material on record, arguments advanced and case law cited, having consciously reached a conclusion, order of Tribunal cannot be said to suffer from mistake

apparent form record even though subsequently on similar facts, Tribunal reached a contrary conclusion. (A.Y. 1998-99, 2002-03, 2003-04 & 2005-06.)
Pravan Air Products (P) Ltd. v. JCIT (2012) 137 ITD 249 / 150 TJ 261 / 79 DTR 198 (Ahd.)(Trib.)

S. 254(2) : Apellate Tribunal -Rectification of mistake apparent from the record - Reasessment - Service of notice on power of attroney holder - Tribunal cannot recall the order [S. 147, 148]
The Assessing Officer issued notice to the GPA holder of the assessee for reopening assessment under section 148. The Tribunal confirmed that there was a valid service of notice under section 148. In the instant case the Tribunal after considering the entire facts and circumstances of the case held that there is valid service of notice under section 148. The order of the Tribunal may not be drafted in a manner as the assessee wanted. Because the order is not in favour of the assessee that cannot be said to be an error having mistake apparent on record. The Tribunal cannot be said to be committed an error as the Tribunal not elaborately given the finding that the order of the Tribunal relied upon by the assessee's counsel is not analysed. The Tribunal after taking due care taken a conscious decision that there is a valid service of notice under section 148. Tribunal cannot recall entire order and pass a fresh decision as that would amount to a review of entire order and that is not permissible under Act, as no power of review has been given to Tribunal under Act. (A.Y. 1999-2000 to 2003-04)
Ruhina Ahmed (Smt) v. ITO (2012) 54 SOT 123 (URO)(Hyd.)(Trib.)

S. 254(2A) : Appellate Tribunal - Stay - Tribunal has no power to extend stay beyond 365 days even if assessee not at fault
The Tribunal allowed the assessee's stay applications for a period beyond 365 days [presumably following Tata Communications (Bom.)(Trib.)(SB). The department filed an appeal claiming that the grant of stay beyond 365 days was in contravention of the third proviso to section 254(2A) inserted by the FA 2008 w.e.f. 1.10.2008. Held by the High Court allowing the appeal:
The third proviso to section 254(2A) as amended by the FA 2008 w.e.f. 1.10.2008 provides that if the appeal is not decided within the period of 365 days, the order of stay shall stand vacated after the expiry of such period even if the delay in disposing of the appeal is not attributable to the assessee. The Tribunal which is a creature of the statute has to abide by these statutory provisions in letter and spirit. The third proviso to the Finance Act 2008 makes it abundantly clear that the purpose of putting the outer limits is only for curtailing the period an order of stay can operate and to ensure that it has no effect after the period of 365 days from the date of initial order. An interpretation to enable or confer power on the Tribunal to extend a stay order beyond 365 days would be contrary to such statutory provision. While the argument that hardship & injustice will be caused to the assessee by being deprived of the stay even when he is not at fault is appreciated, one cannot ignore the language of the provision [CIT v. Ronuk Industries (2011) 333 ITR 99 (Bom)(HC) dissented from.] (A.Y. 2006-07)
CIT v. Ecom Gill Coffee Trading Pvt. Ltd. (2012) 74 DTR 241 / 209 Taxman 190 / 252 CTR 281 (Karn.)(HC)
CIT v. B. Fouress (P) Ltd. (2012) 74 DTR 241 / 209 Taxman 190 / 252 CTR 281 (Karn.)(HC)

S. 254(2A) : Appellate Tribunal - Stay - Judicial conflict whether Tribunal has power to extend stay beyond 365 days has to be resolved in favour of the assessee
The Third Proviso to section 254(2A), as amended w.e.f. 1.10.2008, provides that if the appeal filed by the assessee is not disposed off within the period of stay granted by the Tribunal (which cannot exceed 365 days), the order of stay shall stand vacated even if the delay in disposing of the appeal is not attributable to the assessee. In Tata Communications Ltd. v. ACIT (2011) 138 TTJ 257 (SB)(Mum.), the Special Bench held, following CIT v. Ronuk Industries Ltd. (2011) 333 ITR 99 (Bom.), that even after the amendment to the Third proviso to section 254(2A) w.e.f. 1.10.2008, the

Tribunal had jurisdiction to extend stay beyond 365 days. However, the Karnataka High Court took the view in CIT v. Ecom Gill Coffee Trading Pvt. Ltd. that after the aforesaid amendment, the Tribunal had no power to extend stay beyond 365 days even if the delay was not attributable to the assessee. The Tribunal had to now consider whether the view of the Bombay High Court & Special Bench had to be followed or that of the Karnataka High Court. Held by the Tribunal:
In Narang Overseas (P) Ltd. v. ACIT (2008) 114 TTJ 433 (SB), it was held by the Special Bench that if there is a cleavage of opinion amongst different High Courts and there is no decision of the jurisdictional High Court on the issue, then the view favourable to the assessee has to be followed. As the view of the Bombay High Court in CIT v. Ronuk Industries Ltd. (2011) 333 ITR 99 (Bom.) & that of the Special Bench in Tata Communications Ltd. v. ACIT (2011) 138 TTJ 257 (SB)(Mum.) is favourable to the assessee, that has to be followed and it has to be held that the assessee is entitled to a stay of the demand even after the expiry of the period of 365 days if the delay in disposal of the appeal is not exclusively attributable to it. (A.Y. 2000-01 to 2006-07)
Qualcomm Incorporated v. ADIT (2012) 80 DTR 1 / 150 TTJ 661 / (2013) 56 SOT 72 (URO)(Delhi)(Trib.)

S. 254(2A) : Appellate Tribunal - Stay - Third Proviso - Tribunal has the power to grant unlimited stay of demand
The assessee's appeal was not disposed of by the Tribunal as a similar issue was pending in the case of another assessee before the Supreme Court. The Tribunal had granted a stay on recovery of the demand. On the expiry of 365 days, the assessee filed an application seeking extension of the stay for a further period. The assessee relied on CIT v. Ronuk Industries (2011) 333 ITR 99 (Bom.), Tata Communications Ltd. v. ACIT (2011) 138 TTJ 257 (Mum.)(SB) and Qualcomm Incorporated (Delhi)(Trib.) where it had been held that despite the Third Proviso to section 254(2A), the Tribunal had the power to grant stay of demand beyond 365 days if the assessee was not at fault. The Department opposed the application by relying on Ecom Gill Coffee Trading (Karn.)(HC) where a contrary view was taken and on ACIT v. Dunlop India Ltd. (1985) 154 ITR 172 (SC). Held by the Tribunal allowing the stay application:
The assessee is seeking extension of stay beyond 365 days. The assessee argued that on similar facts the matter is pending before the Supreme Court in case of Idea Cellular Ltd. and Bharti Cellular Ltd. wherein ad interim order had been passed. In CIT v. Ronuk Industries Ltd. (2011) 333 ITR 99 (Bom.) & Tata Communications Ltd. v ACIT (2011) 138 TTJ 257 (Mum.)(SB) it has been held that the Tribunal has power to extend the period of stay beyond 365 days under the Third Proviso to section 254(2A) even if the delay in disposing off the appeal is not attributable to the assessee as there may be several other reasons for not disposing of the appeal by the ITAT. In Qualcomm Incorporated (Delhi)(Trib.) it was held that as there was a cleavage of opinion between the Bombay High Court and the Karnataka High Court and there was no decision of the jurisdictional High Court on the issue, the view favourable to the assessee has to be adopted. Consequently, the stay has to be extended subject to certain conditions. (A.Y. 2009-10)(S.A. Nos 86&87 /Ahd/2012 dt 11-1-2013)
Vodafone West Ltd. v. ACIT (Ahd.)(Trib.) www.itatonline.org

S. 254(2A):Appellate Tribunal-Stay of penalty proceedings before Commissioner(Appeals) - Concealment penalty proceedings can be stayed to await decision on quantum appeal so to avoid multiplicity of proceedings & harassment to assessee[S.271(1)(c),275(1)(a)]
In dealing with the assessee's appeal, the CIT(A) enhanced the assessment by making a disallowance of Rs. 7.53 crores towards bad debts and an upward transfer pricing adjustment of Rs. 5.50 crores. The CIT(A) also initiated section 271(1)(c) proceedings for concealment of income. The assessee filed an appeal to challenge the CIT(A)'s order and also filed a stay application seeking to restrain him from proceeding with the section 271(1)(c) penalty proceedings. Held by the Tribunal in dealing with the stay application:

Under section 275(1)(a), the Assessing Officer cannot pass an order imposing penalty under section 271(1)(c) if the relevant assessment is subject matter of appeal before the CIT(A). The same analogy will apply where the CIT(A) initiates penalty and the first appeal is pending before the Tribunal. Accordingly, the assessee's request that the penalty proceedings should be stayed till the disposal of appeal by the Tribunal is not unreasonable. If the CIT(A) is allowed to proceed with the penalty proceedings, prejudice will be caused to the assessee as it will have to face multiplicity of proceedings. In case the assessee succeeds in the quantum appeal, the penalty order passed by the CIT(A) will have no legs to stand while if the assessee fails in the quantum appeal, the CIT(A) will get ample time of six months to dispose of the penalty proceedings. Therefore, to prevent multiplicity of proceedings and harassment to the assessee, the CIT(A) is directed to keep the penalty proceedings in abeyance till the disposal of quantum appeal by the Tribunal [CIT v. Wander Pvt. Ltd. (Bom.)(HC) (ITA No. 2753 of 2010) referred. www.itatonline.org] (A.Y. 2004-05)

GE India Industrial Pvt. Ltd. v. CIT(A) (2013) 83 DTR 173 / 152 TTJ 536 (Ahd.)(Trib.)

S. 255(4) : Appellate Tribunal - Binding - Third member - Bench cannot refuse to give effect to third member's opinion

The Tribunal had to consider whether certain amounts could be assessed as cash credits under section 68 and whether certain expenditure incurred by the assessee could be allowed as a deduction. The Judicial Member decided both issues in favour of the assessee while the Accountant Member decided both issues in favour of the department. The Third Member agreed with the opinion of the JM and decided both issues in favour of the assessee. At the stage of giving effect to the opinion of the Third Member, the JM passed an order in conformity with that of the Third Member. However, the AM observed that it is not possible to give effect to the order of the Third Member on the ground that the order of the Third Member was contrary to his own expressed opinion and that he had not considered various points of differences arising from the dissenting orders. He accordingly framed certain new questions on the merits of the dispute and directed that the matter be referred back to the President. The JM did not agree and raised the issue whether the Members of a Bench could comment on the order of the Third Member instead of merely passing a confirmatory order in terms of section 255(4). This was referred to the Special Bench. Held by the Special Bench:

After the Accountant Member passed the order formulating the questions for reference to the Third Member, he became functus officio. The opinion expressed by the Third Member was very much binding on the AM and he was bound to follow the opinion of the Third Member in its true letter and spirit. It was necessary for judicial propriety and discipline that the Member who is in minority must accept as binding opinion of the Third Member. The AM had no power to formulate new questions at the stage of giving effect to the opinion of the majority and his action was not sustainable in law. (A.Y. 2004-05 & 2005-06)

Tulip Hotels Pvt. Ltd. v. Dy. CIT (2012) 136 ITD 1 / 15 ITR 548 / 70 DTR 217 / 146 TTJ 257 (SB)(Mum.)(Trib.)

S. 255(4) : Appellate Tribunal - Third member - Jurisdiction - Third member has no right to express third opinion

The third member held that jurisdiction of the Third member of the Tribunal is confined only to agreeing with either of two opinions available before him given by the dissenting Members who heard the appeal first. Third member has no right to express at a third opinion on the point of difference even if he is fully convinced about the correctness of such third opinion. (A.Y. 2007-08)

Visen Industries Ltd. v. Addl. CIT (2012) 136 ITD 309 / 74 DTR 57 / 148 TTJ 137 (TM)(Mum.)(Trib.)

S. 255(4) : Appellate Tribunal - Third member - Jurisdiction - Third member has no right to express third opinion

The jurisdiction of third member starts from the 'point' which is referred to him and ends at rendering decision on 'such point'. In the light of the clear manadate given by the legislature, it is crystal clear that the third member's authority extends only to the point on which the members have diffred and such difference has been so referred to him. It is impersible to him to take up any poin for consideration and decision, either suo motu or at the instance of the parties, other than that which has been referred to him. (A.Y. 2005-06)

Addl. CIT v. Technimont ICB India (P) Ltd. (2012) 138 ITD 23 / 75 DTR 259 / 148 TTJ 547 / (2013) 21 ITR 267 (TM)(Mum.)(Trib.)

Technimont ICB India (P) Ltd. v. Addl. CIT (2012) 138 ITD 23 / 75 DTR 259 / 148 TTJ 547 / (2013) 21 ITR 267 (TM)(Mum.)(Trib.)

S. 260A : Appeal - High Court - Monetary limit - Circular - Circular - Apex Court held that High Court to consider whether the monetary limit of tax fixed by the CBDT Circular No. 3/2001 dated 9-2-2011 has retrospective effect

The Department filed an appeal under section 260A in 2006 where the tax effect was less than Rs. 10 lakhs. The High Court, relying on Instruction No. 3/2011 dated 9-2-2011 (2011) 332 ITR 1 (St) (which had been held to apply to pending appeals in CIT v. Delhi Race Club Ltd.) dismissed the appeal as not maintainable. The Department challenged the decision on the ground that para. 11 of Instruction No. 3/2011 dated 9-2-2011 made it clear that it would apply only to appeals filed on or after 9.2.2011 and not to appeals filed earlier. Held by the Supreme Court:

In view of Para 11 of CBDT Instruction No. 3/2011 dated 9th February, 2011, liberty is granted to the Department to move the High Court by way of review within four weeks.(C.C.21705/2011 dt 6-1-2012)

CIT v. Virgo Marketing Pvt. Ltd. (SC) www.itatonline.org

S. 260A : Appeal - High Court - Duty of High Court - Reasoned order - Opportunity of hearing - It is the duty of High Court to pass a reasoned order

In an appeal filed by the department against the order of Tribunal, the High Court set aside the order of Tribunal, without hearing the assessee. The Apex Court held that the assessee must be heard and it is the duty of the High Court to pass the reasoned order. Accordingly the order of High Court was set aside to decide de novo.

Rajesh Mahajan v. CIT (2012) 346 ITR 513 / 249 CTR 28 / 69 DTR 99 / 204 Taxman 522 (SC)

S. 260A : Appeal - High Court - Order of special bench - Non filing of appeal - Not assailing the order of Special Bench for earlier years in appeal can be challenged in subsequent year on question of law [S. 143, 261]

Even though the order of the Special Bench of the Tribunal relating to earlier assessment years was not assailed in appeal by the Department itself, it does not take away the right of the Revenue to question the correctness of the assessment order on the same issue in the relevant A.Y., particularly when a question of law is involved which goes to the very root of the matter. (A.Y. 1985-86 to 1987-88, 2002-03)

Catholic Syrian Bank Ltd. v. CIT (2012) 343 ITR 270 / 68 DTR 1 / 248CTR 1 / 206 Taxman 182 / (2012) 3 SCC 784 / Vol. 42 Tax LR 382 (SC)

CIT v. South Indian Bank Ltd. (2012) 343 ITR 270 / 68 DTR 1 / 248 CTR 1 / 206 Taxman 182 / (2012) 3 SCC 784 / Vol. 42 Tax LR 382 (SC)

Federal Bank Ltd. v. CIT (2012) 343 ITR 270 / 68 DTR 1 / 248 CTR 1 / 206 Taxman 182 / (2012) 3 SCC 784 / Vol. 42 Tax LR 382 (SC)

S. 260A : Appeal - High Court - Remand by Tribunal - Transfer pricing - In a matter which is remanded by Tribunal for re-examination, no question of law arises [S. 92C]

In Aztec Software and Technology Services Ltd. v. ACIT (2007) 294 ITR 32(AT) / 107 ITD 141 (SB)(Bang)(Trib.) a 5 member Special Bench judgement of the Tribunal answered several questions such as (a) Whether it is a legal requirement under the provisions contained in Chapter X of the Income-tax Act, 1961 that the Assessing Officer should prima facie demonstrate that there is tax avoidance before invoking the relevant provisions?, (b) Whether it is a legal requirement under the provisions contained in Chapter X of the Income-tax Act, 1961 that the Assessing Officer should prima facie demonstrate that any one or more of the circumstances set out in clauses (a), (b), (c) and/or (d) of sub-section (3) of section 92C of the said Act are satisfied in the case of any assessee, before his case is referred to the Transfer Pricing Officer under sub-section (1) of section 92CA for computation of the arm's length price?, (c) Whether the Assessing Officer is required to record his opinion/reason before seeking the previous approval of the Commissioner under section 92CA(1) of the Income-tax Act, 1961?, (d) Whether before making a reference to the Transfer Pricing Officer under section 92CA(1) read with section 92C(3) of the Income-tax Act, 1961, is it is a condition precedent that the Assessing Officer shall provide to the assessee an opportunity of being heard?, (e) Is the approval granted by the Commissioner under section 92CA(1) justiciable ? If so, can it be called in question in appeal on the ground that it was accorded without due diligence or proper application of mind?, (f) What is the legal effect of Instruction No. 3 of 2003 dated 20-5-2003 issued by the Central Board of Direct Taxes on Transfer Pricing matters?, (g) What is the role of the Assessing Officer after receipt by him of the order passed by the Transfer Pricing Officer under section 92CA(3) of the Income-tax Act, 1961 etc. After laying down the principles of law, the matter was remanded to the Assessing Officer. On appeal by the assessee against the principles of law laid down by the Special Bench, Held by the High Court dismissing the appeal:

We notice that in this appeal, the assessee has raised as many as 30 substantial questions of law. In our considered opinion, it is not really necessary to consider any of these questions, as in the first instance, the order of the Tribunal is not at all adverse to the interest of the appellant but is one to set aside the order passed by the Lower Appellate Authority and remanding the matter. We notice that all questions are left open, for redetermination by the Lower Appellate Authority. In a matter which is remanded for a reexamination, no question of law arises for examination by the High Court in an appeal under section 260A of the Act, unless any part of the remand order suffers from a patent illegality or is an order perverse in nature, and is left to the Lower Appellate Authority to redetermine. Appeal of assessee was dismissed. (A.Y. 2002-03)

Aztec Software & Technology Services Ltd. v. ACIT (2012) 209 Taxman 187 (Karn.)(HC)

S. 260A : Appeal - High Court - Order of Appellate Tribunal - Mistake apparent on record - Writ - Appeal is not maintainable [S. 254(2), Art. 226)

No appeal lies before the High Court under section 260A against the order passed under section 254(2) and therefore writ petition filed by the assessee against the order of Tribunal rejecting the miscellaneous application cannot be dismissed on the ground that the assessee has alternative remedy by way of appeal under section 260A. (A.Y. 1999-2000)

Madhav Marbles & Granites v. ITAT (2012) 65 DTR 217 / 246 CTR 243 / 2012 Tax LR 465 (Raj.)(HC)

S. 260A : Appeal - High Court - Monetary limit - Circular - Less than 10 lakhs - CBDT's decision to confine the effect of low tax effect Instruction to fresh appeals is contrary to the object of Section 268A & the National Litigation Policy hence appeal is not maintainable [S. 268A]

The department filed an appeal in the year 2005, the tax effect of which was less than Rs. 10 lakhs. The High Court had to consider whether inspite of para 11 of CBDT's Instruction No. 3 of 2011 dated 9.2.2011 which declared that that the bar on filing departmental appeals with tax effect of less than Rs. 10 lkahs would apply only to appeals filed after 9.2.2011, the Instruction could still be considered

to be applicable to pending appeals. Held by the High Court dismissing the appeal as non-maintainable:

Though paragraph 11 of Instruction No. 3/2011 provides that the revised tax limits will apply only to fresh appeals, the same has to be held to be applicable to pending appeals as well because (i) the Department has not kept in mind the object with which such Instructions have been issued from time to time; (ii) the object of section 268A which empowers the CBDT to issue such instructions & under the National Litigation Policy, the Government has to be an "efficient & responsible" litigant and not a "compulsive" litigant and appeals should not be pursued in low-tax matters, (iii) a beneficial circular has to be applied retrospectively (iv) extending the benefit of the Instruction to pending matters will be only in the nature of a one-time settlement akin to the KVSS & VDIS, (v) by experience it is seen that tax is levied by defeating Parliament's intention to grant incentives to trade and industry & where the Tribunal has come to the rescue of the assessees, appeals are filed mechanically & compulsively with the approach of "let the Court decide" & to "save their skin"; (vi) there would be an anomaly in confining the Instruction to fresh appeals because if the Tribunal has decided a case expeditiously, such matters will be denied the benefit of the bar on filing appeals while if there is no disposal by the Tribunal owing to pendency etc, the benefit accrues to the assessee. The benefit to which the assessee is entitled cannot depend on the date of the decision over which neither the assessee nor revenue has any control; (vii) the Instruction would be discrim inatory, if held to be prospective only. It can be saved from the vice of discrimination by holding it as retrospective.

CIT v. Ranka & Ranka (2012) 206 Taxman 322 / 72 DTR 270 / 253 CTR 498 / (2013) 352 ITR 121 (Karn.)(HC)

S. 260A : Appeal - High Court - Frivolous appeal - Cost - High Court awarded the cost of Rs. 1 lakh on officer who had file the appeal - High Court held that only way to prevent department from filing frivolous appeals is by imposing heavy costs

The assessee set up a 100% EOU unit in A.Y. 1993-94 and claimed 5 year deduction till A.Y. 1997-98 as was then allowable under section 10B. By the IT (SA) Act, 1998, section 10B was amended w.e.f. 1.4.1999 to allow deduction for 10 years from the date the eligible unit started software development. Accordingly, the assessee claimed section 10B deduction for A.Y. 1999-2000 to 2001-02. The Assessing Officer held that as the deduction under the amended provision was allowable only for the "unexpired period", it was necessary that as on the date of the amendment, there was "unexpired period" and as the assessee's entitlement had ended in A.Y. 1997-98, it was not eligible for further relief. The CIT(A) & Tribunal allowed the claim on the ground that there was nothing in the Act to provide that the units which have fully availed the exemption under section l0B will not get the benefit of the amended provision. On appeal, by the department, held dismissing the appeal while passing strictures and imposing heavy costs:

(i) It is clear from the amended section 10B that the benefit of tax holiday is extended for a period of ten consecutive A.Y. beginning with the A.Y. in which the undertaking begins to manufacture or produce articles. The object behind the amendment is to give added thrust to exports. If the assessee has already availed the benefit under the unamended provision and 10 years have expired as of 01.04.1999, the assessee would not be entitled to the said benefit. If 10 years from the date of production has not expired prior to 01.04.1999, he would be entitled for the remaining unexpired period. The department's stand that if the 5 year period had expired as of the date of the amendment, the benefit is not available runs counter to the intention with which the amended provision was enacted and negates it.

(ii) This case shows how the department is filing appeals without proper application of mind and wasting the precious time of the Court and the tax payer's money. Even if the Assessing Officer was overzealous in passing the assessment order, there was no need to file an appeal to the High Court. This is not an isolated case. The department is filing appeals mechanically either for the purpose of statistics or to save their skins without application of mind. In the process, a person eligible to tax

holiday has been denied the benefit and made to contest the proceedings. If the object of extending the benefits was to give added thrust to exports, the assessee is made to unnecessarily waste his time in fighting the dispute in different forums. The only way to bring reason to the department is by imposing costs so that appropriate action may be taken against the person who has taken a decision to file the appeal and recover the same after enquiry. The department is directed to pay costs of Rs. 1 lakh for wasting the tax payer's money. It is open to the authorities to recover the money from the person who has taken a decision to file the frivolous appeal.(ITA no 462 of 2007 dt 12-10-2011)
CIT v. DSLD Software Ltd. (Karn.)(HC) www.itatonline.org

S. 260A : Appeal - High Court - Tax effect - Circular - Low Tax Effect Circular is retrospective and department must Show "Cascading Effect" hence appeal of revenue less than 10 lakhs tax limit was dismissed
The department filed an appeal in the year 2010 where the tax effect was Rs. 6.69 lakhs. The issue raised was whether deduction of interest payment on funds introduced in the firm, (in the form of loan), could be allowed against remuneration received from the firm. In response to the point whether Instruction No. 3 of 2011 dated 9.2.2011 issued by the CBDT which states that appeals should not be filed where the tax effect was less that Rs. 10 lakhs, the department argued that (i) as the appeal had been filed prior to the issuance of the circular, the circular did not apply and (ii) as the appeal had a "cascading effect" involved a "common principle", the appeal could not be dismissed in view of the Supreme Court's verdict in Surya Herbals. Held dismissing the appeal:
In CIT v. Polycott Corp. (2009) 318 ITR 144 (Bom.) & CIT v. Vijaya V. Kavekar, it was held that Circular No. 3 of 2011 has retrospective operation and applies even to pending cases. As regards Surya Herbals, the appeal does not involve any "cascading effect" as the department has not shown whether there are other appeals which raise the same point.
CIT v. Varsha Dilip Kohle (Smt) (2013) 350 ITR 384 / 214 Taxman 88 (Mag.) (Bom.)(HC)

S. 260A : Appeal - High Court - Small tax effect - Circular - Appeal is maintainable if substantial question of law is involved
On the facts of the case all appeals were filed in May 2005 and September, 2007 therefore Circular of board issued in 2005 has to be considered. As per the circular if substantial question of law is involved, regardless of fact, that amount of tax involved was less than 4 lakhs, appeals are maintainable. (A.Y. 1997-98 to 2000-01)
CIT v. Pushpa Vijoy (Smt) & Anr. (2012) 67 DTR 354 / 247 CTR 575 / 206 Taxman 22 / Vol. 42 Tax. L.R. May 301 (Ker.)(HC)

S. 260A : Appeal - High Court - Substantial question of law - At the time of hearing -High Court can formulate other substantial questions of law not only formulated earlier but also other substantial questions of law not formulated by it
The High Court has admitted and formulated the questions only in respect of two items. At the time of arguing the matter the assessee contended that other issues though not admitted may be allowed to argue the matter on substantial question of law. The court held that if the court satisfies that the case involves not only the substantial question of law formulated but also other substantial question of law not formulated by it, it can hear such questions on reasons recorded. (A.Y. 1999-2000)
Indian Additives Ltd. v. Dy. CIT (2012) 67 DTR 389 / 2012 Tax LR 479 (Mad.)(HC)

S. 260A : Appeal - High Court - Finding of fact - Question of law - Perverse - "a fortiori"
The Court held that, even where a reference of a question of law is made to the High Court in its advisory jurisdiction, and not the appellate jurisdiction, where normally the findings of fact recorded by the Tribunal are binding on the High Court, the finding are not binding on the High Court, if they are perverse or if the findings are such that no person acting judicially and properly instructed as the

relevant law could have come to the determination under appeal. The position in an appeal under section 260A of the Income-tax Act, 1961 is "a fortiori". (A.Y. 2000-01)

CIT v. Nova Promoters and Finlease (P) Ltd. (2012) 342 ITR 169 / 206 Taxman 207 / 75 DTR 65 / 252 CTR 187 (Delhi)(HC)

S. 260A : Appeal - High Court - Power of review - Review petition is dismissed against the order of High Court in tax appeals

Revenue filed application seeking review the order passed by the High Court in the tax appeal. The assessee relying on judgment in the case of CIT v. West Coast Paper Mills Ltd. (2009) 319 ITR 390 (Bom.) contended that no review is maintainable, enabling review of the order by the High Court in tax appeal and sub section (7) of section 260A does not permit such a course. The revenue contended that the power of review is a akin to section 100 of the C.P.C. and if an appeal lies on the substantial question of law under section 100 of the C.P.C., the High Court while exercising the appellate power in terms of this provision, is empowered to review its own orders. The revenue submitted that section 114 of the C.P.C. read with order XL.VII, Rule (1) of the C.P.C. specifically confers power of review in appeal and in these circumstances all provisions enabling the High Court, in exercise of its appellate power, to deal with first appeals and second appeals have been made applicable, that would include power of review. The Court held that power of review cannot be read into sub-section (7) of section 260A and therefore, review petition is not maintainable against order passed by High Court in tax appeals by invoking sub-section (7) of section 260A.

CIT v. Automobile Corporation of Goa Ltd. (2012) 206 Taxman 640 / 80 DTR 81 (Bom.)(HC)

Editorial:- Followed CIT v. West Coast Paper Mills Ltd. (2010) 229 CTR 239 (Bom.)(HC) and dissented from D. N. Singh v. CIT (2010) 325 ITR 349 (FB)(Patna)(HC)

S. 260A : Appeal - High Court - Appellate Tribunal - Finding of fact - Additions confirmed by Income-tax Appellate Tribunal contrary to the evidence is liable to set aside

There was search and seizure action in the premises of assessee and the assets were seized. The Assessing Officer treated the income and assets of wife also as income of assessee. In appeal the Commissioner(Appeals) and Tribunal also confirmed the addition. On appeal by the assessee relying on the ratio of Apex Court in DSP v. K. Inbasagaran (2006) 282 ITR 435 (SC), Dhirajlal Girdharilal v. CIT (1954) 26 ITR 736 (SC), Lalchand Bhagt Ambica Ram v. CIT (1959) 37 ITR 288 (SC), the High Court set aside the order and held that addition of income from assets belonging to wife of assessee is not justified. The Court also held that the finding of fact not based on evidence can be set aside. (A.Y. 1985-86)

S. K. Bahadur v. UOI (2012) 345 ITR 95 / 253 CTR 449 (Delhi)(HC)

S. 260A : Appeal - High Court - Condonation of delay - Appeal against order of Tribunal declining to condone the delay is not maintainable [S. 253(5), 254(1)]

Order passed by the Tribunal under section 253(5) of the Act declining to condone the delay in filing the appeal is not appealable before the Hon'ble High Court under section 260A of the Act.

Per Court. There will be a direction to the Registry to take note of this judgment and not to number the appeals filed against the orders of the Tribunal declining to condone the delay in filing the appeals.

V. K. Sreenivasan v. CIT (2012) 70 DTR 341 / (2013) 213 Taxman 17 (Mag)(Ker.)(HC)

S. 260A : Appeal - High Court - Review of judgment - Review cannot be done on the ground that later contrary decision was not considered

Review of the judgment on the ground that the court did not take into account the later contrary decision of the Karnataka High Court is not permissible. Court having its own way considered the scope of the amended provisions applicable to the case rendered by it, not being based merely on an

earlier decision of the Karnataka High Court, there is no mistake or any other ground warranting interference with the judgment simply on the ground that the Court has not taken into account the later contrary decision of the Karnataka High Court.
Patspin India Ltd. v. CIT (2012) 251 CTR 63 / 73 DTR 143 (Ker.)(HC)

S. 260A : Appeal - High Court - Tax effect less than 10 lakhs - Low Tax Effect Circular No. 3 /2011 dated 9-2-2011 is retrospective and applies to pending appeals [S. 268A]
The department filed an appeal in June 2000, the tax effect of which was less than Rs. 10 lakhs. The assessee claimed, relying on Instruction No. 3/2011 dated 9.2.2011, that as the tax effect was less than Rs. 10 lakhs, the appeal was not maintainable. The department opposed the plea on the ground that the said Instruction was *prospective* and did not apply to appeals filed before 9.2.2011. Held by the High Court dismissing the appeal:
Section 268A was inserted by the Finance Act 2008 w.r.e.f. 1.4.1999 to reduce litigation in small cases and regulate the right of Revenue to file or not to file appeal. Instruction No. 3/2011 dated 9.2.2011 has been issued by the CBDT pursuant to this power. Though clause 11 provides that the instruction would apply to appeals filed on or after 9.2.2011 and appeals filed that date would be governed by the instructions operative at the time the appeal was filed, in a number of cases, it has been interpreted to mean that the monetary limits specified in the Instruction would apply to pending appeals as well [CIT v.Vijaya V. Kavekar (2013) 350 ITR 237(Bom.)(HC) followed. (A.Y. 1986-87)
CIT v. Virendra & Co. (2012) 77 DTR 210 / 253 CTR 488 (Bom.)(HC)

S. 260A : Appeal - High Court - Penalty - Less than 10 lakhs - Low Tax Effect Circular No. 3 / 2011 dated 9-2-2011 is retrospective and applies to pending appeals
The department filed an appeal in the High Court where the tax effect was less than Rs. 10 lakhs. The assessee argued that in view of Instruction No. 3 of 2011 dated 9.2.2011, the appeal was not maintainable. The department argued that the said Instruction made it clear that it applied only to appeals filed the date of its issue and had no retrospective effect. Held by the High Court dismissing the appeal:
The question about applicability of Instruction No. 3 of 2011 has been considered in several judgements including Smt. Vijaya V. Kavekar (Bom.) and Ranka & Ranka (Karn.) and the view is that Instruction No. 3 of 2011 dated 9.2.2011 would also apply to pending appeals. We are in agreement with this view and so tax appeals filed by the department which are below the tax effect of Rs. 10 lakhs are not maintainable.
CIT v. Sureshchandra Durgaprasad Khatod (HUF) (2012) 253 CTR 492 / 77 DTR 213 / (2013) 214 Taxman 59 (Mag.)(Guj.)(HC)

S. 260A : Appeal - High Court - Condonation of delay - Reasonable cause
Appeal filed on 1st July, 2005 but directions were passed on 14th Feb., 2006 for removal of office objections on or before 7th March, 2007. On appellants failure to remove objections, appeal automatically stood dismissed on 8th March, 2006. Office copy of the appeal, however, indicates that all the objections were permitted to be removed and were removed on 28th April, 2006. Nature of the negligence does not warrant a dismissal of the appeal for it is possible that the appellant who had taken steps to prosecute the appeal, legitimately expected the appeal to come up for admission on account of the objections having been removed albeit belatedly and had even appointed an advocate to prosecute the appeal. Further, scales in this case must tip in the appellants favour for it the respondent loses, the prejudice would not be as severe upon him as it would be to the revenue if the appeal is dismissed due to the alleged negligence of some of its officers. In the circumstances, the notice of motion is made absolute subject to the appellant paying the costs fixed at Rs. 10,000/- to the respondent.
CIT v. Kamal Kumar Johari (2012) 77 DTR 12 (Bom.)(HC)

S. 260A : Appeal - High Court - Monetary limit - Circular - Earlier view of the same Court that Low tax effect Circular applies to pending appeals is against "public policy" - Suggestions given on how to increase tax base

The High Court had to consider (i) whether in the light of the judgement of the same Court in Ranka & Ranka (Karn.), Instruction No. 3 of 2011 dated 9.2.2011 which states that the department cannot file appeals where the tax effect is less than Rs. 10 lakhs applies to pending appeals and (ii) whether under section 132B, credit for the cash seized in the hands of another assessee could be given to the assessee. It was held by the High Court that:

(i) Though in Ranka and Ranka it was held by the Court that Instruction No. 3 of 2011 issued by the CBDT is applicable to the pending cases filed prior to 09.02.2011, this view is against public interest and public policy because clause 11 of the said Instruction specifically says that it will be applicable only to cases filed on or after 9.2.2011. The Revenue's contention that Instruction No. 3 dated 09.02.2011 has no retrospective effect is upheld;

(ii) It is suggested to the Union Government to reduce the tax burden/ rate of Income tax on the existing Income tax payers by bringing more persons under the Income tax net. If so, the existing tax payers would not evade tax and Income tax disputes also will come down. The following suggestions are made:

(a) that all Government servants, under the State/Centre (who are not assessees under the Income Tax), shall be made liable to pay Income Tax of at least Rs. 1,000 per annum;

(b) that all male graduates, who are mentally and physically sound, aged between 31 years to 60 years (who are not assessees under the Income Tax), shall be made liable to pay income-tax at least Rs. 1,000/- per annum and protect their interest on attaining age of 61 years by providing pension;

(c) that Election law may be amended prescribing a condition that every male person contesting election to the State assembly/ Parliament shall be an income tax assessee. (A.Y. 1992-93)

CIT v. B. Sumangaladevi (Smt) (2013) 212 Taxman 362 / 352 ITR 143 (Karn.)(HC)

S. 260A : Appeal - High Court - Retrospective amendment - Review petition - Condonation of delay - A Retrospective Amendment does not affect completed matters

The assessee filed a belated appeal to the High Court under section 260A. The High Court dismissed the appeal following CIT v. Mohd. Farooqui (2009) 317 ITR 305 (All)(FB) where it was held that the High Court had no power to condone delay in filing a section 260A appeal. Section 260A(2A) was inserted by the Finance Act, 2010 w.r.e.f. 01.10.1998 to give the High Court the power to condone delay. Pursuant to the said retrospective amendment, the assessee filed a review petition and requested that its appeal mat be restored. Held dismissing the review petition:

Though section 260A(2A) has been inserted retrospectively w.e.f. 01.10.1998 by the Finance Act, 2010, the fact remains that cases already settled before the said amendment cannot be reopened as per the ratio laid down in Babu Ram v. C. C. Jacob AIR (1999) SC 1845, where it was observed that the prospective declaration of law is a devise innovated by the Apex Court to avoid reopening of settled issues and to prevent multiplicity of proceedings. It is also a devise adopted to avoid uncertainty and avoidable litigation. By the very object of prospective declaration of law, it is deemed that all actions taken contrary to the declaration of law prior to its date of declaration are validated. This is done in the larger public interest. In matters, where decisions opposed to the said principle have been taken prior to such declaration of law cannot be interfered with on the basis of such declaration of law. The amendment is applicable to future cases to avoid uncertainty as per the ratio laid down in M. A. Murthy v. State of Karnataka and others (2003) 264 ITR 1 (SC), where it was observed that prospective over-ruling is a part of the principles of constitutional canon of interpretation and can be resorted to by the Court while superseding the law declared by it earlier. It is not possible to anticipate the decision of the highest court or an amendment and pass a correct order in anticipation as per the ratio laid down in CIT v. Schlumberger Sea Company (2003) 264 ITR 331 (Cal). Therefore, the

amendment introduced in section 260A(2A) has the effect only on pending and future cases. On the date when the appeal was dismissed on the ground of limitation, there was no discretion with the court to condone the delay. A discretion has come to the Court by virtue of the amendment by inserting section 260A(2A). The appeal was (rightly) dismissed as per the then law and the subsequent amendment is not applicable as the matter has already attained finality.

Jay Batra Roy(J.B.Roy) v. Dy. CIT (2012) 83 CCH 7/(2012)BCAJ Pg. 34, Vol. 44-B Part 2, November 2012/ (All.)(HC)

S. 260A : Appeal - High Court - Circular - Low tax effect - Question whether Low tax effect circular can apply to pending appeals referred to Full Bench.[S.268A]

The department filed an appeal in the High Court in 2008, the tax effect of which was more than Rs. 4 lakhs but less than Rs. 10 lakhs. The assessee claimed, relying on Sureshchandra Durgaprasad Khatod (HUF) & CIT v. Madhukar K. Inamdar (HUF) (2009) 318 ITR 149 (Bom.), that as Instruction No. 3 of 2011 dated 9.2.2011 issued by the CBDT applied to pending appeals and as the tax effect was lower than the sum of Rs. 10 lakhs prescribed therein, the appeal was not maintainable. The department argued that the maintainability of the appeal had to be decided on the basis of the CBDT Instruction dated 15.5.2008 which was in force at the time of filing the appeal. HELD by the High Court:

Though in Sureshchandra Durgaprasad Khatod (HUF) (and other judgements), it has been held that Instruction No. 3 of 2011 dated 9.2.2011 shall apply to pending appeals paragraph 11 of the Instruction itself provides that "This instructions will apply to appeals filed on or after 9th February, 2011. However, the cases where appeals have been filed before 9th February, 2011 will be governed by the instructions on this subject, operative at the time when such appeal was filed". The issue requires consideration by a larger Bench. A number of decisions of various High Courts on the subject [CIT v. Kodananad Tea Estates (2005) 275 ITR 244 (Mad.), CIT v. Varinder Construction Co. (2011) 331 ITR 449 (P&H)(FB), CIT v. John L. Chackola (2011) 337 ITR 385 (Ker.)] were not brought to the notice of this Court in the case of Sureshchandra Durgaprasad Khatod (HUF). We, independently also have serious doubts if the instructions of 2011 can be applied to cases filed earlier. Also, the said Instruction cannot be interpreted on the basis of the litigation policy. Also, prospective application of the instructions would not lead to any absurdity. If by applying the instructions prospectively, certain appeals would be decided on merits, because the appeals were filed prior to issuance of the new instructions, the same cannot be stated to be absurd. A counter situation also may arise if such instructions are applied with retrospective effect to all pending appeals whereby an appeal would be dismissed without examination on merits simply because the same survived for a longer period than the cognate appeals. Sureshchandra Durgaprasad Khatod (HUF) accordingly requires reconsideration.

CIT v. Shambhubhai Mahadev Ahir(2013) 88 DTR 204 (Guj)(HC)

S. 260A : Appeal - High Court - Not represented by departmental counsel - Non-payment of fees - High Court directed to make the payments within two months and the member CBDT promised that there would be no laxity in the assistance rendered to the court in future

The Department filed an appeal in the High Court. However, the matter was not properly represented by the department's counsel and it transpired that the department's Counsel had not been paid their fees by the department for a long time. The Court directed the CBDT to file a chart giving details of the total bills raised month-wise by each of the 10 standing counsels, the amounts for which these have been settled and the payments released against the bills. It directed that the reason for the difference between the bills raised and as paid should be communicated to the counsels and incorporated in the chart. However, there was continuous non-compliance by the CBDT, the Court directed the Member CBDT and the CCIT to appear in person and explain the position. Mr. K. P. Chowdary, Member, CBDT (A&J) and Mr. Amitabh Misra, CCIT appeared before the court and

promised that necessary action with regard to revamping the system and giving better assistance to the court had been taken. As regards the non-payment of fee to counsel, it was stated that the arrears towards the admitted fee would be cleared in the next two months and in cases where there was a dispute of parameters, it would be sorted out with the counsels themselves. The CBDT Member requested that a quietus may be given to the issue and assured the court that there would be no laxity in the assistance rendered to the court in future.(ITA no 187 /2003 dt 11-11-2011)
CIT v. Jackson Engineers Ltd. (Delhi)(HC) www.itatonline.org

S. 260A : Appeal - High Court - Condonation of delay
Revenue, having regard to the steps taken from time to time, cannot be criticized of being either sluggish, indifferent or causal in its approach to the requirement of filing the appeals. Last date for completing assessment being 22nd Jan., 2008, the Assessing Officer might have diverted his attention to the assessment cases, which were to get time barred prior thereto, i.e. 31st Dec., 2007. Merely because instructions were provided to the standing counsel by the Revenue on more than one occasion, the same is not demonstrative of unnecessary wastage of time by it. More so, there is nothing to the contrary to even infer the same. Personal problems plaguing the standing counsel have not been controverted by the opposite party so as to discard the same as untrue. On a totality of the considerations the applications have considerable merit and ought to succeed. Delay of 290/287 days in preferring the appeals condoned. (A.Y. 1996-97 & 2000-01)
CIT v. Williamson Tea (Assam) Ltd. (2012) 78 DTR 181 / 254 CTR 200 (Gau.)(HC)

S. 260A : Appeal - High Court - Review - Retrospective amendment of law - Review petition for recalling a decision on the basis of amendment of law is permissible
Amended section 260A being, by virtue of a legal fiction on the statute book w.e.f. 1st Oct., 1998, the order dated 16th June, 2010 whereby the Revenues appeal being barred by limitation, was rejected on the ground that the curt as on that day had no power to condone the delay in filing the appeal under section 260A, cannot be allowed to continue. In that view of the matter, the order dated 16th June, 2010, is hereby recalled. Refusal to review under order 47 of the CPC on the basis of a subsequent judicial decision or an alteration of law lacks persuasion. Delay of 286 days for filing an appeal was condoned.
CIT v. Williamson Tea (Assam) Ltd. (2012) 346 ITR 436 / 78 DTR 189 / 254 CTR 208 (Gau.)(HC)

S. 260A : Appeal - High Court - Maintainability - Monetary Limit - Circular is applicable to pending cases - Small tax effect [S. 268A]
Circulars or instruction issued under section 268A by the CBDT are applicable not only to new cases but to pending cases as well. Such circulars have been issued under section 268A which is an exception to the provisions of section 260A. CBDT being mindful of this position has issued the instructions in question. Therefore, the instructions would be applicable to pending cases as well. Instruction No. 5 of 2008 and Instruction No. 3 of 2011 are pari materia. Main objective of such instructions is to reduce the pending litigation where the tax effect is considerably small. Therefore, the tax appeals are required to be dismissed, as they are not maintainable in view of the provisions of section 268A and the Instruction No. 3 of 2011, dt. 9th Feb., 2011. (A.Y. 1988-89, 1989-90]
CIT v. Vijaya V. Kavekar (Smt.) L/H of Late Vijaykumar B. Kavekar (2013) 350 ITR 237 / 214 Taxman 136 (Mag.) / (2012) 77 DTR 203 / 253 CTR 481 (Bom.)(HC)
Editorial:- CIT v. Madhukar K. Inamdar (HUF) (2009) 318 ITR 419 / 27 DTR 132 (Bom.) followed. Refer CIT v. Virendra & Co. (2012) 77 DTR 210 / 253 CTR 488 (Bom.)(HC)

S. 260A : Appeal - High Court - Monetary limit - Maintainability - Small tax effect

Tax effect of the instant appeal filed by the revenue was less than the there shold monetary limit for filing of appeal by the Revenue as prescribed by Instruction No. F. 279/126/98-ITJ, dated 27th March, 2000 and the instruction No. 2 of 2005 dated 24th Oct., 2005 and no questions of general importance are involved and therefore appeal is dismissed. (A.Y. 1988-89)

CIT v. S. Akbar Shah (2012) 253 CTR 524 / 78 DTR 167 (Mad.)(HC)

S. 260A : Appeal - High Court - Alternate remedy - Writ petition dismissed [Constitution of India , Art. 226]

In original assessment order certain additions were made on account of failure on part of assessee to produce confirmation letters relating to loans allegedly taken by him. Said additions were confirmed by Commissioner(Appeals). During pendency of appeal, assessee obtained loan confirmation letters from some of parties and requested Tribunal to produce same as and by way of additional evidence. Tribunal allowed additional evidence and restored matter to file of Assessing Officer for consideration of additional evidence. When matter was taken up by Assessing Officer for consideration of additional evidence, assessee filed some more loan confirmations which were not produced before Tribunal. Assessing Officer declined to consider those loan confirmations on ground that direction of Tribunal was to consider specified number of loan confirmations and not beyond. Against said order, assessee filed a writ petition. The court held that petition filed by assessee could not be entertained because he had an alternate remedy of filing an appeal and agitate issue as to whether Assessing Officer was bound to consider additional evidence other than those permitted by Tribunal. (A.Y. 1998-99)

Indrakumar Patodia v. ITO (2012) 211 Taxman 38 (Mag.)/(2011) 238 CTR 437/51 DTR 183(Bom.)(HC)

S. 261 : Appeal - Supreme Court - Search and seizure - Block assessment - Assessment of third persons - Satisfaction - Recording of satisfaction was raised first time before Supreme Court, held cannot be taken first time before Supreme Court [S. 158BD]

Assessee first time before the Supreme Court raised the contention that the Department did not have jurisdiction to invoke Chapter XIV-B of the Act , the Assessing Officer had not recorded his satisfaction that any undisclosed income belonged to the assessee or that the assessee did not have the intention to disclose its income, was never urged before the High Court or Tribunal. The Supreme Court held that contention can not be taken for the first time before Supreme Court. (A.Y. 1995-96)

ACIT v. A. R. Enterprises (2013) 350 ITR 489 / 3 SCC 196 / 212 Taxman 531 / 256 CTR 1 / 82 DTR 97 (SC)

S. 261 : Appeal - Supreme Court - Delay - Supreme Court flays department for "peculiar phenomenon" of delay in filing high stakes appeals [S. 260A])

For the reasons given in the Orders passed by this Court on 2nd July, 2012, and 13th August, 2012, on account of huge delay in filing the special leave petitions as also in filing the appeal before the High Court, we had asked the Department to file an affidavit explaining the delay in filing the above proceedings. The affidavit has been filed. It is reiteration of the same affidavit which has been filed earlier in the High Court and the Supreme Court. Further, the affidavit has not been filed by the concerned officer. The amount involved in this matter is approximately Rupees ninety crores. Since the affidavit in this Court pursuant to our Orders, as above, is not satisfactory, we want to know from the learned Additional Solicitor General as to whether the Department intends to hold a departmental inquiry for the above delay.

In large number of cases, we find a peculiar phenomenon. In cases, where huge revenue / demand from the Department is involved, invariably, there is inordinate delay in filing appeals before the High Court under Section 260A of the Income-tax Act, 1961, and in filing special leave petitions before this Court. We do not know the reason why such inordinate delays take place only in matters

of stakes. This aspect needs to be looked into. This aspect has been brought to the notice of the learned Attorney General as well as the Ministry of Law in the past. This is one such case. Even in the past, this Court has raised a similar query. Moreover, once a matter is dismissed on the ground of delay, it has a ricocheting effect.

In the above circumstances, we direct the Registry to forward a copy of this Order to the Hon'ble Finance Minister and Hon'ble Law Minister for doing the needful at the departmental level so that such cases of revenue leakages do not recur. (SLP No. 19986/2011 dated 14-09-2012)

DIT v. Citibank N.A. (2012) 210 Taxman 258 / (2013) 350 ITR 302 (SC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Profits and gains from hotels or industrial undertakings in backward area - Maintenance of accounts unit wise - Neither section 80HH, nor section 80I statutorily obliged to maintain the accounts unit wise hence consolidated accounts held to be valid and revision was held to be not valid. [S. 80HH, 80I]

The Assessing Officer has allowed the deduction under section 80HH, after examining the unit wise profit and loss statement filed by the Assessee. Commissioner revised the order under section and disallowed the deduction on the ground that the assessee should have maintained Segregated Accounts for each of the three units to avail benefit of section 80HH and section 80I. In appeal before the Tribunal the Tribunal held that assessee should submit unit wise audited accounts and claim deduction under section 80HH and 80I. On appeal the High Court set aside the order of Tribunal. On appeal to Supreme Court the Court held that neither section 80HH nor section 80I (as it then stood) statutorily obliged the assessee to maintain its accounts unit wise and it was open to the assessee to maintain its accounts in a consolidated form, in order to put to an end to the litigation between the tax department and the PSU the matter was remitted back to the Assessing Officer to ascertain whether the assessee had correctly calculated the net profits for claiming deduction under section 80HH and 80I. If not done, it could be done such working is certified by the Auditors the net profit computation (Unit wise) could be placed before the Assessing Officer who can find out whether such profits is properly worked out and on that basis compute deduction under section 80HH/80I. (A.Y. 1992-93)(From the judgment of Gauhati High Court ITR No. 4 of 2001 dated 6-6-2002)

CIT v. Bongaigaon Refinery & Petrochemical Ltd. (2012) 349 ITR 352 / 210 Taxman 229 / 79 DTR 8 / 254 CTR 98 (SC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Penalty - Dropping penalty proceedings - Revicion is justified

Commissioner under section 263, can revise the order passed by the Assessing Officer dropping penalty proceedings. The word "proceedings" under section 263 is broad enough to include dropping penalty proceedings. (A.Y. 2004-05)

R. A. Himmatsingka and Co. v. CIT (2012) 340 ITR 253 / 247 CTR 546 (Patna)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Deduction - Export of mica products - Mineral ore - Revision is justified [S. 80HHC]

Assessee exported the goods which are made by converting mica into pieces of specific sizes and the same lost its character as goods and merchandise of the category namely 'mineral ores' hence claimed the deduction under section 80HHC, which was allowed by the Assessing Officer. The Commissioner revised the order under section 263 on the ground that Assessing Officer gave the benefit of section 80HHC notwithstanding the fact that the legislature had excluded the operation of section 80HHC in respect of goods and merchandise of mineral items processed by the assessee. High Court up held the revision order passed by the Commissioner. (A.Y. 1990-91)

Jai Mica Supply Co. (P) Ltd. v. CIT (2012) 246 CTR 280 / (2011) 61 DTR 61 (Cal.)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Not application of mind to relevant material or an incorrect assumption of facts or an incorrect application of law will satisfy the requirement of order being erroneous, hence, revision held to be valid

The assessee bought shares on 21.4.2000 for Rs. 19,536/- and sold them on 2.5.2001 for Rs. 6,36,640/-. A gain of more than 30 times was made in one year. The Assessing Officer accepted the LTCG and allowed section 54F relief. The CIT passed an order under section 263 in which he held the order to be 'erroneous and prejudicial to the interest of the revenue' on the ground that the Assessing Officer had not made any enquiry to determine the genuineness of the transaction though the circumstances warranted the same. On appeal of the assessee, the Tribunal relied on B & A Plantation & Industries & Anr. v. CIT (2007) 290 ITR 395 (Gau.) and held that as the order of the Assessing Officer was not without jurisdiction, it could not be held to be 'erroneous' for purposes of section 263. On appeal by the department, the issue was referred by the Full Bench as to the supposed conflict between various judgements of the Court on the subject:

Jurisdiction under Section 263 can be exercised whenever it is found that the order of assessment was erroneous and prejudicial to the interest of the Revenue. Not holding such inquiry as is normal and not applying mind to relevant material would make the assessment 'erroneous' warranting exercise of revisional jurisdiction. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being 'erroneous'. Non application of mind and omission to follow natural justice is in same category. CIT v. Daga Entrade (P) Ltd. (2010) 327 ITR 467 (Gau.) lays down the correct law and is not in conflict with Rajendra Singh v. Superintendent of taxes & Ors. (1990) 1979 STC 10 (Gau.). (A.Y. 2002-03)

CIT v. Jawahar Bhattacharjee (2012) 341 ITR 434 / 67 DTR 217 / 247 CTR 473/ 209 Taxman 174 (FB.)(Gauhati)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Reasoned order -Double taxation relief - India-Canada - As the computation was not clearly indicated in the assessment order the revision was held to be valid [S. 143(3), Art. 23]

Assessee while filing the return of income, claimed relief under DTAA, in respect of Canada and Thailand. Assessing Officer has allowed the claim under section 143(3). The Commissioner passed the order under section 263, and directed the Assessing Officer to examine the enactment of both the countries and to ascertain the exact relief that the assessee can claim under Article 23(2) with Canada and Article 23(3) of the DTAA of Thailand .Tribunal set aside the order of Commissioner and restored the order of the Assessing Officer. On further appeal to High Court by the revenue the court held that as the Assessing Officer has not clearly indicated the computation with the relevant Articles of DTAA and the basis, can be construed as an order both erroneous and prejudicial to the interest of revenue, hence the revision order was justified. (A.Y. 1995-96 & 1996-97)

CIT v. Infosys Technologies Ltd. (No. 2) (2012) 341 ITR 293 / 67 DTR 33 / 205 Taxman 98 / 247 CTR 410 (Karn.)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Limitation - Order giving effect of order of Commissioner(Appeals) - Revision of orders beyond the period of two years held to be bad in law

Assessment order was passed on 27th Feb., 1997. The assessment order was subject matter of appeal, while giving effect the Assessing Authority had passed an order dated on 31st March, 1999. The Commissioner has passed the revision order on 31st March, 1999. The Tribunal set aside the order of Commissioner. On appeal to High Court by revenue the High Court held that the order passed by the Commissioner in exercise of the revisional jurisdiction beyond two years of assessment order was clearly barred by limitation and confirmed the order of Tribunal. (A.Y. 1994-95)

CIT v. Infosys Technologies Ltd. (No. 1) (2012) 341 ITR 290 / 67 DTR 57 / 247 CTR 573 (Karn.)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Business - Coaching classes - Revision of order on the ground that the Institute was carrying on business of coaching against charge of fee held to be not valid [S. 143(3)]

The Assessing Officer has passed the order under section 143(3) and allowed the exemption under section 10(23C)(iv). Commissioner revised the order under section 263 on the ground that the assessee was carrying on business of coaching against charges of fee and separate books of account were not maintained. High Court in appeal quashed the order passed under section 263 of the Income-tax Act, 1961 and held that Institute cannot be said to be carrying on business. (A.Y. 2005-06)

DIT (Exemption) v. The Institute of Chartered Accountants of India (2012) 347 ITR 86 / 67 DTR 67 / (2011) 202 Taxman 138 (Delhi)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Finding - Remand - Commissioner must give finding on merits and cannot simply remand to Assessing Officer

The assessee purchased property for Rs. 69.63 lacs in 1997, yielding a rent of Rs. 2.05 lacs per month, and sold it for Rs. 70 lacs in 2003. The assessee claimed indexation loss which was accepted by the Assessing Officer. The CIT passed an order under section 263 holding that a high-yielding asset could not be disposed off at such a low value and that the assessment order was erroneous & prejudicial to the interests of the revenue as the Assessing Officer had not examined the aspect of full value of consideration receivable by the assessee. The Tribunal, reversed the CIT on the ground that he had not come to the conclusion that the actual receipt of consideration was more than what was declared in the return. On appeal by the department, the High Court. Held, dismissing the appeal:

While the Assessing Officer is both an investigator and an adjudicator, a distinction has to be drawn between a case where the Assessing Officer has not conducted any enquiry or examined any evidence whatsoever ("lack of inquiry") from one (i) where there is enquiry but the findings are erroneous; and (ii) where there is failure to make proper or full verification or enquiry ("inadequate inquiry"). The fact that the assessment order does not give any reasons for allowing the claim is not by itself indicative of the fact that the Assessing Officer has not applied his mind on the issue. All the circumstances have to be seen. A case of lack of enquiry would by itself render the order being erroneous and prejudicial to the interest of the Revenue. In a case where there is inquiry by the Assessing Officer, even if inadequate, the CIT would not be entitled to revise under section 263 on the ground that he has a different opinion in the matter. Also, in a case where the Assessing Officer has formed a wrong opinion or finding on merits, the CIT has to come to the conclusion and himself decide that the order is erroneous, by conducting necessary enquiry before passing the section 263 order. The CIT is entitled to collect new material to show how the order of the Assessing Officer is erroneous. The CIT cannot remand the matter to the Assessing Officer for further enquiries or to decide whether the findings recorded are erroneous without a finding that the order is erroneous and how that is so. A mere remand to the Assessing Officer implies that the CIT has not decided whether the order is erroneous but has directed the Assessing Officer to decide the aspect which is not permissible. On facts, as the CIT had doubts about the valuation and sale consideration received, he ought to have examined the said aspect himself and given a finding on the merits on how the consideration was understated [Gee Vee Enterprises v. Addl. CIT (1975) 99 ITR 375 (Delhi), CIT v. Sunbeam Auto Ltd. (2011) 332 ITR 167 (Delhi) & CIT v. Gabriel India Ltd. (1993) 203 ITR 108 (Bom.) followed] (A.Y. 2004-05)

ITO v. D. G. Housing Projects Ltd. (2012) 343 ITR 329 / 74 DTR 153 / (2013) 212 Taxman 132 (Mag.)(Delhi)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Deduction - Allocation of expenses - Assessing Officer has not applied his mind hence revision is held to be justified - Other issues where the Assessing Officer has applied his mind, revision held to be not justified

Assessee is engaged in growing of tea leaves and manufacturing of tea filed its return of income and claimed deduction under section 80I, 80IA and 80HH. The Assessing Officer restricted the claim under section 143(3). Commissioner revised the order on the ground that the Assessing Officer should have allocated expenditure on scientific research while computing profits derived from industrial undertaking to which deduction pertained and also agency commissioner and interest paid were also to be allocated while computing the deduction. On appeal to the Tribunal, the Tribunal quashed the order of Commissioner on the ground that the during the course of assessment proceedings the Assessing Officer has asked specific query and same was replied. The Court held that though the specific query was raised and the reply was filed, the Assessing Officer has not applied his mind and failure to do so the revision order was held to be justified.

As regards agency commission and interest the Court held that the revision was not justified because the agency commission has already been factored in while computing the profits of the eligible units. Similarly, interest was not depended upon borrowed funds and there was sufficient accruals in the eligible units. As regards whether cess on green leaves is part of expenditure incurred in business of growing and manufacturing of tea and it is allowable as business expenditure, therefore while computing composite income derived from sale of tea grown and manufactured by assessee entire cess would be claimed against taxable income. Hence revision of order is not justified. (A.Y. 1998-99)

CIT v. Hindustan Lever Ltd. (2012) 343 ITR 161 / 206 Taxman 75 / 70 DTR 185 / 249 CTR 378 / Vol. 114(2) Bom. L. R. 807 (Bom.)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Cess on green tea leaves - Revision of order on the basis of Guwahati High Court which was not approved by Jurisdictional High Court is not valid

The Assessing Officer while making assessment under section 143(3) has allowed, cess paid green leaf to the Government as business expenditure. After wards the proposal was sent by the Assessing Officer for revising the order under section 263 on the ground that the Guwahati High Court in Jorehaut Group Ltd. v. Agri ITO (1997) 226 ITR 622 (Gau.) held that the cess should be deductible from agricultural income-tax proceedings. Commissioner revised the order, which was upheld by the Tribunal. On appeal to the High Court there was no justification for commissioner to invoke section 263 to disallow the cess on green tea leaves on the basis of decision of the Guwahati High Court when the said decision was not approved by the Jurisdictional High Court in CIT v. A.F.T. Industries Ltd. (2004) 270 ITR 167 (Cal.)(HC) and it has been held that the amount of cess so payable is deductible. The revision order was set aside. (A.Y. 1995-96)

Hindustan Lever Ltd. v. CIT (2012) 70 DTR 182 / 249 CTR 367 / (2011) 335 ITR 108 (Cal.)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Limitation - Limitation from the original assessment order under section 143(3) [S. 143(3)]

The order under section 143(3) was passed on 10th March, 1999. The said order was revised under section 147 read with section 148, the issues which was allowed under section 143(3) was not the subject matter of reassessment. The Commissioner passed the order under section 263 revising the order passed under section 143(3) dated 10th March, 1999. Second order of reassessment was passed on 26th March, 2002. The order under section 263 was passed on 28th March, 2003. The said order was quashed by the Tribunal. On appeal to the High Court, the Court held that where the jurisdiction under section 263(1) is sought to be exercised with reference to an issue which is covered by the original order of assessment under section 143(3) and does not form the subject matter of the reassessment. Limitation must necessarily begin to run from the order under section 143(3). The order of Tribunal is up held. (A.Y. 1996-97)

CIT v. ICICI Bank Ltd. (2012) 343 ITR 74 / 70 DTR 419 / 252 CTR 85 / (2013) 212 Taxman 130 (Mag.)(Bom.)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Charitable purposes - Institution conducting coaching classes and charging fees, matter not investigated by Commissioner, revision order held to be not valid [S. 2(15), 10(23C)]

The Institute of Chartered Accountants of India was established under the Chartered Accountants Act, 1949, for regulating the profession of chartered accountants in India. Since the A.Y. 1996-97, the CBDT had been approving the Institute under sub clause (iv) of section 10(23C) of the Income-tax Act, 1961. Approval under section 10(23C)(iv) was granted for the A.Y. 2003-04 to 2005-06. The Commissioner withdrew the exemption on two grounds, namely, that coaching activity was under taken by the Institute and the activity was "business" and not a charitable activity. Secondly, it was also held that the Institute had incurred expenses of Rs. 164.33 lakhs on overseas activities including travelling, membership of foreign professional bodies, etc., without permission from the Board as required under section 11(1)(c). The Tribunal set aside the order of revision. On appeal by Department to the High Court. Held, dismissing the appeal, that the purpose and object to do business is normally to earn and is carried out with a profit motive; in some cases the absence of profit motive may not be determinative. The Commissioner had given no such finding as far as the activities of the Institute were concerned. The Commissioner without examining the concept of business had held that the Institute was carrying on business as coaching and programmes were held by them and a fee was being charged for the same. The order of revision was not valid. (A.Y. 2005-06)

DIT (Exemption) v. The Institute of Chartered Accountants of India (2012) 347 ITR 86 / 67 DTR 67 / (2011) 202 Taxman 138 (Delhi)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Investment allowance - Machinery used in manufacture of denatured spirit - Assessee is entitled to investment allowance - Revision held to be not valid [S. 32A]

The assessee was allowed investment allowance by the Income-tax Officer. The Commissioner, in revision under section 263 of the Income-tax Act, 1961, withdrew it on the ground that the assessee manufactured rectified spirit and denatured spirit and sold arrack after diluting the rectified spirit. Held that item 1 of the Eleventh Schedule reads "Beer, wine, and other alcoholic spirits". The words "other alcoholic spirits" are grouped with the words "beer" and "wine". "Beer" and "wine" are alcoholic spirits which are fit for human consumption. They are in other words postable alcoholic spirits. That is not the case with rectified spirit or industrial alcohol. Industrial alcohol or rectified spirit was not intended to be included within "other alcoholic spirits." The revision held to be not valid and assessee could not be denied investment allowance. (A.Y. 1985-86, 1986-87, 1989-90)

CIT v. O. R. Distilleries Ltd. (2012) 349 ITR 215/87 DTR 268/(2013) 259 CTR 473 (AP)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Tribunal set aside the order of Commissioner, on appeal the Court remanded the matter to Commissioner to pass fresh order after hearing the parties [S. 80IA]

In course of assessment, Assessing Officer allowed assessee's claim of deduction under section 80-IA while computing book profits. Subsequently, Commissioner taking a view that deduction had been wrongly computed by including interest income credited to profit and loss account, issued notice under section 263. In its reply, assessee stated that it had two units; power generation unit which was entitled to deduction under section 80-IA and energy system unit which was not entitled to said deduction. Assessee further submitted that there was proper bifurcation of interest income as interest belonging to power generation unit alone had been included while computing amount of deduction. Commissioner rejected assessee's explanation and passed a revisional order under section 263. On appeal, Tribunal having accepted bifurcation and nature of interest income, set aside revisional order. On facts, right and proper course for Tribunal was to ask Commissioner to examine factual aspect relating to bifurcation and nature of interest rather than giving its own factual finding without there

being factual examination and verification of assessee's claim, therefore, impugned order passed by Tribunal was to be set aside and, matter was to be remanded back to Commissioner to pass a fresh order after hearing assessee. (A.Y. 2005-06)
CIT v. DLF Power Ltd. (2012) 345 ITR 446 / 211 Taxman 123 (Mag.)/345 ITR 446(Delhi)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Matter remanded to Tribunal for fresh adjudication
Assessing Officer made an addition on account of disallowance of certain excessive expenses and some un-vouched expenses. Commissioner, vide revision order passed under section 263 held that assessment framed by Assessing Officer was erroneous and prejudicial to interest of revenue, and he set aside order of Assessing Officer. Tribunal, allowed appeal of assessee. It was found that none of issues as had been noticed by Commissioner and included in order passed under section 263 had been considered and analysed by Assessing Officer and he had failed to discuss as to how and why returned income of Rs. 8.53 lakhs was accepted against surrendered income of Rs. 12 lakhs by assessee.Order of Tribunal could not be sustained as it failed to appreciate and advert to various aspects of matter. Therefore, matter was to be remitted to Tribunal for fresh decision. (A.Y. 2004-05)
CIT v. Raja Industries (2012) 340 ITR 344 / 211 Taxman 125 (Mag.)(P&H)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Additions which was made in respect of reasons recorded under section 148, revision of order is not valid [S. 147, 148]
Assessee did not file its return. Later on it was discovered that assessee had made certain undisclosed investments in FDRs. In compliance of notice under section 148 assessees filed its return declaring a loss. In course of proceedings under section 147, it was noted that assessee had shown in its profit and loss account a substantial increase in share application money. In order to confirm genuineness of share application money summons were issued to alleged share applicants. Finally assessment order was passed by accepting return of loss and holding that assessee was able to establish and prove source and capacity to invest in FDRs. Commissioner, however, exercising its revisionary jurisdiction held assessment order to be erroneous on ground that Assessing Officer had passed order without making necessary enquiries and verifications with regard to share application money. Since Assessing Officer did not make any addition on issues reasons recorded at time of issuance of notice under section 148, sequitur was that he could not have made an addition on account of share application in assessment proceedings under section 147 and, therefore, assessment order was not erroneous. Therefore, Commissioner could not have exercised its revisionary jurisdiction. (A.Y. 1993-94)
CIT v. Software Consultants (2012) 341 ITR 240 / 211 Taxman 120 (URO)(Delhi)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Expenditure on exempt income and depreciation - Matter remanded [S. 14A, 32, 143(3)]
Original assessment order was passed under section 143(3). Thereupon, Commissioner passed a revisional order under section 263 on two grounds, firstly, assessee had earned dividend income which was exempt from tax but no disallowance of expenditure was made under section 14A and, secondly, assessee had claimed depreciation on computer software, printers, ticket printers, routers and scanners etc. at full rate, which was allowed by Assessing Officer without examining whether said peripherals/items were used for more than 180 days. Tribunal quashed revisional order holding, with regard to section 14A expenditure, that Rule 8D of the Income-tax Rules, 1962 was not retrospective and, with regard to depreciation and that same was admissible at full rate. The Court held that even though Rule 8D was prospective in nature applicable from A.Y. 2008-09, yet Assessing Officer was required to apply section 14A because assessee had admittedly earned exempt income. Further for allowing claim for depreciation, Assessing Officer was required to consider as to whether or not computer peripherals were used for more than 180 days. Accordingly the matter was remanded. (A.Y. 2005-06)

CIT v. Galileo India (P.) Ltd. (2012) 211 Taxman 35 (Mag.)(Delhi)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Revision of order held to be justified [S. 158BC]

A notice under section 158BC was issued and assessee in compliance thereto filed return declaring undisclosed income at NIL. Assessing Officer completed block assessment accepting undisclosed income at NIL. Commissioner found that Assessing Officer had finalized impugned assessment without making inquiry in respect of cash found at premises of assessee, unsecured loans, fresh investment, etc. He accordingly set aside assessment. On appeal Tribunal restored the order of Assessing Officer. On appeal by the revenue the Court held that since nothing was referred which might justify passing impugned assessment by Assessing Officer, Commissioner was justified in setting aside said order and initiating revision procedure. Accordingly the appeal of revenue was allowed. (B.P. 1-4-1990 to 10-11-2000)

CIT v. Rajesh Mahajan (2012) 211 Taxman 37 (P&H)(HC)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Depreciation - Plant - Terminal building - Revision is not justified [S. 32]

Airports Authority of India uses the terminal building for regulation of air traffic and communicational and Navigational control and use of said building for passengers was only incidental, therefore, Assessing Officer was justified in treating entire terminal building as 'plant' and allowing depreciation, hence revision under section 263 may not be justified. (A.Y. 1995-96 & 1997-98 to 2001-02)

Airports Authority of India v. CIT (2012) 134 ITD 34 / (2011) 12 ITR 482/(2013) 153 TTJ 676 (Delhi)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Capital gains - Business income - Investment in shares - Revision order is not justified [S. 28(i), 45]

If an Assessing Officer acting in accordance with law makes certain assessment, same cannot be branded as erroneous by Commissioner simply because he disagrees with view of Assessing Officer or according to him order should have been written more elaborately. Section 263 does not visualize a case of substitution of judgment of Commissioner for that of Assessing Officer, unless the decision is held to be erroneous. Assessee was holding equity shares of various companies as investment, income arising from sale of investment would be assessable as long term/short term capital gains and not as business income. Revision order under section 263 was not justified. (A.Y. 2006-07)

Manish Kumar v. CIT (2012) 134 ITD 27 / 17 ITR 324 / 72 DTR 255 / 147 TTJ 371 (Indore)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Computation deduction under section 80HHF - Adjustment of brought forward losses - Legal position to be seen when exercising the revision jurisdiction and not when the Assessing Officer passed the order - Revision held to be valid

Assessing Officer allowed the deduction under section 80HHF, before setting off the losses of brought forward from earlier years. Commissioner passed the order under section 263 revising the order. On appeal, the Tribunal held that for the purpose of examining the validity of revision proceedings, what one needs to examine is the legal position prevailing as on the time when revision powers are exercised by the commissioner and not when the Assessing Officer passed the order at the point of time. Accordingly revision order held to be valid. (A.Y. 2003-04)

Star India Ltd. v. Addl. CIT (2012) 65 DTR 169 / 143 TTJ 307 / 14 ITR 106 / 49 SOT 422 (Mum.)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Transfer pricing - Computation - Arm's length price - Revision order held to be invalid [S. 92C]

Assessing Officer has completed the assessment of assessee by accepting export sales made by it. Commissioner passed the revision order on the ground that assessee had entered into international transaction as it had made export sales and the Assessing Officer has passed the order without referring the matter to TPO for determination of ALP. Tribunal held that no part of total export turnover related to any sales made by to any associated concern and more over no evidence had been brought on record by Commissioner to effect that international transactions by way of mutual agreement/arrangement with associated enterprises. As the provision of section 92C itself is not applicable the order cannot be held to erroneous. Tribunal also held that the order may be brief or cryptic but that by itself is not sufficient to brand assessment order as erroneous or prejudicial to interest of revenue. As regards the cash credits the Assessing Officer had made proper enquiries, deputed the inspector, who examined the return of lenders, bank statement, etc. hence, the order of revision was not proper. The Tribunal quashed the order and decided the issue in favour of assessee. (A.Y. 2004-05)

Maithan International v. ACIT (2012) 134 ITD 393 (Kol.)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Depreciation - Air Craft - Revision is not justified is entitled depreciation at 40% [S. 32]

Air Craft owned by assessee not Aeroplane, hence entitled to depreciation at 40%. All air crafts whether lighter-than-air or heavier-than-air were "aircrafts". No aircrafts could ever be termed as an "aero engine" because an "aero engine" was not an aircraft or aeroplane at all. It was only power unit of an aircraft. The Tribunal set aside the revision order of Commissioner on merit and held that depreciation is allowable at 40%. (A.Y. 2005-06 to 2007-08)

SRC Aviation P. Ltd. v. Dy. CIT (2012) 13 ITR 600 (Delhi)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Appeal - Fresh assessment - No appeal is preferred by assessee against revision order hence no ground relating to revision order could be taken in appeal against fresh assessment

Where assessee did not prefer any appeal against a revision order of Commissioner, no ground relating to revision order could be taken in appeal against fresh assessment order passed giving effect to revision order. (A.Y. 2003-04)

Crew B.O.S. Products Ltd. v. ACIT (2012) 135 ITD 542 / 147 TTJ 628 / 74 DTR 203 (Delhi)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Application of mind - Assessing officer applies his mind, examines accounts, makes enquiry hence Commissioner cannot revise the order

The provisions of the Section 263 does not visualize a case of substitution of the judgment of CIT for that of ITO where ITO in exercise of its quasi-judicial powers while making an assessment examines the accounts, makes enquiry, applies his mind to the facts and circumstances of the case and determines the income by either accepting or making changes in accounts. Such order of ITO cannot be called as erroneous. (A.Y. 2003-04)

Antala Sankaykumar Ravjibhai v. CIT (2012) 135 ITD 506 / 74 DTR 228 / 148 TTJ 121 (Rajkot)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Application of mind - Twin condition of 'erroneous order' and 'prejudice caused to revenue' must be satisfied, Assessing Officer has applied mind hence the order not erroneous and cannot be revised

It is trite that an order can be revised only and only if twin conditions of 'erroneous in the order' and 'prejudice caused to revenue' co-exits. Where the Assessing Officer examined the issue from all angles it was held that order could not be held to be erroneous on account of non- application of mind. Therefore, the assessment order could not be revised as one of the twin preconditions to revise the order was absent. (A.Y. 2006-07)

S. Murugan v. ITO (2012) 135 ITD 527 (Chennai)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Housing project - Areas of open land / garden and also merger of flats exemption cannot be denied - Revision of order held to be invalid [S. 80IB(10)]

The assessee firm started construction of residential project at Aundh, Pune. The total area of the plot was shown to be 3995.34 mts. i.e. marginally less than the prescribed area of 1 acre. The assessee submitted that an additional area of land of measuring 5 'Acre' was also acquired by the assessee for the approach road to the said project vide separate agreement with same land lord. On including this area it exceeded 1 acre. The assessee further submitted that if this area would not have sanctioned the plan and issued commencement certificate. Assessing Officer visited the site and allowed the deduction. Commissioner found this order to be erroneous and prejudicial to the revenue on the ground that (1) the area of the plot of project is less than 1 acre; (2) As per sale agreement of row house, the saleable area mentioned is more than 1500 sq. feet; (3) in A.Y. 2005-06 the Assessing Officer in order passed under section 143(3) denied deduction under section 80IB(10) and (4) flats have been merged together and the modification is not as per approved plans. The assessee filed an appeal before the Tribunal against the order under section 263. The Tribunal held that, Areas of open land /garden /store /gym room meant for common use are not to be included for calculating built up area of the residential unit. Merger of flat after purchase, by owners thereof to make it larger flat for their convince cannot be denied exemption. Tribunal held that the revisional order is not valid. (A.Y. 2004-05, 2005-06, 2006-07)

Baba Promoters & Developers v. ITO (2012) 54 SOT 89 (URO)(Pune)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Application of mind - Revision order held to be not valid

In the present case, the assessment order revealed that the Assessing Officer (Assessing Officer) had allowed the claim of payment of house tax after verification of necessary documentary evidence. The Assessing Officer, in the order passed under section 143 had categorically after appreciation of factual matrix of the case disallowed ¼ th of the total expenditure. The CIT in the impugned order held that the assessment order was erroneous and prejudicial to the interests of the revenue within the meaning of section 263. It was held that the Assessing Officer had examined the material on record and then made various disallowances, hence the CIT was not justified invoking the provisions of section 263 of the Act. (A.Y. 2006-07)

Roshan Lal Vegetable Products (P) Ltd. v. ITO (2012) 51 SOT 1 (URO) / (2011) 9 ITR 431 (Amritsar)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Order found to be erroneous and prejudicial to interest of revenue - Commissioner to revise any order passed by any subordinate authority

Section 263 authorizes a Commissioner to revise any order passed by any subordinate authority, which is to be found erroneous and prejudicial to the interest of revenue. The order passed by the authority to give to the orders of the Tribunal is "any order" passed by assessing authority, who is subordinate to the commissioner. Thus, invoking of power of Revision under section 263 by Commissioner was within the permissible limits of the law. (A.Y. 2002-03 and 2003-04)

Pentamedia Graphics Ltd. v. ACIT (2012) 17 ITR 302 / 52 SOT 200 (Chennai)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Issue not considered by the Assessing Officer can be brought within the jurisdiction of Commissioner [S. 147]

Income-escaping assessment order passed under section 143(3), r.w.s. 147, is an assessment order passed by Assessing Officer and therefore, any issue, which Commissioner thinks that Assessing Officer has not considered in said assessment, can be brought to life by Commissioner in exercise of his powers under section 263. In such a case, revisional power of Commissioner cannot be denied on ground that issue considered in income-escaping assessment and issue proposed to be considered in revisional proceedings are different (A.Y. 2002-03)

Spencer & Co. Ltd. v. ACIT (2012) 137 ITD 141 / 75 DTR 311 / 148 TTJ 421 (TM)(Chennai)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Tax effect is nil - Order not open to revision even if erroneous and prejudicial to the interest of revenue

Where tax effect because of an order passed by the Assessing Officer is NIL, such order even if erroneous being prejudicial to the interest of the revenue, is not open to revision under section 263 of the Act. (A.Y. 2006-07)

Punjab Wool Syndicate v. ITO (2012) 17 ITR 439 / 148 TTJ 25 (UO)(Chd.)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Lack of enquiry - Only on the basis of lack of enquiry order can not be revised, when details were furnished before the Assessing Officer [S. 143(3)]

The assessment was completed under section 143(3) on the basis of details furnished by assessee, without discussion in the assessment order. The Tribunal held that exercise of jurisdiction under section 263 on t he grouns of lack of enquiry can not be sustained. (A.Y. 2009-10)

India Heritage Foundation v. Dy. DIT (2012) 138 ITD 28 / 149 TTJ 908 / 78 DTR 319 (Bang.)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - No mention in the notice

The CIT mentioned that the auditor has not attached the P & L A/c and the balance sheet of the Brahma Aangan Project along with the audit report and hence deduction under section 80IB(10) was wrongly allowed by the Assessing Officer In the notice under section 263, the CIT has nowhere mentioned the above reason that the audit report was blank. The stand of the assessee is that no opportunity of hearing has been given by the CIT on a particular issue so he is not justified in revising the order on that issue. Therefore, it could not form the basis for revision of the assessment order under section 263. (A.Y. 2004-05, 2005-06)

Brahma Builders v. Dy. CIT (2012) 77 DTR 249 / 149 TTJ 624 (Pune)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Complete application of mind by the Assessing Officer - Rerevision warranted [S. 40(a)(ia)]

The assessee was engaged in the business of manufacturing and export of jewellery. During the course of assessment proceedings, while examining the details of expenses relating to the head 'miscellaneous expenditure', the Assessing Officer took the view that expenses on account of repairs and maintenance were capital expenditure and disallowed them, also Assessing Officer made disallowance under section 40(a)(ia). This order was revised and cancelled by CIT under section 263. It was held that there was a complete application of mind by the Assessing Officer while examining the expenditure under the brand promotion and brand building. Thus, the view taken by the Assessing Officer was prima facie correct and therefore, there was no reason to hold that such an order was erroneous or prejudicial to the interest of revenue. (A.Y. 2006-07)

Fine Jewellery (India) Ltd. v. ACIT (2012) 19 ITR 746 / (2013) 56 SOT 226 (Mum.)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Transfer pricing - Assessment order following binding TPO's order is not "erroneous or prejudicial". Doubt raised whether TPO's order can at all be revised under section 263 [S. 92CA(3)]

The assessee sold equity shares held by it in PT Essar, Indonesia, to Essar Global Ltd., Mauritius and claimed a capital loss of Rs. 19 crores by adopting the NAV method for computing the sale price. The TPO rejected the NAV method and held that the PE method was the appropriate method. He recomputed the ALP and reduced the capital loss to Rs. 7.41 crores. The Assessing Officer passed an assessment order in conformity with the TPO's order. The TPO thereafter submitted a proposal to the DIT which was forwarded to the CIT that the average of the NAV & PE method should have been adopted instead of the PE method to compute the capital loss and that the TPO's order be revised under section 263. However, instead of revising the TPO's order, the CIT passed an order under section 263 holding that the assessment order was erroneous and prejudicial to the interests of the revenue. On appeal by the assessee to the Tribunal, held ;

(i) While the TPO proposed, in his application to the DIT/CIT that section 92CA(3) order be considered for revision, the CIT revised the assessment order passed under section 143(3). This action of the CIT is not appropriate because as so long as the TPO's section 92CA(3) is not revised, it is binding on the Assessing Officer under section 92CA(4). There is no fresh reference to the TPO nor is there any revised order of the TPO. As, in the assessment order, the Assessing Officer followed the binding order of the TPO, there is no error in the assessment order capable of revision [Sun Microsystems (Bang.)(Trib.) distinguished on the ground that at that the Assessing Officer was not bound by the TPO's order];

(ii) The issue whether the TPO's order could be revised by the CIT or by the DIT is not considered as it does not arise in the present case though as the CIT has no administrative jurisdiction over the TPO, he could not have revised the section 92CA(3) order passed by the TPO. There seems to be no clarity about the authority competent to modify the TPO's order in case it is is prejudicial to the interests of the revenue. The CIT cannot exercise jurisdiction over the TPO as the TPO functions separately under the DIT(TP). The DIT should have initiated the section 263 proceedings himself instead of sending a proposal to the CIT for revising the TPO's order though the question would also arise whether the DIT can revise an order which he himself has approved as per the Board's Circular;

(iii) Further, the issue as to whether the TPO ought to have adopted the NAV method or the PE method or an average of the two is a debatable issue on which two opinions are possible. If the Assessing Officer/TPO has taken a possible view, the order cannot be branded erroneous merely because the CIT feels that the other view should have been taken [CIT v. Max India Ltd. (2007) 295 ITR 282 (SC) followed]. (A.Y. 2005-06)

Essar Steel Limited v. ACIT (2013) 152 TTJ 265 / 82 DTR 365 (Mum.)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Non-performing assets - Deduction of securitization - Two views possible revision was held to be not valid [S. 143(3)]

The assessee company was assessed under section 143 (3) for the relevant A.Y. The commissioner thereafter revised the assessment order under section 263 of the Income-tax Act, 1961, on the ground that verification was required to be made regarding (i) extent of income arising to assessee on non-performing assets and (ii) deduction on account of securitizations. It was held that in so far interest on NPA was concerned, since it had to be considered only after recognizing income from such assets and further verification had been made by the A.O., the order could not be revised. As regards deduction of securitization income, since two views were possible and the Assessing Officer had adopted one view after deliberating on facts, The C.I.T. could not impose his view and direct action under section 263. Therefore the revisional order was quashed and the assessment order restored. (A.Y. 2005-06)

Shriram Investments Limited v. Addl. CIT (2012) 51 SOT 5 (URO)(Chennai)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Allowability of interest to partners - Revision of orders held to be not justified [S. 40(b)]

Interest amount to partners was calculated as per daily product method by the assessee. The CIT is not justified in holding the view that the interest should be calculated on the average amount of opening and closing balances. The Tribunal further noted that the assessee has followed the product method for the purpose of calculating interest payable to the partner, since the partner was having frequent transaction of both receipts and payments. According to it, the said product method is scientific and also followed by the banks and financial institutions. The method takes into account all transactions of payments and receipts carried out throughout the year. On the other hand, the method suggested by the CIT was unscientific which does not taken into account the transactions that have taken place during the year. Therefore, the order of the CIT under section 263 was set aside.(ITA No. 223/Coch/2010, decided on 27.7.2012)

Muthoot Bankers v. Dy. CIT (2012) BCAJ Pg. 28, Vol. 44-B Part 1, October 2012 (Cochin)(Trib.)

S. 263 : Revision - Orders prejudicial to interest of revenue - Reassessment - limitation - Reassessment order can also be revised by Commissioner [S. 147, 148]

Reassessment order passed by Assessing Officer under section 143(3), read with section 147, by itself is independently amenable to revisional jurisdiction of Commissioner. Therefore, limitation for purpose of revision order is not to be reckoned with initial order passed under section 143(1) which is only to adjust for demand arising out of income disclosed by assessee. (A.Y. 2002-03)

Accel Ltd. v. Dy. CIT (2012) 54 SOT 174 (URO)(Chennai)(Trib.)

S. 263 : Revision - Orders prejudicial to interest of revenue - Expenditure - Exempt income - Revision held to be not justified [S. 14A]

Section 14A(1) has been brought into statute book by Finance Act, 2006 with effect from 1-4-2007 and therefore, functional operation of section 14A is not applicable to impugned A.Y. 2002-03. Argument of assessee was that dividend had been received from its hundred per cent subsidiary and assessee had not incurred any expenditure whatsoever in earning that dividend income and, therefore, there was no occasion for assessee to claim any such expenditure in computing its taxable income. However, while examining reassessment order in light of section 14A, Commissioner had not made any prima facie finding that in fact assessee had incurred expenditure to earn tax-free income and that expenditure had been claimed as a deduction in computing its taxable income. In absence of a prima facie finding, reassessment order could not be held to be erroneous and therefore, revision order passed by Commissioner was not sustainable. Appeal of assessee was allowed. (A.Y. 2002-03)

Accel Ltd. v. Dy. CIT (2012) 54 SOT 174 (URO)(Chennai)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Order seat aside considering the issues on merits

After Tribunal passed its order, Assessing Officer passed a consequential order. Commissioner passed revisional order in respect of following issues: (a) income from sale of old rubber trees, (b) indexation allowed in case of sale proceeds of Grevillea trees, (c) proportionate interest relatable to investment made in subsidiary companies to be disallowed under section 14A, (d) disallowance of expenses claimed under head 'Share transfer expenses'. As regards first issue, it was noticed that Rule 7A does not take in its ambit question of sale of old rubber trees and accordingly, Commissioner had placed incorrect interpretation on Rule 7A. Further, issue of taxability of income on sale of Grevillea trees had been considered and decided by Commissioner(Appeals) as well as Tribunal in earlier proceedings and hence, in view of specific provisions in clause (c) of Explanation to section 263(1), said issue fell outside scope of revisionary proceedings under section 263. As regards third issue, it was noticed that Assessing Officer had considered applicability of section 14A to facts of assessee's

case and he had taken one plausible view with which Commissioner did not agree and, in such a case revisionary proceedings under section 263 would not lie in respect of same. Finally, as regards share transfer expenses, Commissioner had entertained a view without properly appreciating facts relating to same and, thus, it could not be a ground to initiate revision proceedings. In view of aforesaid, impugned revisional order was to be set aside. On facts the revision order was set aside. (A.Y. 2005-06)

Harrisons Malayalam Ltd. v. Dy. CIT (2012) 54 SOT 163 (URO)(Cochin)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Order passed after application of mind cannot be revised - Expenses should be reduced from the total turnover and export turnover [S. 10A, 143(3)]

Assessing Officer passed assessment order under section 143(3) after examining allowability of deduction under section 10A, its computation, impact of losses of other STPI units, brought forward losses, unabsorbed depreciation, impact of foreign exchange fluctuation on 'export turnover', etc. Conclusions and findings thereon were recorded. Details examined during assessment proceedings and order passed under section 143(3) clearly indicated application of mind by Assessing Officer in taking one of possible views. Such order could be set aside on ground that Commissioner disagreed with Assessing Officers view. The Tribunal also held that expenses reduced from 'total turnover' should also be reduced from 'export turnover' in computing deduction under section 10A. (A.Y. 2006-07)

Infosys BPO Ltd. v. ACIT (2012) 54 SOT 168 (URO)(Bang.)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to interest of revenue - Doctrine of merger - Business expenditure - Production of film [Rule 9A]

Where assessee engaged in business of producing and distribution of Cinematographic films had claimed entire cost of production of a film (i.e., Darna Zaroori Hai) as expense, since Assessing Officer as well as Commissioner(Appeals) considered applicability of Rule 9A while allowing cost of production of said film and restricted it to some extent, it was not open to Commissioner to have a relook into matter under section 263. Issues falling outside show cause notice issued under section 263 cannot form basis of revision of assessment order by Commissioner. Commissioner cannot exercise his jurisdiction in respect of an order/issue which has been considered by Commissioner(Appeals) in appeal because said order of Assessing Officer on being given a finding by Commissioner(Appeals) merges with order of Commissioner(Appeals). (A.Y. 2006-07)

K. Sera Sera Productions v. CIT (2012) 54 SOT 157 (URO)(Mum.)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Depreciation - Additional depreciation - Generation of electricity - Manufacture - Revision is not justified - On reduction of sales on estimate basis revision held to be justified [S. 32(1)(iia)]

Process of generation of electricity is akin to manufacture or production of an article or thing and assessee engaged in activity of generation of electricity would be entitled to additional depreciation under section 32(1)(iia). Hence, revision is not justified. As regards other issue which Commissioner observed that Assessing Officer had allowed assessee to provisionally revise its sales downwards on estimate basis that too without issuing any corresponding credit note to customers which in opinion of Commissioner was erroneous and prejudicial to interest of revenue. He, therefore, set aside assessment order and remitted that issue to file of Assessing Officer for fresh examination. On reduction of sales, Commissioner had rightly taken cognizance under section 263 and had rightly remitted that issue to Assessing Officer for fresh adjudication. If on verification of record, Commissioner forms an opinion that an issue available in computation of income required verification and investigation at end of Assessing Officer before its acceptance or rejection and such

inquiry was not conducted, then assessment order on such issue can be set aside under section 263. (A.Y. 2005-06)
N.T.P.C. Ltd. v. Dy. CIT (2012) 54 SOT 177 (URO)(Delhi)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to interest of revenue - Revision of order other than what is referred in show cause notice was held to be not valid
The assessee was engaged in the business of manufacturing and trading in refractories. The assessment order in assessee's case was passed under section 143(3). Subsequently, the Commissioner issued a show-cause notice to assessee as to why assessment order so passed should not be revised because the Assessing Officer failed to assess certain repair charges and other contractual receipts received by assessee. Thereupon, the commissioner having considered assessee's explanation, passed a revisional order whereby the Assessing Officer was directed to call for original vouchers as well as ledger containing sales account as well other sub-accounts in which the assessee claimed to have made entries regarding such income. When revision order is passed on ground other than grounds for which revision proceedings are initiated, same is not sustainable in law. Since there was change in reasoning, having regard to aforesaid legal position mentioned above, impugned revisional order was not sustainable. (A.Y. 2002-03)
Vesuvius India Ltd. v. CIT (2012) 54 SOT 172 (URO)(Kol.)(Trib.)

S. 263 : Commisioner - Revision of orders prejudicial to revenue - Export oriented undertaking - Manufacture or produce - Producing and exporting tissues culture plants - Revision held to be not valid [S. 2(29BA), 10B]
The assessee was a company engaged in business of producing and exporting tissue culture plants. It claimed deduction under section 10B which was allowed. The Commissioner passed a revisional order holding that the assessee had claimed exemption in respect of a Unit which was engaged in raising tissue culture plants and exporting the same. Since the product was live plants, it could not be considered as article or thing for the purposes of section 10B. Accordingly, the order passed by Assessing Officer allowing deduction was erroneous and prejudicial to interest of revenue. On appeal the Tribunal held that assessee's business activity of producing plants through tissue culture and amounted to 'manufacture or produce' within meaning of section 10B(2)(i) and thus, assessee was entitled to claim deduction in respect of export of such tissue and cultured plants hence revision of order held to be not valid. (A.Y. 2007-08)
L. J. International Ltd. v. Dy. CIT (2012) 54 SOT 131 (URO) / 151 TTJ 104 / (2013) 81 DTR 61 (Chennai)(Trib.)

S. 263 : Commissioner - Revision - Orders prejudicial to revenue - Lack of proper enquiry - Revision held to be valid
Assessing Officer having blindly allowed unpaid portion of leave encashment as an allowable deduction without noticing the mandatory provision of cl. (f) of section 43B, the order of Assessing Officer was erroneous and prejudicial to interests of Revenue hence amenable to revisionary jurisdiction of CIT. Reliance placed by assessee on Calcutta High Court decision in Exide Industrial Ltd. & Anr. v. Union of India (2007) 212 CTR 206 (Cal.) striking down cl. (f) of section 43B is of no avail as operation of said decision has been stayed by the Supreme Court. (A.Y. 2006-07)
Mysore Sales International Ltd. v. CIT (2012) 138 ITD 422 / 150 TTJ 872 / 80 DTR 175 (Bang.)(Trib.)

S. 263 : Commissioner - Revision of orders prejudicial to revenue - Partly valid [S. 80C]
Assessment having been made by Assessing Officer after forming opinion on examination of complete record, exercise of revisional jurisdiction by CIT at the instance of successor Assessing Officer was invalid as it suffered from change of opinion and non application of mind by CIT;

however, erroneous view having been taken by Assessing Officer as regards deduction under section 80G revision was sustainable on this issue. (A.Y. 2006-07)
Bina Indrakumar Ms. v. ITO (2012) 137 ITD 238 / 80 DTR 180 / (2013) 151 TTJ 394 (Mum.)(Trib.)

S. 264 : Commissioner - Revision of other order - Natural justice - Speaking order - Commissioner must pass a reasoned order which would ensure due application of mind, Accordingly the order was set aside [S. 179]
The assessee was non-executive director of company. He resigned from the Board on 29th April, 1994. On 27th September, 2006 the assessee was issued notice to recover the tax due of the company for the A.Y. 1986-87 to 1993-94 under section 179 of the Income-tax Act. The assessee informed to the Assessing Officer that the Company is a partnership form having 80% share hence the assessing Officer must proceed against the firm for recovery dues of the Company. The Assessing Officer rejected the application of assessee. Assessee moved petition under section 264 which was rejected by the Commissioner without giving an opportunity of hearing. On writ petition the Court set aside the order of Commissioner and Assessing Officer and directed the Assessing Officer to pass an order after following principle of natural justice and including granting a personal hearing. (A.Y. 1986-87 to 1993-94)
Bhupatlal J. Sheth v. ITO (2012) 210 Taxman 481 / 80 DTR 279 (Bom.)(HC)

S. 264 : Commissioner - Revision of other order - Revised return was filed beyond limitation, Commissioner was directed to rectify the return and grant the relief [S. 10(34), 10(38), 139(5)]
The assessee filed the return of income wherein he has shown dividend and long term capital gains as taxable and forgot to claim the exemption. On receipt of intimation the assessee filed the revised the return claiming the exemption. The Assessing Officer has not taken the congnisance of revised return as the same was filed beyond time limit specified under section 139(5). The Assessee filed the revision application under section 264 against the intimation under section 143(1). The Commissioner rejected the application under section 264. The Assessee also filed rectification application before the Assessing Officer under section 154, which was pending. The Hon'ble Court quashed the order passed under section 264 and directed the Assessing Officer to dispose the application keeping in mind the object of circular dated 11-4-2005. The Court also observed that in any civilized system, the assessee is bound to pay the tax which he is liable under the law to the Government. The Government on the other hand is obliged to collect only that amount of tax which is legally payable by an assessee. The entire object of administration of tax is to secure the revenue for the development of the Country and not to charge assessee more than that which is due and payable by the assessee. (A.Y. 2007-08)
Sanchit Software & Solutions (P.) Ltd. v. CIT (2012) 349 ITR 404 / 210 Taxman 539 / (2013) 89 DTR 278 (Bom.)(HC)

S. 264 : Commissioner - Revision of other order - Rectification of mistake - Rectification of mistake is maintainable and is not barred by section 154(IA) [S. 154(IA)]
An order was passed under section 264 by the Commissioner against the order of Assessing Officer under section 143(3). Where in an amount of Rs. 6.80 lakhs was allowed and balance amount of Rs. 31.25 lakhs was disallowed. The assessee moved an application 154 before the Commissioner. The Commissioner declined to entertain the application placing reliance on section 154(IA). On writ the court held that the application was not made before the Assessing Officer who passed the order which was the subject-matter of revision, but, the application was made before the revisional authority himself for rectification. Such an application was maintainable and was not barred by section 154(IA). Accordingly the writ petition was allowed. (A.Y. 2007-08)
Janata Co-Operative Bank Ltd. v. CIT (2012) 349 ITR 715 (Bom.)(HC)

S. 264 : Commissioner - Revision of other order - On admission the income was assessed for the A.Y. 2008-09, hence the revision application was rejected [Constitution of India - Art. 226]

In the course of assessment proceedings the assessee admitted the cash payment to builder and offered to tax for the A.Y. 2008-09. The assessee thereafter moved an application under section 264 before the Commissioner stating that the addition was not justified as the amount was not paid to the builder in the A.Y. 2008-09 but was paid to the builder during the period from 22nd May, 1994 to 4th May, 2008, since the documentary evidence to that effect could not be traced out at the relevant time and same is now traced out. The assessee requested the Commissioner to reduce addition. Commissioner rejected the application. The assessee filed writ petition. The Court held that there was categorical admission on the part of the assessee that an amount of Rs. 9,74,775/- were paid in cash, the entire case sought to be made out by the assessee is only after thought and no fault can be find in the order of Commissioner rejecting the application under section 264. Accordingly the writ petition was dismissed. (A.Y. 2008-09)

Laxmichand Jagshi Vora v. CIT (2012) 80 DTR 193 / (2013) 255 CTR 512 / 214 Taxman 139 (Mag.)(Bom.)(HC)

S. 264 : Commissioner - Revision of other orders - Deduction at source - Certificate for lower rate - Alternative remedy is available hence, Writ petition was held to be not maintainable [S. 197]

Against the order under section 197 the assessee filed a writ petition contending that opportunity of being heard was not given to it before passing order. High Court remanded matter back with a direction that competent authority would pass a fresh order within a period of 30 days. Thereupon, Assessing Officer passed a fresh order under section 197. Assessee filed instant writ petition contending that assumption of jurisdiction under section 197 by Assessing Officer was totally without jurisdiction. Since assessee could challenge impugned order in a revision under section 264(2), instant writ petition was not to be entertained, therefore, matter was to be disposed of with a direction to assessee to file a revision. Matter remanded.

Sis Live v. ITO (2012) 211 Taxman 151(Mag.)/ (2011) 333 ITR 13 (Delhi)(HC)

S. 268A : Appeal - Reference Income tax authorities - High Court - Tax effect - Low tax effect Circular cannot apply "Ipso Facto" [S. 260A]

Liberty is given to the Department to move the High Court pointing out that the Circular dated 9th February, 2011 should not be applied ipso facto, particularly, when the matter has a cascading effect. There are cases under the Income Tax Act, 1961, in which a common principle may be involved in subsequent group of matters or large number of matters. In our view, in such cases if attention of the High Court is drawn, the High Court will not apply the Circular ipso facto (Surya Herbal reiterated) (A.Y. 1987-88) [C.C. No. 21465/2011 dated 2-7-2012, from the Judgement order dated 26-4-2011 ITA No. 6/1995]

CIT v. Atma Ram Properties Pvt. Ltd. (2012) 210 Taxman 254 (SC)

S. 269SS : Acceptance of loans or deposits - Otherwise than by account payee cheque or account payee bank draft - Penalty - Sister concern - For job work levy of penalty was held to be not justified

Assessee is doing job work for 'NEL' which was a sister concern. Entire goods manufactured by assessee was sold to 'NEL' and it was not sold to any other person .Assessee was running under loss. To tide over financial crisis, assessee received Rs. 8.15 lakhs excess cash from NEL in several installments, each of which was less than Rs. 20000. Excess cash so received could not be treated as loan under section 269SS so as to initiate penal actions. (A.Y. 1997-98)

CIT v. Bangalore Leather & Leather Crafts Ltd. (2012) 211 Taxman 148 (Mag.)(Karn.)(HC)

S. 269T : Repayment of loans and deposits - Otherwise than by account payee cheque or account payee bank draft-Debit by journal entries - Repayment through journal entries is in contravention of provision, however as the assessee had shown reasonable cause the levy of penalty is not justified [S. 269SS, 271D, 271E, 273B]

The assessee company has accepted the loan by account payee cheques. While repaying the loan the assessee settled the account by making journal entries in respect of sale price of shares and balance amount was paid by cheque. The Assessing Officer levied the penalty on the ground that the assessee had repaid the loan in contravention of section 269T. In appeal Commissioner(Appeals) confirmed the levy of penalty. On appeal before the Tribunal, the Tribunal held that the payment through journal entries did not fall within the ambit of section 269SS or 269T, hence consequently no penalty could be levied either under section 271D or section 271E of the Act. On appeal by revenue the Court held that repayment by debit of account through journal entries is in contravention of provision hence penalty can be levied. On facts the assessee had a reasonable cause and the assessee had no intention to evade tax hence the deletion of penalty by Tribunal is justified. (A.Y. 2003-04)

CIT v. Triumph International Finance (I) Ltd. (2012) 345 ITR 270 / 74 DTR 57 / 208 Taxman 299 / 251 CTR 253 / Vol. 114(4) Bom. L.R. 2545 (Bom.)(HC)

S. 269UA : Purchase of immoveable property by Central Government - Understatement of consideration - Failure to apply mind - Conflicting finding of authority - Preemptive purchase was not valid - Authority did not tender consideration to owners - Order stand abrogagted and property re-vested in owners [S. 269UG, 269UH]

While passing the order for preemptive purchase of property the authorities have not taken into consideration market value of property, there was conflicting finding by Authorities, hence, the pre-emptive purchase was held to be not sustainable and the property revests in transferors. In pursuance High Court's order, second order vesting of property in Government was passed. Owners did not surrender or deliver possession to Appropriate Authority. Authority did not in turn, tender amount of consideration to owners. The Court held that impugned orders would stnd abrogated and property re-vested in owners. The petition nwas decided in favour of petitioners.

Pandharinath Bhikaji Telge and others v. Appropriate Authority and others (2012) 340 ITR 420 / 66 DTR 42 / 211 Taxman 140 (Mag.)(Bom.)(HC)

S. 269UD : Purchase of immovable property by Central Government - Order - Difference is less than 15% order of appropriate authority was set aside

Difference in sale consideration of first comparable and property in question was less than figure of 15 per cent. Insofar as second comparable was concerned, said property was much smaller in size as compared to property in question. The Court held that, order under section 269UD(1) for pre-emptive purchase of property in question was not to be issued .Accordingly the order of appropriate authority was set aside.

Gian Devi v. Union of India (2012) 211 Taxman 149 (Mag.)(Delhi)(HC)

S. 269UD : Purchase by Central Government of immoveable properties - Order - Order by appropriate authority - Similar sale consideration was ignored - Difference is less than 15% apparent sale consideration Acquisition order was held to be not valid [Form No. 37-I]

Assessee entered into a plot buyer agreement with one 'M' on 12-6-1996. Agreement stipulated that basic sale price of plot was Rs. 2,392 per sq. meter and in addition assessee was liable to pay external development charges of Rs. 275.80 per sq. meter, preferential location charges of Rs. 60 per sq. meter, and a contingency deposit of Rs. 24 per sq. meter. Total cost of plot after including another amount of Rs. 15,000/- was Rs. 24,16,983/-. After development was completed and plot was ready for possession, assessee had filed Form No. 37-I seeking permission under section 269UD(1) on 25-8-2000. Appropriate authority while passing order under section 269UD(1) evaluated market value of

property on date when Form No. 37-I was filed (i.e., 25-8-2000) and held that apparent consideration as declared in Form No. 37-I for purchase of property was understated. On writ, Division Bench of High Court remitted the order and directed appropriate authority to take into consideration past history of transaction which had culminated in filing of Form No. 37-I on 25-8-2000 along with private agreement, dated 12-6-1996 for determining whether it was a fit case for acquisition under section 269UD(1). However, said directions were ignored by appropriate authority. Since sale transaction in instant case had its own history and transaction-in-question related to original agreement/understanding which was admittedly entered into between assessee and 'M' vide plot buyers agreement dated 12-6-1996, appropriate authority should have considered same. Further since in other similar sale instances permission / approvals were granted by appropriate authority and moreover, difference between fair market value and apparent sale consideration was not more than 15 per cent conditions of section 269UD were not satisfied and, therefore, order of appropriate authority was to be quashed.

R. N. Soin & Sons (P.) Ltd. v. Appropriate Authority (2012) 211 Taxman 136 (Mag.)(Delhi)(HC)

S. 269UD : Purchase by Central Government of immoveable properties - Order - Allotment letter was issued before introduction of Chapter XXC - Order of appropriate authority was quashed and held that provisions of Chapter XXC were not applicable

Petitioner company applied for allotment of space in proposed building and was issued allotment letter dated 6-5-1980. Allotment letter stipulated that at time of booking, allottee would pay 20 per cent price. Allotment letter prescribed a schedule of payment depending upon stage of construction. Disputes arose between builders and respondent No. 5 and subsequently, inter se, between partners of builders. Ultimately, a tripartite agreement dated 13-6-1990 was arrived at between builders, respondent No. 5 and respondent No. 4. Respondent No. 4 stepped in as a builder. Petitioner being an original allottee was issued a fresh allotment letter dated 15-10-1990. Said letter of allotment recorded past history and terms and conditions which were agreed between parties. Chapter XXC was introduced with effect from 1-10-1986. Contention raised by petitioner was that said Chapter XXC was not applicable to transaction in question as agreement to sell/allotment letter was issued in year 1980. Case of revenue was that said Chapter would apply as there was a subsequent tripartite agreement dated 13-6-1990 and petitioner was issued a fresh allotment letter in terms of said agreement on 15-10-1990. Appropriate Authority passed order dated 20-12-1990 to purchase immovable property allotted to petitioner. Petitioner filed writ and submitted that Chapter XXC was not applicable to transaction in question between petitioner and respondent Nos. 4 and 5. In view of decision of Delhi High Court in case of Capt. Sanjeev Sethi v. Union of India (1992) 195 ITR 338, it was to be held that provisions of Chapter XXC were not applicable and, hence, order of appropriate authority under section 269UD was to be quashed.

Oriental Longman Ltd. v. Union of India (2012) 211 Taxman 139 (Mag.)(Delhi)(HC)

S. 271(1)(c) : Penalty - Concealment - Company - Book profit - There cannot be concealment if book profit is assessed under section 115JB

For A.Y. 2001-02, the assessee filed a ROI declaring loss of Rs. 43.47 crores under the normal provisions of the Act and book profits of Rs. 3.86 crores under section 115JB. The Assessing Officer assessed a loss at Rs. 36.95 crores as per normal provisions and book profits at Rs. 4.01 crores. As there was a reduction in the loss under the normal provisions owing to various additions and disallowances, the Assessing Officer levied penalty under section 271(1)(c) in accordance with Explanation 4 & CIT v. Gold Coin health Food P. Ltd (2008) 304 ITR 308 (SC). Before the High Court, the assessee argued that even if there was a concealment under section 271(1)(c) with respect to the normal assessment, the same was not relevant because the assessee's income was assessed under section 115JB. The High Court accepted the plea and held that as the section 115JB "book

profits" were by a legal fiction deemed to be the "total income", the furnishing of wrong particulars had no effect on "the amount of tax sought to be evaded" as defined in Explanation 4 to section 271(1)(c). On appeal by the department to the Supreme Court, Held:
Delay condoned. The special leave petition is dismissed(SLP(Civil) no 18564 /2011 dt 4-05-2012)
CIT v. Nalwa Sons Investment Ltd. (SC) www.itatonline.org

S. 271(1)(c) : Penalty - Concealment - Immunity - Income disclosed during search - Explanation 5 immunity available even if tax not paid by due date of filing of return [S. 132(4)]
In a section 132 search and seizure operation, on July 29, 1987 the assessee was found with unaccounted income of Rs. 42 lakhs. The assessee made a declaration under section 132(4) and offered the said amount to tax. However, neither the return of income was filed, nor was the tax due on the surrendered income paid, on the due date (31.7.1987). The tax was paid during the assessment proceedings. The Assessing Officer took the view that the assessee was not entitled to immunity from penalty under Explanation 5 to section 271(1)(c) as it had not paid the tax due on the surrendered income by the due date. The CIT(A) reversed the Assessing Officer. The Tribunal reversed the finding of CIT(A) High Court reversed the finding of Tribunal and decided in favour of assessee. On appeal by the department the Supreme Court, held dismissing the appeal: Explanation 5 to section 271(1)(c) is a deeming provision which provides that if, in the course of search under section 132, the assessee is found to be the owner of unaccounted assets and he claims that such assets have been acquired by him by utilizing, wholly or partly, his income for any previous year which has ended before the date of search or which is to end on or after the date of search, then, in such a situation, notwithstanding that such income is declared by him in any return of income furnished on or after the date of search, he shall be deemed to have concealed the particulars of his income for the purposes of imposition of penalty under section 271(1)(c). Sub-clause (2) confers an immunity from penalty if three conditions are fulfilled, namely, (i) the assessee must make a statement under section 132(4) in the course of search stating that the unaccounted assets and incriminating documents found from his possession during the search have been acquired out of his income, which has not been disclosed in the return of income to be furnished before expiry of time specified in section 139(1), (ii) the assessee should specify in the section 132(4) statement the manner in which such income stood derived and (iii) the tax together with the interest has to be paid. There is no time limit prescribed in the third condition for the payment of the tax & interest. As the assessee had fulfilled the first two conditions and paid the tax & interest (before the completion of the assessment), it was entitled to immunity under Explanation 5 to section 271(1)(c). (A.Y. 1987-88)
ACIT v. Gebilal Kanhaialal HUF (2012) 348 ITR 561 / 252 CTR 345 / 76 DTR 345 / 210 Taxman 244 (SC)
Editorial:- View of Rajasthan High Court in Gebelal Kanhailal (HUF) v. ACIT (2004) 270 ITR 523 (Raj.) is affirmed.

S. 271(1)(c) : Penalty - Concealment - Filing inaccurate particulars of income - Inadvertent - Human error - Bonafide mistake - Levy of penalty held to be not leviable [S. 37(1), 44B]
The assessee filed the return of income together with audit report. It has claimed an amount of Rs. 23 lakhs towards provision for gratuity which was not allowable under section 40A(7). The said claim was allowed by the Assessing Officer. The Assessing Officer thereafter reopened the assessment and disallowed the said claim. The assessee explained that the mistake has occurred due to confusion and the return was prepared by non Chartered Accountant. The Assessing Officer levied penalty, which was confirmed by Commissioner(Appeals), Tribunal as well as High Court. On appeal to Supreme Court the, the Supreme Court held that, notwithstanding the fact that the assessee is undoubtedly a reputed firm and has great expertise available with it, it is possible that even the assessee could make a "silly" mistake. The fact that the tax audit report was filed along with the return and that it unequivocally stated that the provision for payment was not allowable under section 40A(7) indicates

that the assessee made the computation error in its return of income. The Court held this being an inadvertent human error. The caliber and expertise of the assessee has little or nothing to do with the inadvertent error. The Court held the levy of penalty is not justified. (A.Y. 2000-01)

Price Waterhouse Coopers Pvt. Ltd. v. CIT (2012) 348 ITR 306 / 253 CTR 1 / 77 DTR 153 / 211 Taxman 40 (SC)

S. 271(1)(c) : Penalty - Concealment of income - Suit by bank settled by consent terms for sum less than sum shown as outstanding to bank in assessee's books - Not a case of concealment of income or furnishing inaccurate particulars of income hence, penalty is not attracted

The assessee took a loan from a bank to buy a hotel but defaulted in repayment. The suit filed by the bank was settled by a consent decree on April 30, 1982, to the effect that the assessee acknowledged its liability to the bank in the sum of Rs. 42,45,477/- the sum outstanding in the loan account of the bank as on April 30, 1982. However, in the books of account of the assessee, the outstanding repayable to the bank was Rs. 52,07,873/- as on April 30, 1982. On the ground that there had been waiver by the bank to the extent of approximately rupees ten lakhs the Department initiated proceedings under section 271(1)(c) of the Income-tax Act, 1961, against the assessee. The penalty was upheld by the High Court. On appeal allowing the appeal, the Court held that although in the books of account of the assessee, the outstanding amount, as on April 30, 1982, was Rs. 52,07,873/- including interest, the decree in favour of the bank was for Rs. 42,45,477/- because that was the amount indicated as the outstanding amount due and payable by the assessee to the bank in its books of account. The bank had not calculated the interest over the years possibly for the reason that, in its accounts, this amount was classified as a non-performing asset. In the peculiar facts, section 271(1)(c) of the Act was not applicable. (A.Y. 1983-84, 1984-85, 1985-86)

Northland Development and Hotel Corporation v. CIT (2012) 349 ITR 363 / 80 DTR 321 / 254 CTR 646 / 210 Taxman 249 (SC)

Editorial:- Decision of the Allahabad High Court in Northland Development and Hotel Corporation v. CIT (2006) 285 ITR 265 (All.) and ITR No. 127 of 1995 is reversed.

S. 271(1)(c) : Penalty - Concealment - Assessment at loss - Penalty is leviable

Penalty for concealment under section 271(1)(c) is leviable even where the assessed income is loss. [Followed CIT v. Gold Coin Health Food (P) Ltd. (2008) 304 ITR 308 (SC)]

CIT v. Unipol Chemicals Intermediates Ltd. (2012) 80 DTR 145 / 211 Taxman 45 / 254 CTR 466 (SC)

S. 271(1)(c) : Penalty - Concealment - Annual value of leased property - Notional income - Levy of penalty is upheld

Assessee has leased the property to a Bank for a sum of Rs. 1 lakh per annum as per lease agreement. The assessee has also received interest free deposit of Rs. 67 crores. In the course of assessment proceedings the assessee filed the valuation report of an approved valuer who estimated the annual letting value of total constructed area leased at Rs. 75,63,360/-, as per section 23(1)(a). The penalty levied by the Assessing officer was confirmed by the Tribunal. On further appeal to the High Court, the Court held that the assessee has diverted the interest free amount to its sister concerns without any interest. The court held that the explanation of assessee was not bonafide hence Explanation 1 to section 271(1)(c) of the Act would fully applicable and the Assessing Officer was justified in levying the penalty. (A.Y. 2006-07)

PSB Industries India (P) Ltd. v. CIT (2012) 65 DTR 400 / 211 Taxman 173 (Mag.)(Delhi)(HC)

S. 271(1)(c) : Penalty - Concealment - Untenable claim of bad debt - Write off of the share application money advanced to another company - Converting into interest bearing loan - Penalty is justified

Assessee has deposited an amount of Rs. 50 lacs with Dimension Investments and Securities Ltd. as share application money, however no shares were allotted to the assessee and therefore the assessee chose to exercise the option of converting the share application money into loan bearing interest at 22% compounded quarterly. The assessee wrote off the amount as bad debt. The Court observed that no interest on said advances had been offered and assessed to tax in any earlier years and that in fact no interest was charged and claim which was ultimately disallowed by the High Court, it is a case where the assessee failed to particulars, furnished in accurate particulars of income and there was lack of bona fide on the part of assessee, therefore, penalty was sustainable. (A.Y. 2000-01)

Kanchenjunga Advertising (P) Ltd. v. CIT (2012) 340 ITR 595 / 66 DTR 137 / 246 CTR 409 (Delhi)(HC)

S. 271(1)(c) : Penalty - Concealment - Revised return - Penalty for concealment is leviable though the income was offered in pursuance of notice under section 148 [S. 148]

The assessee filed a ROI offering Rs. 4.68 lakhs which was assessed. Subsequently, the Assessing Officer issued a section 148 notice claiming that cash credits of Rs. 4.50 lakhs had to be assessed. The assesse filed a ROI pursuant to the section 148 notice in which it offered the said cash credits as income and the assessment was finalized on that basis. In the section 271(1)(c) penalty proceedings, the assessee claimed that it was not liable for penalty on the ground that (i) the income offered in the ROI was accepted without any addition and so there was no concealment as per the ROI; (ii) the cash credits were offered as income to buy peace & (iii) that the Assessing Officer had not recorded satisfaction that the assessee had concealed the income. The CIT(A) & Tribunal accepted the assessee's claim. On appeal by the department to the High Court, held reversing the lower authorities: The ROI filed pursuant to a section 148 notice is not 'voluntary' & it can be readily inferred that the assessee had not furnished full particulars of his true income and so reopening became necessary. The explanation that the income was offered to buy peace is not acceptable because it is a clear case of admission of not offering true income earlier. If it had not been for the reopening, the income would have escaped assessment. When the assessee admits, by offering additional income in the section 148 ROI, that the earlier ROI did not disclose the true income, there is no burden on the department to show concealment. (A.Y. 1996-97)

CIT v. Sangameshwara Associates (2012) 345 ITR 396 / 71 DTR 287 / 208 Taxman 311 / 253 CTR 87 (Karn.)(HC)

S. 271(1)(c) : Penalty - Concealment - Disallowance of claim - Disallowance of claim under section 80HHC, penalty cannot be levied as the issue is debatable

Assessee has made full disclosure of claim under section 80HHC in respect of job work charges, which was certified by Chartered Accountant. The fact that the claim was not allowed on merits does not mean that assessee has concealed the income. The issue being debatable penalty for concealment confirmed by the Tribunal was deleted by High Court.

Geeta Prints (P) Ltd. v. ACIT (2012) 247 CTR 620 / 67 DTR 30 (Guj.)(HC)

S. 271(1)(c) : Penalty - Concealment of Income - No penalty to be levied where assessee could show and explain that the interpretation propounded was plausible and had merit, though it was not accepted in quantum appeal

The assessee made a payment to Registrar of Companies which it claimed as revenue expense which was disallowed. Also there was disallowance of payment on which tax deducted at source paid to the government after the end of the previous year. It was held that cancellation of penalty under Section 271(1)(c) was justified where the plea and the interpretation propounded by the assessee was rejected in the quantum proceedings but the assessee could in the penalty proceedings show and explain that the interpretation propounded was plausible and had merit, though it was not accepted. (A.Y. 2000-01)

CIT v. AT&T Communication Service India P. Ltd. (2012) 342 ITR 257 / 70 DTR 379 / 250 CTR 57 / 205 Taxman 93 (Delhi)(HC)
Editorial:- Referred Nestle India Ltd. (2005) 275 ITR 1 (Delhi)(HC) and Oracle Software India Ltd. (2007) 293 ITR 353 (Delhi)(HC)

S. 271(1)(c) : Penalty - Concealment - Lease and finance - Depreciation - Penalty held to be not justified
The assessee entered in to a transaction of leasing. The assessee claimed the depreciation. It was found that the documents were fabricated and bogus. The assessee filed the complaint in the police station. The claim of depreciation was disallowed and penalty for concealment was levied. The penalty was deleted by the Commissioner(Appeals) and which was confirmed by the Tribunal. On further appeal to the High Court by revenue the Court confirmed the order of Tribunal and held that the order of Tribunal being not perverse, there is no concealment. (A.Y. 1990-91, 1991-92)
CIT v. Sangeeta Leasing (2012) 343 ITR 428 (Delhi)(HC)

S. 271(1)(c) : Penalty - Concealment - Bonafide mistake - If a wrong claim caused by "bona fide mistake", penalty is not leviable
The Assessing Officer levied section 271(1)(c) penalty in respect of two issues: (i) claim of depreciation in respect of properties that were assessed under the head "house property" and (ii) claim of deduction in respect of provision for income-tax. The CIT(A) & Tribunal deleted the penalty on the ground that the claim for deduction in respect of Income-tax was a "human bonafide clerical mistake" as the assessee was a firm not having expert Chartered Accountants on its payroll. In appeal before the High Court, the department relied on CIT v. Zoom Communication P. Ltd. (2010) 327 ITR 510 (Delhi)(HC) and CIT v. Escorts Finance Ltd., (2010) 328 ITR 44 (Delhi)(HC) where it was held that as under no circumstances could an assessee have claimed provision for tax as a deduction, penalty was imposable. Held by the High Court dismissing the appeal:
As regards depreciation, the property was let out for the first time in the latter part of the A.Y. As such, the benefit of inadvertence or mechanical or repetitive claim being made can be given to the assessee. As regards the provision for taxation, the assessee made a claim for deduction of the provision for the first time in the year under appeal. There was no history of furnishing such accurate particulars by the assessee for the previous years. Accordingly, section 271(1)(c) penalty is not leviable. (A.Y. 1997-98)
CIT v. Societex (2012) 82 CCH 69 / (2013) 212 Taxman 73 (Mag.)/259 CTR 325/ 87 DTR 373(Delhi)(HC)

S. 271(1)(c) : Penalty - Concealment - Bona fide claim - Penalty cannot be levied
Where the assessee firm was not able to sufficiently explain the amount appearing in the books of accounts maintained by it, as such the amount was surrendered by the assessee. Further, the partners of the assessee firm were uneducated and not having knowledge of accounting. On these facts it was held that their bonafide act cannot be treated as concealment within the meaning of section 271(1)(c) of the Act. (A.Y. 1992-93)
Punjab Rice Mills v. CIT (2012) 71 DTR 79 / 250 CTR 201 / 211 Taxman 127 (Mag.)(All.)(HC)

S. 271(1)(c) : Penalty - Concealment - Estimation - Levy of penalty is held to be not valid
Assessing Officer levied penalty under section 271(1)(c) in respect of trading addition made by application of NP rate of 8 per cent, addition under section 68 on account of unexplained cash credits in the names of partners and disallowance of interest on unexplained capital. Finding of the Tribunal was that the additions were based on estimation. A fact or allegation based on estimation can be correct or incorrect. Penalty under section 271(1)(c) of the Act cannot be levied under section

271(1)(c) of the Act cannot be levied in case additions are made by the assessing officer only on estimate basis.

CIT v. Mahendra Singh Khedla (2012) 71 DTR 189 / 252 CTR 453 (Raj.)(HC)

S. 271(1)(c) : Penalty - Concealment - Ignorance of law - Bonafide belief - Ignorance of law caused by complicated provisions amounts to "bona fide belief", deletion of penalty held to be justified

The assessee, a foreign national, was an employee of Sandvik AB, Sweden. He was deputed to India and appointed Managing Director of Sandvik Asia Ltd. In addition to the salary from Sandvik Asia, he received an amount from Sandvik AB, Sweden, being the difference between the tax rates in India and Sweden. In the ROI, the assessee did not offer the amount received from Sandvik AB to tax even though it was taxable in India. On being asked by the Assessing Officer, the assessee offered the same to tax and paid tax thereon for all years including the earlier and subsequent AY. The Assessing Officer levied penalty on the ground that the assessee was assisted by tax experts and so ignorance of the law was no excuse. However, the Tribunal deleted the penalty on the ground that (i) there were multiple amendments to the statutory provisions [section 10(b)(vii)] and the concept of grossing-up embedded therein is of a technical nature and out of the scope of common knowledge of the tax payers, (ii) the possibility of mistake by even tax experts cannot be ruled out; (iii) the assessee relied on the tax experts and signed the ROI, (iv) the conduct of the assessee in paying up the taxes for all the years including those that were beyond reassessment showed his bona fides, (v) the claim of bona fide belief need not be substantiated with documentary evidence but can also be substantiated by circumstantial evidence; (vi) penalty is not an automatic consequence of addition to income; (vii) concealment implies that the person is hiding, covering up or camouflaging an income; penalty is not leviable in case where assessee is able to provide a 'bona fide' explanation; penalty is not leviable in cases where assessee made errors, under bona fide beliefs. On appeal by the department to the High Court, HELD dismissing the appeal:

In the ROI, the assessee had not offered the above reimbursed amount to tax under the bonafide belief that the same were not taxable. However, when a query was raised by the Assessing Officer during the assessment proceedings, the assessee immediately offered that amount to tax for all the years. The penalty imposed under section 271(1)(c) by the Assessing Officer was deleted by the ITAT after recording detailed reasons that it was a case of bonafide mistake and that there was no intention to evade tax. The discretion exercised by the ITAT in accepting the explanation given by the assessee is reasonable and we see no reason to interfere with the decision of the Tribunal which is based on finding of facts(ITA.nos(L)2209 to 2214 of 2010 dt 22-06-2011).

CIT v. Hans Christian Gass (Bom.)(HC) www.itatonline.org

S. 271(1)(c) : Penalty - Concealment - Quantum appeal pending before High Court - If Quantum appeal is admitted by Court - Section 271(1)(c) penalty proceedings may be kept in abeyance till the decision of the High Court on the merits [S. 275(IA)]

The assessee's quantum appeal against the Tribunal's order was admitted by the High Court. In the section 271(1)(c) penalty proceedings, the Tribunal, instead of deciding the issue whether the assessee was liable to penalty, restored the issue to the Assessing Officer with a direction to decide the issue of levy of penalty after the decision of the High Court in the quantum appeal. The department challenged the Tribunal's order on the ground that it had no jurisdiction to issue such an order as it would in effect extend the time limit prescribed in section 275 for passing the penalty order (6 months from the end of the month in which the Tribunal's order is received by the CIT). Held by the High Court dismissing the appeal:

The assessee's quantum appeal has been admitted by the High Court. If the assessee succeeds in the quantum proceedings, it would not even be necessary to consider the section 271(1)(c) penalty proceedings and so no prejudice has been caused to the department qua the penalty proceedings. The

department's apprehension that the penalty proceedings may be barred by limitation under section 275(1A) is not well founded. In any event, the apprehension is set at rest by directing that in the event the proceedings are held to be barred by limitation, this appeal shall stand revived automatically and without further orders of the Court. (A.Y. 1997-98)

CIT v. Wander Pvt. Ltd. (2012) Vol. 114 (5) Bom. L.R. 2893 (Bom.)(HC) www.itatonline.org

S. 271(1)(c) : Penalty - Concealment - Disallowance of expenses - Diminution in the value - Levy of penalty was held to be not justified for disallowance of expensed under section 35D and disallowance of claim on account of diminution in the value of shares

The assessee a NBFC, claimed deduction under section 35D which was disallowed on the ground that it was not an industrial undertaking. The assessee also claimed deduction on account of diminution in the value of shares held by it. The same was disallowed on the ground that the shares were held as investments and profits and loss on the sale thereof were to be considered as capital gains. The quantum was confirmed. Penalty levied was deleted by the Tribunal. On appeal by revenue the Court held that the assessee neither concealed of any material particulars nor did the assessee furnished inaccurate particulars. The assessee disclosed all material facts and on the basis thereof, made certain claims which have been found to be unsustainable in law. Explanation 1(B), would apply only on where an assessee has concealed the particulars of his income or furnished inaccurate particulars of income. The Court following the ratio in CIT v. Reliance Petro Products Pvt. Ltd. (2010) 322 ITR 158 (SC), confirmed the order of Tribunal and dismissed the appeal of revenue. (A.Y. 2000-01)(ITA No. 3899/2010 dated 14-8-2012)

CIT v. Aditya Birla Nuvo Ltd. (2012) Income Tax Review Sept. P. 82 (Bom.)(HC)

S. 271(1)(c) : Penalty - Concealment - Taxability of amount received as security deposit, two views possible, no concealment of income

The assessee was engaged in the business of providing service in connection with obtaining orders from Govt. Departments. The Assessing Officer assessed the total income at Rs. 88,582/- being interest chargeable to tax under the head "Income from other sources". The Commissioner(Appeals) noticed that a sum of Rs. 3 crores received by the assessee on March 2, 1998, from D by virtue of clauses 8 to 11 of the memorandum of understanding between D and that the assessee had shown it in the balance sheet as on March 31, 1998, under the head "trade deposits" on the liabilities side. The Commissioner(Appeals) after examining the agreement was of the opinion that the receipt of Rs. 3 crores was in the nature of revenue receipt pertaining to the A.Y. 1998-99 and since it had not been disclosed and offered for taxation by the assessee in the return as income, he issued notice under section 251(2) of the Act for enhancement of income. The Commissioner(Appeals) held that the receipt of Rs. 3 cores was in the nature of income and should be taxed in the A.Y. 1998-99. The Tribunal confirmed the order of the Commissioner(Appeals) in quantum proceedings. It was held that not only had the assessee disclosed the receipt of the amount of Rs. 3 crores from D, albeit, showing it as a liability at that time (as according to the assessee it had not been converted into income). The Assessing Officer, in fact, went into this aspect specifically and accepting the stand taken by the assessee, did not treat the receipt as income. The issue was dealt with by the Assessing Officer in the quantum proceedings. This would amply demonstrate that the assessee had not concealed the particulars of his income nor was it a case where the assessee deliberately furnished inaccurate particulars of such income. This would also demonstrate that two views were possible and the claim of the assessee was bona fide. Quantum proceedings are independent proceedings and only when the ingredients of section 271(1)(c) of the Income-tax Act 1961, are satisfied, penalty can be imposed. Penalty could not be imposed. (A.Y. 1998-99)

CIT v. Mahavir Irrigation P. Ltd. (2012) 347 ITR 241 / (2011) 244 CTR 596 / 202 Taxman 415 (Delhi)(HC)

S. 271(1)(c) : Penalty - Concealment - Ad hoc disllaownce levy of penalty is not justified
Marketing expenditure and additions to closing stock the High Court having remanded the matter to Tribunal which in turn referred the same to Assessing Officer for fresh consideration, penalty under section 271(1)(c) on these two counts is rendered infructuous. Ad hoc disallowance towards obsolescence cannot be made basis of penalty under section 271(1)(c). (A.Y. 2000-01, 2001-02)
CIT v. Nokia India (P) Ltd. (2012) 343 ITR 434 / 77 DTR 254 / 254 CTR 139 (Delhi)(HC)

S. 271(1)(c) : Penalty - Concealment - Explanation 5 - Search - Conduct of assessee in filing of returns without full particulars is liable for penalty, not entitled the claim benefit of exeception carved out in Explanation 5 to section 271(1)(c)
The explanation 5 to section 271(1)(c) is premised on search of the assessee. The structure of the provision and the explanation make it clear that the first part, i.e. concealment of income, or furnishing of inaccurate particulars, results in the presumption, that it is liable for penalty. The onus is upon the assessee, whose premises are subjected to search, and from where the books of account pertaining to the undisclosed particulars are found, to show that he falls within the two exceptions, carved out of the Explanation. The assessees did not disclose the income or the assets any time in the returns filed by them. Furthermore, the search conducted was not in their premises; it was in the premises of someone else. They filed a return, which for the first time, disclosed the hitherto concealed income. Their explanations were not of the kind which therefore, fell within the exception to Explanation 5 of section 271(1)(c). Levy of penalty under section 271(1)(c) was therefore sustainable. (A.Y. 1999-2000 to 2003-04)
CIT v. Meera Devi (Smt) (2012) 253 CTR 559 / 77 DTR 382 / (2013) 212 Taxman 68 (Mag.)(Delhi)(HC)
Kiran Devi v. CIT (2012) 253 CTR 559 / 77 DTR 382 (Delhi)(HC)

S. 271(1)(c) : Penalty - Concealment - Disallowance of fees paid to Registrar of companies and claim of depreciation, error being genuine and bona fide, no penalty be levied
The Assessing Officer levied penalty in case of disallowance of fees paid to Registrar of companies and claim of depreciation. It was held that the Assessing Officer did not contradict the plea of the assessee that the excess claim of depreciation was an inadvertent error. As elements in the case indicate that the error by the assessee was genuine and bona fide, deletion of penalty was justified. (A.Y. 2001-02)
CIT v. Brahmaputra Consortium Ltd. (2012) 348 ITR 339 / 211 Taxman 171 (Mag.) (Delhi)(HC)

S. 271(1)(c) : Penalty - Concealment - Revised return - Surrender in the course of survey - Revised return filed before issue of formal notice does not necessarily avoid levy of concealment penalty, on the facts levy of penalty was held to be justified [S. 35CCA]
The assessee filed a ROI claiming deduction under section 35CCA for a donation made to another party. The department had information that the donation was bogus and so a survey was conducted on the assessee's premises. Pursuant to the survey, the assessee filed a revised return of income in which it withdrew the claim for deduction and paid up the taxes thereon. The Assessing Officer imposed penalty under section 271(1)(c) on the ground that the revised return withdrawing the claim was not voluntary but was pursuant to the survey. The CIT(A) & Tribunal deleted the penalty on the ground that as the revised return was filed before any concrete evidence was gathered by the income tax authorities the assessee was exonerated from guilt. On appeal by the Department to the High Court, held reversing the Tribunal:
The mere fact that a revised return was filed withdrawing a claim or offering additional income before issue of a formal notice by the Assessing Officer does not necessarily mean that the return is voluntary. The filing of a revised return does not expatiate the contumacious conduct, if any, on the

part of the assessee in not having disclosed the true income in the original return. At the same time, it cannot be said that the revised return is of no consequence at all. The original return cannot be considered in isolation without reference to the conduct of the assessee subsequent to the filing of the original return. The question whether a revised return is "voluntary" or not has to be decided in the light of the entire material brought on record and whether the revised return was filed when the assessee is cornered by the evidence or material collected by the revenue authorities or before that stage. On facts, the revised return was filed by the assessee only when it was cornered and the income tax authorities had collected material on the basis of which it could be said that the claim for deduction was false or bogus. The filing of the revised return is thus an act of despair and the assessee can gain nothing from it [Qammar-Ud-Din v. CIT (1981) 129 ITR 703 (Delhi), A. N. Sarvaria v. CIT (1986) 158 ITR 803 (Delhi), CIT v Ramdas Pharmacy (1970) 77 ITR 276 (Mad.) & CIT v. SAS Pharmaceuticals (2011) 335 ITR 259 (Delhi) referred] (A. Y. 1983-84)

CIT v. Usha International Ltd. (2012) 79 DTR 339 / 254 CTR 509 / (2013) 212 Taxman 519 (Delhi)(HC)

S. 271(1)(c) : Penalty - Concealment - Amounts not deductible - Failure to deposit tax ducted at source - The issue being debatable in view of Special Bench decision holding that amendment in section 40(a)(ia) being not retrospective matter remanded back to Tribunal [S. 40(a)(ia)]

The Assessing Officer held that the assessee has failed to deposit the tax deducted at source on before due date a disallowance was to be effected as per section 40(a)(ia), accordingly penalty under section 271(1)(c) was levied. In appeal Commissioner(Appeals) deleted the penalty. Appeal of revenue was dismissed by the Tribunal. On appeal to High Court by the revenue contended that subsequent decision of Special Bench in Bharati Shi yard Ltd. v. Dy. CIT (2011) 11 ITR 599 (SB)(Mum)(Trib.) holding that the amendment brought about by the Finance Act, 2010 to section 40(a)(ia) was not remedial and curative in nature and would therefore, not retrospective effect, hence the view of Tribunal cannot be sustained. The Assessee contended that the issue is debatable. The Court held that since the submission of assessee was not considered the matter was set aside for fresh consideration before the Tribunal. (A.Y. 2006-07)

CIT v. Shyam Narayan and Bros. (2012) 349 ITR 145 / (2013) 213 Taxman 51 (Mag.)(Bom.)(HC)

S. 271(1)(c) : Penalty - Concealment Search and Seizure - Explanation 5(2) Penalty - Non-disclosure of income due to bona fide belief that income was not taxable and the assessee paying taxes and co-operating with revenue, penalty could not be imposed [S. 132]

A search was carried out in the business premises of the assessee on Sept. 20, 1989. During the course of search, it was discovered that the assessee had invested an amount of Rs. 11 lakhs in two properties and this had not been disclosed. The assessee admitted the purchase of the property out of income which was not disclosed. The non disclosure of the income was due to the circumstances that he was an uneducated and illiterate petty contractor who received payments only after deduction of tax at source. Thereafter, the assessee field returns for the A.Y. 1985-86 to 1989-90. These returns were accepted as they were, without any further payment of tax and regularized after issuance of a notice under section 148 of the Act. The assessee paid the tax due and made an application for waiver of interest. Waiver was granted. The Assessing Officer was of the view that the assessee did not fulfil the requirements of clause (2) of Explanation 5 to section 271(1)(c) and, therefore, was liable to pay penalty. The Tribunal held that penalty could not be levied. The Tribunal also concluded that the conduct of the assessee was not contumacious. On appeal to the High Court: Held, dismissing the appeals, that since both the Commissioner(Appeals) and the Tribunal were satisfied about the bona fides of the assessee and the assessee had complied with the provisions of clause (2) of explanation 5 to section 271(1)(c) of the Act, no case for imposition of penalty was made out. (A.Y. 1985-86 to 1989-90)

CIT v. B. Venkatesam (2012) 349 ITR 413 (AP)(HC)
CIT v. B. Yadagiri (2012) 349 ITR 343 (AP)(HC)
CIT v. B. Nagendar (2012) 349 ITR 343 (AP)(HC)

S. 271(1)(c) : Penalty - Concealed of income - Recording of satisfaction - No was satisfaction recorded hence penalty is not leviable - Deemed satisfaction does not to apply to earlier years
The Assessing Officer has added a sum of Rs. 11,000/- to the income returned by the assessee as per the revised return. Sub-section (1B) of section 271 creates a fiction by which the satisfaction of the Assessing Officer is deemed to have been recorded in cases where an addition or disallowance is made by the Assessing Officer and a direction for initiation of penalty proceedings is issued. This provision is made effective retrospectively with effect from April 1, 1989. As the assessment order for the A.Y. 1984-85 had been passed on March 27, 1987, prior to April 1, 1989, the revenue could not rely on sub-section (1B) of section 271. The Assessing Officer should, before imposing penalty, record in the assessment order his satisfaction that the assessee had either concealed the income or furnished inaccurate particulars of income in his return. There was no finding in categorical terms in the assessment order that the assessee had furnished inaccurate particulars or had concealed income. Appeal of assessee was allowed. (A.Y. 1992-93 to 1994-95)
Chennakesava Pharmaceuticals v. CIT (2012) 349 ITR 196/(2013) 214 Taxman 141(Mag.) (AP)(HC)

S. 271(1)(c) : Penalty - Concealment - Depreciation - Claim for deduction which was debatable - Penalty could not be levied [S. 32]
The assessee claimed depreciation on a building which was being used by the firm in which the assessee was a partner. In quantum proceedings it had been held that the assessee was not entitled to depreciation on the building as it was being used by the firm and not by the assessee. Imposition of penalty under section 271(1)(c) of the Act, is not akin to or like criminal proceedings and the question of mens rea or mala fides on the part of the assessee need not be examined and is not relevant. At the same time, it is not mandatory that in each case where addition or disallowance is made by the Assessing Officer, penalty must and should be imposed. When an assessee establishes that he had acted bona fide and all facts and material were disclosed by him penalty should not be imposed. A wrong deduction claimed can amount to furnishing of inaccurate particulars. However, a distinction must be drawn between a false claim, which cannot be countenanced and claims which are made on the basis of legal provisions which are debatable and quite plausible. When a legal issue arises for consideration, which is debatable but the claim made by the assessee is not accepted, there is no jurisdiction to invoke the penalty provisions under section 271(1)(c). Divergent legal views on legal interpretation of a statute can take place, but it is not necessary that there should be uniformity or consensus of opinion on the aspects of law. (A.Y. 2005-06)
Karan Raghav Exports P. Ltd. v. CIT (2012) 349 ITR 112 / (2013) 212 Taxman 55 (Delhi)(HC)

S. 271(1)(c) : Penalty - Concealment - Bonafide mistake - Levy of concealment penalty under section 271(1)(c) is not justified if income not offered to tax due to "bona fide mistake"
The assessee, a renowned professional international tennis player, received an award of Rs. 30 lakhs. This was disclosed in the statement of affairs filed with the ROI though not offered to tax. The Assessing Officer accepted the ROI under section 143(1). He later reopened the assessment under section 147 at which stage the assessee offered the said amount to tax. The Assessing Officer & CIT levied penalty under section 271(1)(c) on the ground that the assessee had furnished inaccurate particulars of her income and concealed her income. However, the Tribunal cancelled the penalty on the ground that a "bona fide mistake" had been made on her behalf by her Advocate / Chartered Accountant and there was no concealment of income nor a furnishing of inaccurate particulars. On appeal by the department to the High Court, held, dismissing the appeal:

There is nothing to suggest that the assessee acted in a manner such as to lead to the conclusion that she had concealed the particulars of her income or had furnished inaccurate particulars of income. As the amount of Rs. 30,63,310/- was shown by her in the return, it cannot be said that there was any concealment. As the amount was correctly mentioned, there is also nothing inaccurate in the particulars furnished by her. The only error that seems to have been committed was that it was not shown as a capital (sic) receipt. But as soon as this was pointed out, the error was accepted and the amount was surrendered to tax. This is not a fit case for imposition of penalty.(A.Y. 2004-05)

CIT v. Sania Mirza(2013) 259 CTR 386/ 87 DTR 371(AP)(HC)

S. 271(1)(c) : Penalty - Concealment - Two views - Matter referred to special Bench -Association of persons or individual - Quantum addition was confirmed by Tribunal - Levy of penalty was held to be not justified [S. 167B(2)]

The assessee, an association of persons, filed returns at nil and claimed refund of the tax deducted at source. The Assessing Officer held that the share of each of the embers of the joint venture agreement having exceeded the maximum amount not chargeable to tax, the maximum marginal rate was applied to the association of persons in terms of section 167B(2) and the entire income was assessed in the hands of the association of persons. This order was confirmed by the Commissioner(Appeals). The Special Bench of the Tribunal decided the issue against the assessee. This was confirmed by the High Court. The Assessing Officer imposed penalties under section 271(1)(c). The Tribunal deleted the penalty on the ground that two views were possible when the assessee filed the nil return. On appeal by revenue :

Held, dismissing the appeals, that there were two views possible inasmuch as the Tribunal itself was in doubt as to which of the two views was to be preferred. Therefore, the Tribunal had passed the referral order requiring the matter to be considered by a Special Bench. The fact that the referral order came into being much after the returns were filed would be of no help to the Revenue in as much as all that the referral order indicated was that a doubt existed with regard to which of the views was possible. It could not be said that prior to that date, the assessee could not have had such a doubt in its mind when it had filed its return. Therefore, there was no reason to disagree with the Tribunal in its conclusion on deleting the penalty imposed on the assessee. Accordingly the appeal of revenue was dismissed. (A.Y. 2003-04, 2004-05)

CIT v. Pradeep Agencies Joint Venture (2012) 349 ITR 477 (Delhi)(HC)

S. 271(1)(c) : Penalty - Concealment - In the course of search - Surrender - Explanation 5 - Explanation 5 to section 271(1)(c) would not include post-search period like assessment proceedings in pursuance to search operations, statement made under section 131(1) during assessment proceedings in pursuance of search and seizure operations could not partake the character of statement under section 132(4), levy of penalty was held to be justified [S. 131, 132(4)]

The appellant filed return filed by the assessee for the relevant assessment year on 17-1-2007 showed income of Rs. 7,88,620/-. The assessment under section 143(3) at the returned amount was completed on 31-10-2007. The returned income contained the surrendered amount of Rs. 7,25,000/- in consequence of the search carried under section 132 on 8-11-2005. The assessee made disclosure under section 131(1) on 5-1-2006 and offered to surrender the amount attributable to him in the investment in property. Thereafter, proceedings for imposing penalty under section 271(1)(c) were initiated and a penalty in the sum of Rs. 1,90,318/- was levied on the appellant-assessee on 20-3-2008. The assessee preferred appeal before the Commissioner(Appeals) which was dismissed. The assessee preferred further appeal before the Tribunal and the same was also dismissed.

On appeal by the assessee the Court held that the expression "in the course of the search" in Explanation 5 to section 271(1)(c) would not include post-search period like assessment proceedings in pursuance to search operations. The legislative intent for providing immunity from

penalty under Explanation 5 to section 271(1)(c) was to give concession and another opportunity to an assessee to come clean before detection during the course of search and seizure. It nowhere entitled an assessee to seek immunity from penalty where the assessee was cornered after detection during assessment proceedings in pursuance to search operations and had not availed benefit of opportunity provided in terms of Explanation 5 to section 271(1)(c). Section 132(4) uses the expression "authorised officer" and not the words "Assessing Officer". The expression "authorised officer" used in section 132(4) instead of "Assessing Officer" also supported the aforesaid interpretation. Therefore, statement made under section 131(1) during assessment proceedings in pursuance of search and seizure operations could not partake the character of statement under section 132(4). As a necessary corollary, the benefit of Explanation 5 to section 271(1)(c) would, thus, not be admissible in such situation. Levy of penalty held to be justified. (A.Y. 2006-07)
Sanjay Aggarwal v. CIT (2012) 211 Taxman 178 (Mag.)(P&H)(HC)

S. 271(1)(c) : Penalty - Concealment - Revised return - Gift - Cash credits - Merely because the assessee surrendered the amount levy of penalty cannot be justified
Assessee revised her return and declared a gift received from relative. During assessment proceedings, assessee further surrendered, another gift received from a family friend. Assessment order was passed taking into account said gifts. Assessing Officer, however, treated above disclosure/surrender by assessee of two gifts as an act of compulsion on her part on account of fact that department had detected racket of making of fake gifts for evading tax and he further observed that one of gifts was not from blood relative. He, therefore, imposed penalty under section 271(1)(c). Gift received from family friend by way of account payee cheque could be disbelieved on ground that same was not from any blood relative. In appeal Commissioner(Appeals) confirmed the penalty. In appeal Tribunal quashed the penalty observing that the Assessing Officer has not given any finding that why the explanation furnished by the assessee was false or untrue. On appeal by revenue the Tribunal also confirmed the order of Tribunal and dismissed the appeal of revenue. (A.Y. 2001-02)
CIT v. Km. Sonali Jain (2012) 211 Taxman 175 (Mag.)(All.)(HC)

S. 271(1)(c) : Penalty - Concealment - Prima facie satisfaction of Assessing Officer that case may deserve imposition of penalty can be discerned from order passed during course of assessment proceedings, hence levy of penalty was justified [S. 158BC]
During search conducted at premises of director of assessee-company, certain documents were seized. In block assessment proceedings, Assessing Officer accepted assessee's explanation in respect of some of entries recorded in seized documents. For remaining amount, assessee explained that said sum was spent by its director from and out of imprest account of Rs. 25 lakhs, which had been given to him for purpose of incurring expenditure on behalf of company. Assessing Officer did not accept said explanation and made addition of that amount on ground that said expenses were not recorded in books of account. On appeal, addition was upheld. Thereafter, Assessing Officer imposed penalty under section 271(1)(c) upon assessee. Assessee challenged penalty on ground that Assessing Officer had not recorded satisfaction in block assessment order regarding levy of penalty. When it was clearly discernible from block assessment order that Assessing Officer had recorded *prima facie* satisfaction that unexplained amount of expenditure recorded in seized document was unexplained income and it was a clear case of furnishing inaccurate particulars of income by assessee, penalty imposed upon assessee was to be upheld. (Block period 1991-92 to 2001-02)
Astra Housing & Investment (P.) Ltd. v. CIT (2012) 211 Taxman 180 (Mag.) / (2011) 58 DTR 159 (Delhi)(HC)

S. 271(1)(c) : Penalty - Concealment - Merely because in quantum proceedings assessee treated a certain sum as business loss whereas revenue treated it as capital loss, provisions of section 271(1)(c) would not get attracted

The assessee claimed a certain sum as business loss. The Assessing Officer treated the same as capital loss and made addition. The Commissioner(Appeals) and the Tribunal upheld said order. On basis of aforesaid orders, penalty under section 271(1)(c) was imposed upon the assessee. On appeal, the Commissioner(Appeals) upheld the penalty. On second appeal, the Tribunal held that penalty proceedings could not be initiated merely because business loss claimed by the assessee was treated as capital loss by the Assessing Officer. On revenue's appeal the Court held that, in the absence of any independent finding by the Assessing Officer that the assessee either concealed his income or furnished inaccurate particulars, merely because the assessee treated certain amount as a business loss, whereas the revenue treated it as a capital loss, the provisions contained under section 271(1)(c) would not get attracted. In the said circumstances, there was no infirmity in the order passed by the Tribunal .Appeal of revenue was dismissed. (A.Y. 2004-05)

CIT v. Praveen B. Gada (HUF) (2012) 211 Taxman 166 (Mag.) / (2011) 244 CTR 463 / 62 DTR 23 (MP)(HC)

S. 271(1)(c) : Penalty - Concealment - Ignorance of law - Plea of ignorance of law was dismissed and levy of penalty was confirmed

Assessee had purchased a property. In its income-tax return, assessee did not disclose source from which amount in question was drawn. On scrutiny of assessment, fact of payment of registration charges and stamp duty was noticed. Accordingly, tax with interest was imposed .Penalty was also levied. Assessee furnished its explanation with regard to penalty that he was innocent and was not aware of legal requirement and, therefore, penalty could not be sustained, High Court rejected the explanation and confirmed the order of Tribunal levying the penalty. (A.Y. 2005-06)

Selvaraj Vedan v. Dy. CIT (2012) 211 Taxman 132 (Mag.)(Karn.)(HC)

S. 271(1)(c) : Penalty - Concealment - Survey - Surrender after detection levy of penalty was held to be justified [S. 133A]

During survey under section 133A carried out at premises of a company, it was found that said company had been paying a handsome commission and incentives to its directors and family members. On being asked, managing director of company, who was husband of assessee, accepted that additional amount was given to 14 persons including assessee. Case of assessee was later on selected for compulsory scrutiny under section 143(3) during which, it was noticed that assessee had not declared any additional amount in return of her income for relevant A.Y. However, assessee agreed to pay income-tax on said amount along with interest under section 234B subject to no penal action against her. Assessing Officer did not agree with submissions of assessee and after making assessment also levied penalty observing that assessee did not surrender amount voluntary in good faith; rather she was compelled by circumstances to do so. Since assessee was unable to point out that she had disclosed surrendered amount in return of income or that there was no concealment or that full particulars had been disclosed by her, levy of penalty on her was justified. Appeal of assessee was dismissed. (A.Y. 2003-04)

Shveta Nanda v. CIT (2012) 211 Taxman 129 (Mag.)(P&H)(HC)

S. 271(1)(c) : Penalty - Concealment - Mere disallowance of expenses, levy of penalty will not be justified

In course of assessment, Assessing Officer disallowed expenditure incurred on account of share transfer holding it to be capital in nature. Assessing Officer also disallowed club expenses claimed by assessee. In respect of aforesaid disallowances, a penalty order under section 271(1)(c) was passed. On appeal, Tribunal set aside penalty order. On revenue's appeal, it was noted that insofar as disallowance of share transfer expenses was concerned, Tribunal recorded that disallowance was made as Assessing Officer suspected same to be expenses relating to share capital increase and on that count held it to be capital in nature. However, it was not disputed that expenditure was incurred

in fact. Likewise, in respect of club expenses, observation of Tribunal was that claim which was for a paltry amount of Rs. 11,359/- was not mala fide. Accordingly the High Court up held the deletion of penalty. (A.Y. 1994-95)

CIT v. H. B. Leasing & Finance Co. Ltd. (2012) 211 Taxman 132 (Mag.) / (2011) 334 ITR 367 (Delhi)(HC)

S. 271(1)(c) : Penalty - Concealment - Foreign flight catering business - For not allowing deduction under section 80HHC penalty cannot be levied

The assessee revised its original return of income claiming deduction under section 80HHC in respect of the income derived from the foreign flight catering business. The basis of the said revised return and the claim of deduction under section 80HHC was that the assessee came to know of a decision of the Mumbai Bench of the Tribunal in the case of Indian Hotels Co. Ltd. v. Dy. CIT (2004) 86 TTJ 195 which was also engaged in the business of foreign flight catering business. The Assessing Officer disallowed the said claim in the assessee's case. The disallowance was upheld by the Commissioner(Appeals) and the Tribunal. Thereafter, the Assessing Officer initiated proceedings under section 271(1)(c) against the assessee for making claim for deduction under section 80HHC in the revised return and imposed maximum penalty under section 271(1)(c). On appeal, the Commissioner set aside the order of the Assessing Officer. On the revenue's appeal, the Tribunal set aside the order of the Commissioner(Appeals) with a direction, however, for reducing the amount of penalty. On appeal to High Court the Court held that Merely because a claim of an assessee did not find favour with the assessing authority, the same cannot, or in any case should not attract the provision contained in section 271(1)(c). Therefore, the order of the Tribunal was to be set aside. (A.Y. 1998-99)

EIH Ltd. v. CIT (2012) 211 Taxman 130 (Mag.) / (2011) 57 DTR 121 (Cal.)(HC)

S. 271(1)(c) : Penalty - Concealment - Mere non-furnishing of a return per se does not tantamount to concealment within meaning of section 271(1)(c), unless Explanation 3 of section 271(1) is attracted - Conditions for applicability of Explanation 3 to section 271(1) are cumulative and each of conditions has to be established for purpose of invoking said provision - Penalty cancelled [S. 142(1), 144, 148]

Assessee had not filed return of income for relevant A.Y., notices under sections 148, 142(1) and 144(1) were issued to him. Assessee made no reply and, therefore, assessment proceeding were finalized under section 144 and a penalty under section 271(1)(c) was also imposed. Since on facts third condition of Explanation 3 of section 271(1)(c) namely, that no notice under section 142(1) or section 148 should have been issued within period specified under sub-section (1) of section 153 was clearly not satisfied, failure on part of assessee to furnish return of income within specified period could not be deemed to be concealment within meaning of Explanation 3 to section 271(1)(c) and, therefore, no penalty could be imposed on assessee. Penalty levied was cancelled. (A.Y. 1994-95)

Chhaganlal S. Suteriya v. ITO (2012) 211 Taxman 133 (Mag.) / (2011) 337 ITR 350 / 242 CTR 528 / 58 DTR 89 (Guj.)(HC)

S. 271(1)(c) : Penalty - Concealment - Deduction - Export - Amendment in law - Manufacturing - Levy of penalty is not justified [S. 80HHHC, 80IB]

Assessing Officer disallowed the claim of deduction under section 80HHC, on export incentive by applying the provisions inserted by the Taxation Laws (Amendment) Act, 2005, which did not exist at the time of filing of the return, assessee cannot be said to have furnished in accurate particulars of income and levy of penalty was not justified. Assessee also disclosed the complete particulars regarding the claim under section 80IB, in its return which was accompanied by audit report, penalty under section 271(1)(c) cannot be levied as the disallowance of claim being debatable. (A.Y. 2002-03, 2004-05)

ACIT v. Perfect Forgings (2012) 143 TTJ 117 / 52 SOT 129 / (2011) 60 DTR 41 / 11 ITR 166 (Chd.)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Additional - Depreciation - Penalty is deleted

Assets installed and put to use in second half of year, depreciation claimed at 50 percentage of rate allowable in that year, balance of depreciation allowable in next year. Additional depreciation was disallowed. Levy of penalty was not justified. (A.Y. 2004-05, 2005-06, 2006-07)

Dy. CIT v. Cosmo Films Ltd. (2012) 13 ITR 340 / 139 ITD 628 (Delhi)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Opinion of Chartered Accountant - Bonafide claim - Chartered Accountant's opinion does not necessarily make claim "bona fide" - Penalty is confirmed

The assessee obtained the opinion of a Chartered Accountant on whether expenditure on fees to the Registrar of Companies for increasing authorized capital can be claimed as revenue expenditure. The Chartered Accountant relied on judicial precedents and opined that the issue was debatable and a claim could be made on the basis that if two views were possible, the view in favour of the assessee should be taken. The assessee claimed deduction and even the tax auditor did not qualify the same. The Assessing Officer relying on Punjab State Industrial Development Corp. 225 ITR 792 (SC) & Brooke Bond 225 ITR 798 (SC) disallowed the claim and levied section 271(1)(c) penalty which was upheld by the CIT(A). Before the Tribunal, the assessee pleaded that as it had relied on the opinion of an expert in making the claim, its action was bona fide & penalty could not be levied. Held dismissing the appeal:

In view of the two decisions of the Supreme Court which held the field when the return was filed, the claim was patently disallowable. The claim was also not discernible on the face of the record and the details of expenses had to be gone into, in order to decipher the claim. The argument that the assessee does not have expertise in taxation matters and so it relied on expert opinion is not acceptable because the opinion was furnished for accounting purposes. An accountant's view is not really material for deciding the deductibility or otherwise of an expenditure. The assessee knew about the problem at the time of filing of return, but still made the claim. Not only this, the claim was pursued even up to the level of the CIT(A) in gross disregard for the decision of the Supreme Court, which the assessee came to know at least after receiving the assessment order. Therefore, the claim was not only wrong but also false and it was persisted with for some time. The fact that the assessee did not even seek explanation from the tax auditor or the CA gave the impression that the whole thing was a sham. (A.Y. 2003-04)

Chadha Sugars Pvt. Ltd. v. ACIT (2012) 135 ITD 42 / 70 DTR 57 / 17 ITR 316 / 146 TTJ 112 (Delhi)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Search - Despite surrender after detection - Penalty is deleted [S. 153A]

Pursuant to a search & section 153A assessment on the basis of seized papers, statements, etc; the assessee offered additional income of Rs. 2.68 crores on the basis that he was unable to explain the old records. Some of the other additions made by the Assessing Officer were partly deleted by the CIT(A) & Tribunal. The Assessing Officer & CIT(A) levied section 271(1)(c) penalty on the ground that the assessee's offer of additional income was not voluntary or bona fide. On appeal by the assessee to the Tribunal, held allowing the appeal:

Though the assessee owned the unaccounted transactions only after search action, when an assessee admits his mistake and that he has committed a wrong and offers the additional income to tax, it cannot be said that his statement is false or not bona fide. Neither the CIT(A) nor the Tribunal were completely clear about the exact amount of concealment and there was no conclusive evidence as some additions had been deleted. Section 271(1)(c) gives discretion to the Assessing Officer to

exonerate the assessee from levy of penalty even in case where the assessee has concealed the income or furnished incorrect particulars of income. Penalty should not be imposed merely because it is lawful to do so. The Assessing Officer has to exercise his discretion judiciously. If an assessee files a revised return though at a later stage or discloses true income, penalty need not be levied. No doubt, merely offering additional income will not automatically protect the assessee from levy of penalty but in a given case where the assessee came forward with additional income though after detection because he was not in a position to explain the seized material properly and expresses remorse in his conduct un-hesitantly, the Assessing Officer has to exercise the discretion in favour of such assessee as otherwise the expression 'may' in section 271(1)(c) becomes redundant. In a case of admitted income, concealment penalty is not automatic. The discretion vested in the Assessing Officer should be used not to levy penalty. On facts, the case was most befitting to exercise such discretion because there was divergent opinion while deleting or sustaining the addition and there was no conclusive proof that the assessee concealed income or furnished inaccurate particulars of income. The assessee's offer was to avoid litigation. If the Assessing Officer had clinching evidence of concealment, he should not have accepted the assessee's offer and should have proceeded on the basis of material on record [VIP Industries 112 TTJ 289, Siddharth Enterprises 184 TM 460 (P&H) & Reliance Petro Products 322 ITR 158 (SC) followed](A.Ys 1999-2000 to 2003-04)(ITA nos 1852 to 1857/M/2011 dt 6-01-2012)

P. V. Ramana Reddy v. ITO (Hyd.)(Trib.) www.itatonline.org

S. 271(1)(c) : Penalty - Concealment - Survey - Search and Seizure - Disclosure of income - Explanation 4 & 5 - Penalty is deleted [S. 153C]

Assessee had surrendered a sum of Rs. 1.60 crores during the course of survey / search and seizure operation. Assessee on its own, furnished its return of income before the issuance of the notice under section 153C where in it had declared additional income of Rs. 1.60 crores, the Tribunal held that levy of penalty was rightly deleted by the Commissioner(Appeals). (A.Y. 2005-06)

ACIT v. Jupiter Distillery (2012) 66 DTR 121 / 143 TTJ 745 (Ahd.)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Unexplained cash credits - Surrender of income - Explanation 1 - Penalty justified

Department has collected sufficient material against the assessee and only after incriminating material collected by the Department was brought to the knowledge of the assessee, the surrender was made by the assessee under the constraint of exposure to adverse action by the Assessing Officer. On the facts the assessee failed to discharge the onus laid down upon him in terms of Explanation 1 to section 271(1)(c) and did not offer any explanation during the penalty proceedings before the Assessing Officer, the Tribunal held that levy of penalty was justified. (A. Y. 2001-02)

Sanjay Enterprises (P) Ltd. v. ITO (2012) 66 DTR 187 / 144 TTJ 198 / 51 SOT 48 (URO)(Delhi)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Provision for doubtful debt - Disallowance of provision for doubtful debt and MODVAT credit under section 43B - Possible view levy of penalty is not justified

The assessee has disclosed full particulars in the return of income. The Assessing Officer has disallowed the provision for doubtful debts and MODVAT credit component under section 43B of the Act. The additions were confirmed by the Tribunal. In the penalty matter the Tribunal held that full particulars were disclosed by the assessee in the computation of income enclosed with the return. The stand taken by the assessee was supported by subsequent decision of another assessee. The Tribunal held that the stand taken by the assessee at the time of filing of return was a possible and plausible view and therefore penalty was not justified. (A.Y. 1998-99)

Hero Honda Motors Ltd. v. Dy. CIT (2012) 14 ITR 161 / 63 DTR 53 (Delhi)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Conditional offer - Seized documents did not contain signatures or initials or director or family members burden is on revenue to prove, Levy of penalty was not justified

During the search various documents were found, the assessee has made disclosure of certain amount however in the course of assessment proceedings the assessee offered additional income with the condition that no penalty should be levied. In appeal the Commissioner(Appeals) partly allowed the penalty. On further appeal to the Tribunal by revenue and assessee, the Tribunal held that, though the conditional offer made by the assessee consequent to search operation is justifed for addition in quantum assessment, the same is not sufficient to attract the levy of penalty under section 271(1)(c), when the seized document did not contain signatures or initials of director or any family member. Accordingly the appeal of assessee was allowed and appeal of revenue was dismissed. (A.Y. 2005-06)

Marathon Nextgen Reality & Textiles Ltd. v. Dy. CIT (2012) 67 DTR 249 / (2013) 154 ITD 254 (Mum.)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Depreciation - Claim of depreciation on non-compete fee deduction under section 10A in respect of foreign exchange expenditure, levy of penalty was not justified

Assessing officer levied penalty for concealment in respect of depreciation claim on non-compete fee and for not correctly claiming deduction under section 10A on foreign exchange expenditures from export turnover. On appeal the Commissioner(Appeals) held that the as regards the deduction under section 10A, the Tribunal has itself decided in favour of assessee and as regards depreciation merely because the assessee had made a claim of depreciation the levy of penalty was not justified. In appeal by the revenue, the Tribunal confirmed the view of Commissioner(Appeals). (A.Y. 2002-03, 2003-04)

ACIT v. Pentasoft Technologies Ltd. (2012) 134 ITD 567 / 145 TTJ 99 / 68 DTR 154 (Chennai)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Revised return - Revised return after issue of notice under section 153A, levy of penalty held to be justified [S. 153A]

Assessee filed the return of income under section 139(1). There was search and seizure action. Assessee obtained the zerox copies of seized documents however in response to notice under section 153A, the assessee filed return of income which was disclosed earlier without disclosing any additional income. After several notices and after issue of notice under section 142(1), the assessee filed a revised return disclosing the additional income which was accepted by the Assessing Officer. The Assessing officer levied penalty in respect of additional income disclosed in the revised return. Commissioner(Appeals) deleted the penalty. On appeal to the Tribunal by revenue the Tribunal held that assessee has filed revised return only after the Assessing Officer had established that the assessee's books of account are incorrect and false and payments claimed to have been made by cheque and debited to the accounts are also held to be false. The Tribunal held that it cannot be accepted that the disclosure of the additional income in the revised return was voluntary and in good faith to buy peace with department, therefore levy of penalty was held to be justified. (A.Y. 2004-05, 2005-06)

Dy. CIT v. Sushma Devi Agarwal (2012) 67 DTR 430 / 144 TTJ 567 / (2011) 133 ITD 155 (TM)(Kol.)(Trib.)

Dy. CIT v. Monika Devi Agarwal (2012) 67 DTR 430 / 144 TTJ 567 / (2011) 133 ITD 155 (TM)(Kol.)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Disallowance - Penalty for concealment cannot be levied merely on the basis of disallowance under section 40(a)(ia) where assessee furnished relevant evidence

Assessee having furnished all relevant material facts and the audit report in the statutory form along with its return and also filed an explanation which could not be said to be not bona fide, it cannot be said to be guilty of concealment of income or furnishing of inaccurate particulars thereof, merely because certain expenses have been disallowed under section 40(a)(ia) and therefore, no case for imposition of penalty under section 271(1)(c) is made out. (A.Y. 2005-06)

ACIT v. Medversity Online Ltd. (2012) 145 TTJ 398 / 69 DTR 326 (Hyd.)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Legal opinion - Compensation for alternative accommodation - Simply because the claim of assessee has not been accepted by tax authorities levy of penalty is not justified

The assessee claimed in the return of income compensation on account of failure to provide alternative accommodation as capital receipt. The assessment was reopened and the addition was confirmed by the Tribunal. In the penalty proceedings it was contended that the a proper note was put in the accounts based on the opinion of the counsel stating that the receipt is not taxable. The penalty was levied by the Assessing Officer and the same was confirmed by the Commissioner(Appeals). Tribunal held that assessee having claimed that the amount received by it from its landlord as compensation on account of land lord's failure to provide an alternative accommodation to the assessee on vacating its premises is a capital receipt on the basis of legal opinion given by senior advocate and distinctly showed the said amount as an extraordinary receipt by giving separate note to the annual accounts as well as in the computation of income attached with the return, the claim of the assessee cannot be categorized as not bonafide in any manner and therefore, it cannot be said to be a case of concealment of income or furnishing of inaccurate particulars simply because the claim of the assessee has not been accepted by the tax authorities; penalty under section 271(1)(c) deleted. (A.Y. 1994-95)

Pfizer Ltd. v. Dy. CIT (2012) 70 DTR 239 / 146 TTJ 385 / 52 SOT 16 (URO)(Mum.)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Satisfaction - Penalty not valid if "satisfaction" not recorded in the assessment order

The Assessing Officer passed an order under section 143(3) in which he took the view that the assessee had wrongly claimed deduction for a provision made towards non-saleable goods. This was upheld by the CIT(A) & the Tribunal. The Assessing Officer also imposed penalty under section 271(1)(c) for concealment / furnishing of inaccurate particulars of income. The CIT(A) upheld it. Before the Tribunal, the assessee argued that penalty was not imposable because (a) in the assessment order, the Assessing Officer had not recorded a finding that there was concealment/furnishing of inaccurate particulars of income and so there was no "satisfaction" and (b) there was no finding in the quantum order that the assessee's claim was not bona fide and so penalty was not imposable. Held upholding the assessee's plea:

(i) Despite the insertion of sub-section (1B) to section 271, the necessity for "prima facie satisfaction" for initiation of penalty proceedings continues to be a jurisdictional fact. The Assessing Officer has to record the finding that there was concealment of income. In the section 143(3) assessment order, the Assessing Officer has not mentioned a word that there was furnishing of inaccurate particulars or concealment of income. He made the addition merely on the ground that the assessee was not able to produce any evidence for writing off of the amount in the books of account. As the satisfaction that the assessee had concealed income or furnished inaccurate particulars of such income is not discernible from the assessment order, the penalty order suffers from lack of jurisdiction to impose penalty [Madhu Shree Gupta v. UOI (2009) 317 ITR 107 (Delhi)(HC) followed];

(ii) It is settled law that assessment proceedings and penalty proceedings are separate proceedings and findings arrived at in quantum appeal may have persuasive value but are not conclusive for levying penalty. In the quantum appeal there was no finding of the Tribunal that the assessee's claim was not bona fide or that there was any fraud or gross or willful neglect on its part;

(iii) Penalty should ordinarily not be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty should not be imposed merely because it is lawful to do so. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute. On facts, the assessee's act of writing off un-saleable goods cannot be said to be not bona fide and it cannot be said to be furnishing of inaccurate particulars of income. (A.Y. 2001-02)

Global Green Company Limited v. Dy. CIT (Delhi)(Trib.) www.itatonline.org

S. 271(1)(c) : Penalty - Concealment - Disallowance - Deduction under Section 10A and Section 80HHE in relation to unrealized exports - When all relevant particulars were disclosed, mere disallowance cannot be considered as concealment

Disallowance of claim for deduction under Section 10A and Section 80HHE in relation to unrealized exports cannot be considered as concealment of income or furnishing inaccurate particulars thereof, especially when all the relevant particulars were disclosed before the Assessing Officer and, therefore, penalty under section 271(1)(c) was not leviable pursuant to disallowance made by the Assessing Officer. (A.Y. 2003-04 & 2004-05)

ACIT v. DSL Software Ltd. (2012) 147 TTJ 67 / 72 DTR 34 / 52 SOT 82 (URO)(Delhi)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Opinion - Professional's opinion in support of claim does not per se make it bona fide - Third Member cannot sit in judgment over dissenting Members' views [S. 255(4)]

The assessee filed a ROI claiming deduction for the entire VRS liability despite section 35DDA providing that VRS payments would be allowed in 5 installments. The Assessing Officer allowed the claim in section 143(1) and then issued a section 148 notice (on some other issue; the section 148 notice did not refer to the VRS claim). In the ROI filed pursuant to the section 148 notice, the assessee itself disallowed the VRS payment and claimed only 1/5th thereof as was allowable under section 35DDA. The Assessing Officer accepted the ROI but imposed section 271(1)(c) penalty on the ground that there was suppression of income in the original ROI and the section 148 ROI was not "voluntary". The CIT(A) confirmed the penalty. Before the Tribunal, the assessee argued that section 271(1)(c) penalty was not leviable because (a) under Explanation 3 to section 271(1)(c), income declared in a section 148 ROI cannot be subjected to penalty if a section 139(1) ROI had been filed, (b) at the stage of filing the original ROI, the assessee was advised by his CA that in view of CIT v. Bhor Industries Ltd. (2003) 264 ITR 180 (Bom.), VRS was revenue expenditure & allowable in the year it was incurred, (c) after receipt of the section 148 notice, the assessee was advised by its CA that in view of section 35DDA, VRS was allowable only in installments and it surrendered the claim and (d) the section 148 notice did not refer to the VRS claim and the assessee had voluntarily disallowed it. The JM accepted the assessee's plea that it had acted in a "bona fide manner" based on a mistaken belief of the law and penalty was not leviable. However, the AM took a converse view. On reference to the Third Member, Held:

(i) Under Explanation 1 to section 271(1)(c), the onus is on the assessee to prove that the explanation given by him (for not offering the correct income to tax) is bona fide. The explanation must be an "acceptable explanation". While, the assessee is not required to prove what he asserts to the hilt positively, he must bring material on record to show that what he says is reasonably valid. On

facts, the assessee's conduct cannot be regarded as "bona fide". Though the assessee claimed to have relied on the CA's opinion, the opinion lacked credibility because while he referred to Bhor Industries, he did not deal with section 35DDA which was in effect as of 1.4.2001. Further, in the immediately preceding year, the assessee itself applied section 35DDA and so it cannot claim ignorance of that provision and there was no reason for it to deviate from the tax treatment given to the VRS payments in the earlier A.Y. Just because a claim is supported by a CA's opinion, this fact per se cannot absolve the assessee from penalty under section 271(1)(c). The assessee's claim was contrary to section 35DDA and such that no two opinions were possible thereon;

(ii) The assessee's claim, relying on Tapan Bhattacharya v. ITO, ITA No. 1024 to 1026/Kol./2010 dated 18-11-2010 if the section 148 reopening reasons do not refer to an issue and the assessee voluntarily surrenders it, section 271(1)(c) penalty is not leviable is not acceptable. The claim that the AM was a party to that judgement and so could not have taken a contrary view in the assessee's claim is also not acceptable. Under section 255(4), a Third Member has to merely expressly an opinion on the difference and he does not hear an appeal against the orders passed by the dissenting members. He cannot decide which dissenting member is right and which one is wrong. The practice usually followed in Third Member proceedings of advancing arguments in support of or against the views adopted by the dissenting Members, proceeds on the fallacious assumption that the job of the Third Member is to approve or disapprove the views of the dissenting embers. While it is very tempting to sit in judgment over the what one's colleagues decide, and take a magnified view of one's powers as a third member, yielding to such temptation, irrespective of how senior or how junior these colleagues could be to the Third Member, is not only wholly improper but also plainly contrary to the scheme of section 255(4). It is improper because all the Members in the Tribunal are at the same level of judicial hierarchy with the same judicial powers, and it is contrary to the scheme of section 255(4) because all that this section provides for is an additional judicial opinion so as to form majority and not an appeal against the orders passed by the Members in the original coram of the bench. (A.Y. 2003-04)

Darwabshaw B. Cursetjee Sons Ltd. v. ITO (2012) 137 ITD 331 / 147 TTJ 672 / 74 DTR 268 (TM)(Kol.)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Stamp valuation - Capital gains - Penalty not leviable for breach of section 50C, as per deeming provision of valuation of on the basis of stamp valuation for the purpose of capital gains [S. 50C]

The assessee sold land of which he was the owner for Rs. 36 lakhs and offered capital gains on that basis. The Assessing Officer reopened the assessment under section 147 on the ground that the assessee ought to have taken the consideration at the market value of the land as per section 50C. The assessee accepted and offered capital gains as per section 50C. The Assessing Officer levied penalty under section 271(1)(c) which was confirmed by the CIT(A) on the ground that the assessee's action of offering capital gains under section 50C was after the section 148 notice and not voluntary. On appeal by the assessee to the tribunal, Held allowing the appeal:

The Assessing Officer had not disputed the consideration received by the assessee & the addition had been made solely on the basis of the deeming provisions of section 50C. The assessee had furnished all the facts of the sale which had not been doubted by the Assessing Officer. The fact that the assessee agreed to the additions because of the deeming provisions of section 50C does not mean that he filed inaccurate particulars of his income. The assessee's acceptance of the addition on the basis of the valuation made by the stamp valuation authority is not conclusive proof that the sale consideration as per the sale agreement was incorrect and wrong and so section 271(1)(c) penalty cannot be levied [Renu Hingorani v. ACIT (ITA No. 2210/Mum/2010 (Mum.)(Trib.) followed] (A.Y. 2006-07)(ITA no 508 /Ahd/2010 dt 22-06-2012)

Chimanlal Manilal Patel v. ACIT (Ahd.)(Trib.) www.itatonline.org

S. 271(1)(c) : Penalty - Concealment - Search and seizure - Penalty leviable where assessee did not disclose the concealed income even during the course of search [S. 153A]

The provisions of section 153A clearly shows that rule of abatement applies to an assessment and reassessment which is pending on the date of initiation of the search. This means all returns filed earlier will not abate but only in case where assessments are pending would abate. The said principle is applicable to the instant case as certain bundles of bills were found which pertained to undisclosed sales which were not recorded in books of account and this fact was admitted during the search and, therefore, offence of concealment was complete and therefore penalty under section 271(1)(c) was leviable. (A.Y. 2002-03 to 2006-07)

Shreeji Traders v. Dy. CIT (2012) 136 ITD 249 / 149 TTJ 52 / 76 DTR 148 (Mum.)(Trib.)
Dy. CIT v. Shreeji Traders (2012) 136 ITD 249 / 149 TTJ 52 / 76 DTR 148 (Mum.)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Speculation loss - Penalty cannot be levied merely on disallowance of speculative loss

It was held that since all particulars were furnished by the assessee and Assessing Officer did not disturb any of computations made by the assessee, therefore there was no furnishing of any inaccurate particulars. Also mere disallowance of speculative loss by the Assessing Officer did not constitute concealment of income. Thus, penalty could not be levied under section 271(1)(c). (A.Y. 1992-93)

Hongkong & Shanghai Banking Corporation Ltd. v. Dy. DIT (2012) 136 ITD 357 / 16 DTR 275 (Mum.)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Disallowance of loss levy of penalty is not justified

During quantum proceedings assessee failed to explain certain discrepancies in respect of its claim for loss in share trading business. Assessing Officer disallowed the loss and imposed penalty. The Tribunal held that in the absence of the finding that the claim for loss was bogus or false, penalty cannot be imposed. ('B' Bench, ITA No. 5328/M/06, dated 25-10-1100)

Nath Holding & Invt. P. Ltd. v. Dy. CIT(2012) BCAJ Pg. 43, Vol. 44-A, Part 1, April, 2012 (Mum.)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Rejection of claim - Levy of penalty is held to be not justified

In the present case, the mere rejection of the claim of deduction of expenditure on account of non-commencement of business would not be sufficient to satisfy the requirement of levy of penalty under section 271(1)(c). There was no deliberate attempt on the part of the assessee to submit inaccurate particulars of income warrant penalty under section 271(1)(c) of the Act. (A.Y. 2006-07)

NTN Manufacturing India (P) Ltd. v. ACIT (2012) 51 SOT 66 (URO) / 140 TTJ 33 (UO)(Delhi)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Revised return - Survey - Penalty for concealment cannot be levied if revised ROI filed after survey but before issue of section 148 notice [S. 133A, 148]

It is the settled law that if a revised return offering additional income is filed after investigation has started but before the issue of the section 148 notice, section 271(1)(c) penalty is not leviable. In CIT v. Sureshchand Mittal (2001) 251 ITR 9 (SC) the Supreme Court held that even where the assessee surrendered additional income by way of a revised return after persistent queries by the Assessing Officer, once the revised ROI has been regularized by the revenue, the assessee's explanation that he had declared the additional income to buy peace had to be treated as bona fide and section 271(1)(c) penalty could not be levied. On facts, as the assessee filed a revised ROI after survey but before the issue of the section 148 notice, hence penalty was not leviable. (A.Y. 2005-06)(ITA nos 222&223 /Ind/2012 dt 18-07-2012)

Radheshyam Sarda v. ACIT (Indore)(Trib.) www.itatonline.org

S. 271(1)(c) : Penalty - Concealment - Advice of counsel - Bona-fide act on advice of counsel, no penalty could be levied as no concealment of income

Where the assessee had bona-fide acted on advice of his counsel in respect of claim of exemption under particular provisions of the Act, and which are at variance even under same chapter, where assessee so acted, the claim of the assessee could at the best be called a bona-fide mistake. Thus, penalty under section 271(1)(c) could not be levied. (A.Y. 2006-07)

Majorjit Singh v. ACIT (2012) 17 ITR 183 (Chd.)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Confirming addition in quantum appeal - Mere fact of making or confirming the addition in quantum cannot ipso facto lead to inference that there has been concealment of income or furnishing of inaccurate particulars of such income by assessee so as to levy penalty under section 271(l)(c)

Assessee entered into a licence agreement with NOPL in terms of which it was permitted to run a fast food restaurant in premises of NOPL for eleven months. Shareholding of assessee-company as well as NOPL comprised of certain members of 'N' family. Some dispute on distribution of properties, was going on amongst them. A settlement was arrived through which NOPL was allotted to 'R' who wanted assessee to vacate premises. In legal proceedings, city civil court directed assessee-company to deliver vacant possession of premises. Assessee filed an appeal before High Court against above order of city civil court and obtained an order of stay on operation of decree till disposal of appeal subject to condition that assessee would pay a sum of Rs. 10 lakhs towards arrears and continue to deposit a sum of Rs. 1.25 lakhs per month with effect from 1-8-1993. Thereupon, 'R' filed suit before the High Court praying for possession of premises and also certain amount as mesne profits for illegal occupation of premises by assessee-company. Subsequently, a consent was arrived at in terms of which assessee had to pay a Rs. 34.57 crores to NOPL. Since assessee had already paid a sum of Rs. 1.10 crores over a period to NOPL as per directive of High Court, assessee reduced this sum from total agreed amount of Rs. 34.57 crores and paid the remaining amount of Rs. 33.47 crores to NOPL. Assessee's claim for deduction in respect of said payment was rejected on ground that it was a capital expenditure. Further, Assessing Officer passed a penalty order under section 271(l)(c) for raising a false claim in respect of lump-sum payment of Rs. 34.57 crores. Mere fact of making or confirming the addition in quantum cannot ipso facto lead to inference that there has been concealment of income or furnishing of inaccurate particulars of such income by assessee so as to levy penalty under section 271(l)(c). Since it was apparent from records that prior to making payment in terms of consent decree assessee had made interim payments of similar nature as per order of High Court which had been allowed, claim raised by assessee in respect of lump-sum payment was bonafide. Since assessee had made a proper disclosure of facts material to claim in question, there was no concealment of particulars of income or furnishing of inaccurate particulars of such income by assessee so as to attract levy of penalty under section 271(l)(c). (A.Y. 2002-03)

Narangs International Hotels (P.) Ltd. v. Dy. CIT (2012) 137 ITD 53 (TM)(Mum.)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Death of the assessee - Revised return - Order passed on dead person without bringing on record of legal heir held to be bad in law. As the amount of gift was disclosed in revised return levy of penalty held to be not justified

During pendency of penalty proceedings assessee died and, thereupon Assessing Officer without issuing a fresh notice to legal heir of deceased-assessee passed a penalty order. The Tribunal held that the order so passed was not sustainable being violative of principles of natural justice. Assessee filed revised return wherein he disclosed a gift of Rs. one lakh received from one 'B'. Assessee's case was that though sum of Rs. 1 lakh was given by way of gift by 'B', when he was asked to give in writing for income tax purpose, he showed his inability to furnish details and hence assessee surrendered

amount in revised return. Assessing Officer took a view that assessee had filed revised return because Investigation wing had already started investigation in many cases in respect of assessee. However, Assessing Officer had not brought any material on record to indicate that revenue was aware of non-genuineness of gift received by assessee. Assessing Officer had not made any effort to prove either by obtaining statement from donor or otherwise, that gift was not genuine. The Tribunal held that it was not a case of furnishing inaccurate particulars of income and, therefore, no penalty could be levied. (A.Y. 2001-02)

Jai Narain Upadhyay v. ACIT (2012) 137 ITD 241 / 75 DTR 361 / 148 TTJ 529 (TM)(Luck.)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Book Profits - Penalty under section 271(l)(c) cannot be levied on additions made under normal provisions of Act when income in assessment has been finally computed on basis of book profit [S. 73, 115JB]

Assessee claimed short-term capital gain on sale of shares. However, Assessing Officer rejected said claim and treated gain as speculative business income under section 73. Assessee submitted that it was not engaged in share trading business and that it purchased those shares for investment purposes and, it was under bona fide belief that income from sale of share was taxable as capital gains. The said explanation was rejected by the Assessing Officer and penalty proceedings were initiated on ground that in quantum proceedings assessee had failed to substantiate its claim under head 'capital gains' instead of speculation income. Held that the assessment order is not a final word in penalty proceedings and howsoever good findings may be in assessment proceedings, they are not conclusive so far as penalty proceedings are concerned. Since assessee was carrying out business of infrastructure development and sale and purchase of shares was only ancillary, assessee could not be held to be guilty of furnishing inaccurate particulars of income and hence penalty was deleted. (A.Y. 2007-08)

BSEL Infrastructure Realty Ltd. v. ACIT (2012) 137 ITD 61 / 78 DTR 147 / 150 TTJ 159 (Mum.)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Addition on estimate basis - Additions on account of unaccounted sales on estimate basis and for disclosure of lower profit from sales made to sister concern without pointing any discrepancy in the accounts maintained by assessee cannot form the basis for concealment

On a reference to third member the third member held that the conduct of the assessee whether bonafide or mala fide has to be judged in the background of facts of each case and no penalty under section 271(1)(c) for concealment of income or filing of inaccurate particulars of income can be levied in the case of bonafide or genuine mistake or in case where there is a honest difference of opinion with regard to some issues between the department and the assessee resulting in addition made in the assessment of assessees. Merely because, there is a difference in the returned income and assessed income of the assessee, it does not follow that heavy onus is paled on the assessee to reason for such difference, therefore, additions on account of unaccounted sales on estimate basis and for disclosure of lower profit from sales made to sister concern without pointing any discrepancy in the accounts maintained by assessee cannot form the basis for concealment. Accordingly the onealment penalty was deleted. (A.Y. 1993-94)

Vikarm Plastics v. ITO (2012) 136 ITD 275 / 75 DTR 393 / 148 TTJ 657 (TM)(Ahd.)(Trib.)
Panorama Plastics v. ACIT (2012) 136 ITD 393 / 75 DTR 393 / 148 TTJ 657 (TM)(Ahd.)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Revised return - Issue of notice under section 143(2) - Merely filing of revised return after issue of notice under section 143(2) and showing capital gain in revised return does not tantamount to detection of concealment, penalty levied was deleted [S. 139(5), 143(2)]

The assessee filed the return of income, which was selected for scrutiny under section 143(2). The assessee sought adjournments. On the subsequent date the assessee filed the revised withdrawing the long term capital gains which was claimed as exempt in the original return, and also filed the detailed reply. Since the revised return was beyond the prescribed limit the Assessing Officer treated the said return as invalid. In response to penalty notice the assessee contended that the revised return was file voluntarily before detection hence penalty should not be levied. Assessing Officer levied the penalty. The Tribunal held that, merely because a notice under section 143(2) had already been issued and the assessee filed the revised return thereafter disclosing additional income towards capital gains which was not correctly shown in the original return does not tantamount to detection of concealment of income under section 271(1)(c) of the Act. Appeal of department was dismissed. (A.Y. 2006-07)
ACIT v. Ashok Raj Nath (2012) 19 ITR 70 (Delhi)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Deduction of donation - Loss return - Levy of penalty was held to be justified
The assessee has filed a loss return .In the statement of income it has claimed the deduction under section 80G in respect of donation. As the returned income was loss the assessee was not entitled to deduction. The Tribunal held that as the assessee had not proved that claim was made by mistake and there was no mala fide intention, levy of penalty was held to be justified. (A.Y. 2005-06)
Unison Hotels Ltd. v. Dy. CIT (2012) 138 ITD 39 / 147 TTJ 218 / 72 DTR 444 (Delhi)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Commission disallowance - Failure to deduct tax at source - Failure to file appeal and obtain relief - No penalty warranted [S. 40(a)(ia)]
The Assessing Officer disallowed commission paid to foreign travel agent by invoking the provisions of section 40(a)(ia). The assessee did not file an appeal. The Tribunal held that, merely failure of assessee to file appeal and to obtain legitimate relief cannot lead to inference of penalty. (A.Y. 2005-06)
Unison Hotels Ltd. v. Dy. CIT (2012) 138 ITD 39 / 147 TTJ 218 / 72 DTR 444 (Delhi)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Furnishing of inaccurate particulars - All particulars like freight receipts, income as per the provision of section 44B disclosed in ROI - No penalty to be levied where treaty benefits denied on the ground that effective place of management in Mauritius [S. 44B]
Where the assessee has disclosed all the freight receipts in respect of Indian operation in the return of income and has also shown the income as per the provision of section 44B and calculated tax payable accordingly and claimed benefit of treaty, there cannot be a case of furnishing of inaccurate particulars to invoke penalty under section 271(1)(c) merely because treaty benefits were denied on the ground that effective place of management in Mauritius was not proved by assessee. (A.Y. 2001-02)
Addl. CIT (IT) v. R Liners Ltd. (2012) 149 TTJ 1 / 75 DTR 457 (Mum.)(Trib.)
Dy. DIT (IT) v. James Mackintosh & Co. (P.) Ltd. (2012) 149 TTJ 1 / 75 DTR 457 (Mum.)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Bonafide mistake - Levy of penalty is not justified
Assessee could not be held to be liable for levy of penalty under section 271(1)(c) where the mistake committed by the assessee is a bona fide mistake. (A.Y. 2006-07)
ITO v. Gurmeet Kaur (Smt.) (2012) 149 TTJ 28 (UO)(Chd.)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Additional income declared in return under section 153A [S. 153A]

Where returned income disclosed in the return filed under section 153A is accepted by the Assessing Officer, there is no concealment and consequently penalty under section 271(1)(c) is not leviable. There was no provision relating to entries in expl. 5 prior to insertion of Expl. 5A in section 271(1) w.e.f. 1st June, 2007 and therefore, penalty under section 271(1)(c) cannot be imposed even by invoking expl. 5 is A.Y. 2004-05 in respect of the unaccounted cash found during the search on 22nd Nov., 2006 merely on the presumption that the assessee might have been in possession of such cash throughout the period covered by the search assessments. Hence, till insertion of Expln. 5A and section 271AAA by the Finance Act, 2007, the scheme of assessment gave immunity to the assessee in respect of undisclosed income based on the entries in the seized material. (A.Y. 2004-05)

Prem Arora v. Dy. CIT (2013) 56 SOT 14 (URO) / (2012) 78 DTR 91 / 149 TTJ 590 (URO)(Delhi)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Furnishing of inaccurate particulars - Disclosure of the sum in the year of receipt - No concealment as all facts disclosed

The assessee was engaged in the business of copyrights of motion pictures. The assessee received consideration on transfer of its ownership rights of the movie in the previous year relevant to the assessment but agreement was signed in next year. Addition was made on this account and penalty was initiated. It was held that the factual matrix of the case no where proves that the assessee had either concealed the income or furnished any inaccurate particulars. The fact that it had mentioned the consideration in the year of receipt itself proved its bona fide. It was further held that every instance of addition does not ispo facto led to a conclusion that the assessee was guilty of concealment as penalty proceedings were altogether different in nature. (A.Y. 2007-08)

ITO v. Jain Associates (2012) 19 ITR 824 (Mum.)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Capital gain on sale of shares - No penalty in case of bonafide belief [S. 10(23G)]

Assessee filed its return of income electronically. Assessing Officer made certain inquiry and found that assessee did not offer capital gain on sale of shares of Mumbai SEZ to tax. He, accordingly, brought to tax capital gain and levied penalty upon assessee for concealment of income. It was held that where assessee was under a bona fide belief that capital gains arising on sale of SEZ shares were exempt from taxation and application under section 10(23G) to that effect was pending with CBDT, levy of penalty for concealment of income was not justified. (A.Y. 2006-07)

Skil Infrastructure Ltd. v. ACIT (2012) 139 ITD 25 (Mum.)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Best judgment - No evidence of concealment of income penalty cannot be imposed

For the A.Y. 2005-06 the assessee filed a return declaring an income of Rs. 1,57,120/- and agricultural income of Rs. 80,000. The case was selected for scrutiny and notice was issued under section 143(2) of the Act. The assessee did not respond to successive notices. The Assessing Officer therefore passed an order under section 144 estimating the net income. He also levied penalty but the penalty was cancelled by the Commissioner(Appeals). On appeal the Tribunal held that the Assessing Officer had not established any mala fide intention on the part of the assessee in filing the return. The Assessing Officer completed the assessment under section 144 of the Act and made the addition in dispute on estimation basis without bringing any evidence establishing that the assessee had concealed any income or furnished inaccurate particulars of income. Penalty could not be imposed under section 271(1)(c). (A.Y. 2005-06)

ITO v. Sukhamrit Singh (2012) 20 ITR 636 (Amritsar)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Survey - Revised return - Surrendering additional income before examination under section 131 and notice under section 131 not indicating concealment of income, penalty cannot be levied [S. 131, 133A]

For the A.Y. 2008-09, the assessee filed a revised return on November 24, 2008 declaring additional income. Notice under section 131 of the Income-tax Act, 1961 was issued by the Deputy Director on November 20, 2008 in which the assessee was asked to appear personally before him. The Assessing Officer made an addition to the assessee's income and also levied penalty. The penalty was confirmed by the Commissioner(Appeals). On appeal the Tribunal held that the revised return was filed by the assessee before the recording of the statement under section 131. In the notice under section 131 there was no indication regarding any adverse material having been brought on record by the Department regarding any concealment of income by the assessee. The revised return was filed in time and was valid. There was no concealment of income and penalty could not be levied under section 271(1)(c). (A.Y. 2008-09)

Jaysukh M. Parmar v. ACIT (2012) 20 ITR 687 (Ahd.)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Failure to produce donor, levy of penalty is not justified

Where assessee had duly disclosed gifts in return, but failed to produce alleged donor, assessee's conduct was not contumacious so as to warrant levy of penalty under section 271(1)(c). (A.Y. 1993-94 & 1994-95)

Miter Sain (HUF) v. ITO (2012) 54 SOT 202 (URO)(Delhi)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Long term capital gain - Misunderstanding of provisions section 54 or 54F levy of penalty was not justified [S. 54, 54F]

Assessee earned long term capital gain on sale of a property. He invested a part of sale consideration in a residential house and declared balance for tax. Assessee claimed deduction under section 54F. Assessing Officer observed that in order to claim deduction under section 54F assessee should have invested entire sale consideration. According to assessee, due to clerical mistake of his counsel, exemption was wrongly claimed following method of section 54. Assessee filed revised return offering excess deduction claimed to tax. Assessing Officer, however, passed a penalty order .Since assessee had brought on record complete facts regarding calculation of deduction while misunderstanding provisions of sections 54 and 54F, explanation offered by him was to be considered as bona fide and, consequently, impugned penalty order was to be set aside. (A.Y. 2007-08)

Sarv Prakash Kapoor v. Dy. CIT (2012) 54 SOT 185 (URO)(Agra)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Non-resident - Revised return - Ignorance of law penalty levied deleted [S. 148]

Assessee, a non-resident, was an employee of 'T' International S.A. He deputed to India for working with 'T' India Ltd. During course of expatriate India deputation, assessee received salary from 'T' International S.A. also which he did not disclose in original return of income. In response to notice issued under section 148, assessee filed a revised return wherein amount received from 'T' International S.A. was also disclosed. Assessing Officer having completed reassessment, levied penalty under section 271(1)(c). It was noticed that as regards salary income from 'T' International S.A., assessee was entitled to net of taxes salary and Indian taxes were to be borne by said foreign company. It was also apparent that 'T' International S.A. computed salary income of expatriate taxable in India for each of A.Y. and taxes thereon were deposited along with interest thereon. in aforesaid circumstances, mistake committed by assessee in not disclosing salary income received from 'T' International S.A. could be regarded as inadvertent due to ignorance of Indian income-tax law and, thus, having regard to Explanation 1 to section 271(1)(c), impugned penalty order was to be set aside. (A.Ys 2000-01 to 2005-06)

Emilio Ruiz Berdejo v. Dy. CIT (2012) 54 SOT 188 (URO)(Pune)(Trib.)

S. 271(1)(c) : Penalty - Concealment of income - Depreciation on membership fee paid to stock exchange - Levy of penalty is not justified

Assessee claimed depreciation on membership fee paid to stock exchange. Assessing Officer rejected assessee's claim. He also passed a penalty order under section 271(1)(c) holding that assessee had furnished inaccurate particulars of income. In view of fact that at time of filing return, issue as to whether depreciation was allowable on cost of membership card of stock exchange was a debatable issue and a mere rejection of assessee's claim by relying on different interpretations would not amount to concealment of particulars of income or furnishing inaccurate particulars thereof so as to levy penalty under section 271(1)(c). (A.Y. 2007-08)

Dy. CIT v. Integrated Master Securities (P.) Ltd. (2012) 54 SOT 191 (URO)(Delhi)(Trib.)

S. 271(1)(c) : Penalty - Concealment - Firm - Partners - Surrender of income - No cogent explanation was offered the penalty was confirmed

During assessment proceedings, Assessing Officer noted that assessee had introduced certain amount as capital in name of two partners. Since assessee-firm failed to explain source of said amount, Assessing Officer added same to assessee's taxable income. He also passed a penalty order under section 271(1)(c). Since assessee did not offer any cogent explanation in respect of amount credited in its books of account which was later surrendered as income of year under consideration, it was to be concluded that assessee failed to discharge burden lay upon them by Explanation 1 to section 271(1)(c) and consequently, impugned penalty order was to be confirmed. (A.Y. 2005-06)

Bright India Body Builders v. ITO (2012) 54 SOT 182 (URO) / (2013) 152 TTJ 33 / 82 DTR 186 (Delhi)(Trib.)

S. 271AA : Penalty - Failure to keep and maintain books of accounts - Documents - International transaction - Transfer pricing - Forming general opinion penalty cannot be levied [S. 92D, Rule 10]

The Tribunal held that when there is any failure on part of assessee in complying with requirements of Rule 10D, the TPO and Assessing Officer are bound to point it out specifically before levying of penalty, by forming a general opinion that the assessee has not maintained documents as required under rule 10 penalty cannot be levied. (A.Y. 2003-04)

ITO v. PPN Power Generating Co. (P) Ltd. (2012) 50 SOT 26 (Chennai)(Trib.)

S. 271AA : Penalty - Failure to keep and maintain books of accounts - Documents - International transaction - Transfer pricing - Different method followed by assessee and TPO, result being same penalty cannot be levied [S. 92D, Rule 10D]

The assessee followed the cost plus method. The TPO was of the opinion that the assessee had not gathered and maintained sufficient information as required under Rule 6D. The TPO applied the net margin method. However he concluded that no adjustment is required. He directed the Assessing officer to initiate penalty proceedings under section 271AA. The assessing Officer levied penalty though no adjustments were made. In appeal Commissioner(Appeals) deleted the penalty. In an appeal by revenue, the Tribunal confirmed the order of Commissioner(Appeals) and held that even if there was any failure on assessee's part to maintain proper records, it was only a benign one which had no effect whatsoever on value of international transactions entered in to by assessee. (A.Y. 2002-03, 2003-04)

ACIT v. Pentasoft Technologies Ltd. (2012) 134 ITD 567 / 145 TTJ 99 / 68 DTR 154 (Chennai)(Trib.)

S. 271AAA : Penalty - Search initiated on or after 1st June, 2007 - Immunity - Limitation - Immunity cannot be denied on the ground that entire tax along with interest was not paid before filing of return or before concluding the assessment proceedings

During the course of search action under section 132, the assessee declared Rs. 50,00,000/- as undisclosed income. The Assessing Officer initiated the penalty proceedings on the ground that the assessee has not paid full taxes and interest on disclosure made under section 132(4). The assessee contended that due to in advertent error, the assessee had not computed the interest under section 234C, as a result self assessment tax of Rs. 46,132/- was remained to be unpaid and this shortfall was paid within the time mentioned in notice of demand issued under section 156. The Assessing Officer rejected the explanation and levied the penalty. On appeal the Commissioner(Appeals) deleted the penalty. On appeal by revenue the Tribunal held that payment of taxes along with the interest by the assessee is one of the conditions precedent for availing the immunity from levy of penalty under section 271AAA(2), there is no time limit set out for payment of tax and interest. The Tribunal also held that section 271AAA does not require any subjective satisfaction of the Assessing Officer to be arrived at during the assessment proceedings, therefore outer limit of payment before the conclusion of assessment proceedings will not come into play. Accordingly the order of Commissioner(Appeals) confirmed. (A.Y 2008-09)

Dy. CIT v. Pioneer Marbles & Interiors Pvt. Ltd. (2012) 144 TTJ 663 / 50 SOT 571 / 14 ITR 608 / 68 DTR 1 (Kol.)(Trib.)

S. 271AAA : Penalty - Search and seizure - Limitation for payment of tax - As there is no outer time limit is fixed by statute for payment of tax along with interest, penalty cannot be levied on the ground that tax was not paid before filing of return

The provisions of section 271AAA of the Act do not set a time limit for payment of taxes along with interest. Thus where entire tax and interest was duly paid by assessee within time limit for payment of notice of demand under section 156 and before the penalty proceedings were concluded, the assessee could not be denied immunity under section 271AAA(2) only on the ground that the said amounts were not paid before filing of income tax return or before concluding the assessment. (A.Y. 2008-09)

Dy. CIT v. Pioneer Marbles & Interiors (P.) Ltd. (2012) 144 TTJ 663 / 50 SOT 571 / 14 ITR 608 / 68 DTR 1 (Kol.)(Trib.)

S. 271AAA : Penalty - Search initiated on or after 1st June, 2007 - Conditions precedent

The Assessees have disclosed concealed income while giving statements under section 132 during the course of search and paid the tax thereon and showed the said undisclosed income in the return filed under the head “Income from business” and Department has accepted these returns and accordingly passed the assessment orders. It is not the case of the Departmental authorities that the assessee has not satisfied the manner in which the income is derived and the assessee has not paid the tax with interest on the undisclosed income. Undisputedly the assessees have shown the undisclosed income under the head ‘Income from business’ in the returns filed by them and that was accepted by the Department by passing the assessment orders accordingly.

The impugned orders having been made contrary to the provisions contained in section 271AAA(2), they are not sustainable for legal scrutiny. Hence, the impugned orders of the authorities below are set aside and the penalty levied under section 271SAAA in the cases of the assessees is cancelled. (A.Y. 2007-08 & 2008-09)

Ashok Kumar Sharma v. Dy. CIT (2012) 77 DTR 241 / 149 TTJ 33 (UO)(Cuttack)(Trib.)
Pramod Kumar Jain v. Dy. CIT (2012) 77 DTR 244 / 149 TTJ 33 (UO)(Cuttack)(Trib.)

S. 271B : Penalty - Failure to get accounts audited - Exempt income - Penalty for failure to get the accounts was not imposable [S. 10(20), 44AB]

Assessee filed its return along with which it provided not that it had property income which was exempt under section 10(20). Assessing Officer found that its gross receipts were more than prescribed limit under section 44AB for getting accounts audited and accordingly, he imposed penalty under section 271B. Since there was no income which would fall under heading 'Profits and gains of business or profession' and income of assessee was exempt under section 10(20), section 44AB was not applicable and consequently, penalty under section 271B was not imposable. (A.Y. 1996-97)
CIT v. Market Committee, Sirsa (2012) 210 Taxman 20 / 80 DTR 213 (P&H)(HC)

S. 271B : Penalty - Failure to get accounts audited - Conduct of assessee being contumacious levy of penalty was held to be justified
Assessing Officer initiated penalty proceedings under section 271B against assessee for delay in filing auditor's report. Assessee explained that auditor's report had been prepared in time and it was because of misconduct on part of its accountant, that same was not filed in time. Assessing Officer did not accept assessee's explanation and imposed penalty under section 271B. When assessee had not produced any evidence whatsoever as proof of its averments, same could not be accepted on face value. Assessee should have periodically or at least within a reasonable time, after date fixed for filing auditor's report, enquired with accountant as to whether auditor's report had been filed and assessee having not done so its conduct was clearly contumacious and therefore, penalty was rightly levied. (A.Y. 2000-01)
River View Bar & Silver Restaurant v. CIT (2012) 211 Taxman 187 (Mag.)(Ker.)(HC)

S. 271B : Penalty - Failure to get accounts audited - Delay in filing audit report - Mere availability of the audit report before Assessing Authority even before completing assessment, not a reason to substantiate the delay in filing levy of penalty held to be justified
The assessee in the instant case failed to furnish audit report along with the necessary enclosures as per provisions of section 44AB of the Act. The Assessing Officer accordingly levied penalty as per section 271B of the Act. On appeal to Tribunal it was held that mere availability of the audit report and other enclosures before Assessing Authority even before completing assessment by itself is not a reason to substantiate the delay in filing audit report and enclosures. Thus, penalty under section 271B must be levied. (A.Y. 2006-07)
Paragon Industries v. ITO (2012) 50 SOT 558 (Chennai)(Trib.)

S. 271D : Penalty - Accept loans or deposits - Matter remitted to Tribunal to decide a fresh
The Assessing Officer levied the penalty under section 271D on account of cash received from two individuals. In appeal, Commissioner(Appeals) confirmed the levy of penalty. The Tribunal deleted the penalty without examining issue on merits. Revenue filed an appeal before the High Court, High Court setaside the matter to the Tribunal to decide the appeal afresh after recording factual finding and thereafter apply the decision. (A.Y. 2006-07)
CIT v. Numero Uno Financial Services P. Ltd. (2012) 345 ITR 84 (Delhi)(HC)

S. 271D : Penalty - Accepts any loan or deposit - Reasonable cause - Deposits from rural area where no banking facility, levy of penalty was not justified [S. 269SS, 273B]
Assessee, a residuary non-banking finance company, had engaged services of an agent 'S' to mobilize deposits. Assessing Officer noticed that assessee had collected huge amount of deposits in cash in violation of section 269SS. He imposed penalty under section 271D upon assessee. However, it was discerned from records that depositors came predominantly from rural areas where there were either no proper banking facilities or such facilities were inadequate, that deposits were basically saving schemes involving small amounts of daily or weekly savings, that some banks were reluctant to allow agents of assessee to open bank account for various reasons and that violation of section 269SS

ranged from just 1.1 per cent to 6.14 per cent. In such a situation penalty under section 271D was not to be imposed. *(*A.Y. 1999-2000 to 2001-02)

CIT v. Sahara India Financial Corpn. Ltd. (2012) 211 Taxman 192 (Mag.) / (2013) 83 DTR 162 (Delhi)(HC)

S. 271D : Penalty - Accepts any loan or deposit - Expression 'any other person' does not exclude directors or members of company which has received or accepted loans or deposits - Levy of penalty was held to be justified [S. 269SS, 273B]

Assessee-company received certain sum, from its directors, in cash/bearer cheques in excess of limits prescribed under section 269SS. Assessing Officer was of view that loans had been received and accepted by assessee in a manner prohibited by section 269SS. He, accordingly, initiated penalty proceedings under section 271D. Initially assessee took plea that cash accepted were share application money, however, later on it took plea that it had bona fide belief that loans accepted by it from its directors/shareholders were not covered by the provisions of section 269SS. Story of such bona fide belief was a afterthought and since it was not established that there were bona fide reasons for not accepting said amounts through account payee cheques or account payee bank drafts, penalty was to be upheld. Expression 'any other person' does not exclude directors or members of company which has received or accepted loans or deposits .Levy of penalty was held to be justified. Appeal of revenue was allowed. (A.Y. 2001-02)

CIT v. Samora Hotels (P.) Ltd. (2012) 211 Taxman 189 / 70 DTR 455 (Mag.)(Delhi)(HC)

S. 271FA : Penalty for failure to furnish annual information - Appeal - Commissioner(Appeals) - Penalty for failure to furnish annual information is appealable before Commissioner(Appeals) and Tribunal [S. 246A, 253(1)(c), 271]

Section 246A(1)(q) provides for appeals before the CIT(A) against an order of penalty passed under Chapter XXI. Section 271FA admittedly falls within Chapter XXI. Therefore, appeal against an order passed by Director of IT, an officer of the rank of CIT under section 271FA is maintainable before CIT(A). Merely because orders under section 271 and 272A passed by an officer of the rank of CIT are appealable before the Tribunal under section 253, it cannot be held that an order under section 271FA passed by an officer of the rank of CIT should also be appealable before the Tribunal. Though orders of penalty under section 271 and 272A fall under Chapter XXI, appeals there from stand excluded before the CIT(A) under the general provisions of section 246A(1)(q) by virtue of the specific provision under section 253(1)(c). Consequently, an order under section 271FA is appealable under section 246A(1)(q).

DIT v. Ravi Vijay & Anr. (2012) 252 CTR 228 / 75 DTR 202 / 209 Taxman 498 (Raj.)(HC)
DIT v. Balu Ram & Anr. (2012) 252 CTR 228 / 75 DTR 202 / 209 Taxman 498 (Raj.)(HC)

S. 271FA : Penalty - Failure to file annual information return regarding financial transactions - No satisfactory explanation for late filing of annual return it was held that order levying penalty justified [Constitution of India – Art. 227]

The petitioner filed the annual information return with a delay of 202 days. In the absence of any satisfactory explanation for late filing of the annual information return, the authority imposed a penalty of Rs. 20,200/- at the rate of Rs. 100/- per day during which the default continued. On a writ petition:

Held, dismissing the petition, that there was no illegality or perversity in the order and it was just and in accordance with the provisions of section 271FA of the Income-tax Act, 1961. No fundamental right or personal right of the petitioner was infringed. Otherwise too, the petitioner had an efficacious alternative legal remedy to challenge the order, but the petitioner did not challenge the order. The petitioner could not be permitted to invoke the extraordinary jurisdiction of the court under Art. 227 of the Constitution.

State of Rajasthan v. Dy. CIT (CIB) (2012) 349 ITR 536 / (2013) 214 Taxman 142(Mag.) (Raj.)(HC)

S. 272A(2)(f) : Penalty - Form No. 15H - Proviso - Prior to 1st June, 1992 no penalty can be levied for failure to file form No. 15H, Proviso being remedial operation will have retrospective operation and penalty could not exceed the tax deductible [S. 197A.form no 15H]

The assessee was required to obtain and file the declarations in form no 15H, which were to be filed with Commissioner under section 197A(2) of the Act.

In response to show cause notice the assessee pleaded that he was under the bonafide belief that till 1st June, 1992 the Income-tax Act, 1961 did not require form No. 15H of the Act to be filed and in any case there was no loss to the revenue.The Commissioner levied the penalty. In appeal the Tribunal held that for A.Y. 1991-92 and 1992-93 no penalty can be levied under section 272A(2)(f) till 1st June 1992 because there was no statutory obligation to file the prescribed form under section 197A. For the A.Y. 1994-95 the penalty should be calculated in accordance with the proviso to section 272A of the Act where in it is stipulated that the penalty levied should not exceed the tax deductible as the said proviso was held to be retrospective in operation. On appeal by revenue the High Court also confirmed the order of Tribunal and dismissed the appeal. (A.Y. 1991-92, 1992-93, 1994-95)

CIT v. Krishna Cold Storage (2012) 69 DTR 345 / 207 Taxman 1 / 250 CTR 134 (Guj.)(HC)

S. 272B : Penalty - Failure to comply with provisions of section 139 - Permanent account number - Non production of relevant documents at the time of survey [S. 139]

The Assessing Officer levied the penalty for non production of relevant documents at the time of survey. In an appeal, Tribunal accepted the explanation of the assessee and the relevant documents could not be produced at the time of survey of its premises on account of shifting of its branch shortly before the survey and that the same were furnished afterwards within a period of two weeks. The High Court held that there is no error in the reasoning of the Tribunal and therefore, the impugned order calls for no interference. Appeal of revenue was dismissed.

ITO v. Adinath Co-op. Bank Ltd. (2012) 252 CTR 222 / 208 Taxman 430 (Guj.)(HC)

S. 272B : Penalty - Permanent account number - Obligation to quote permanent account number is on deductee and not on deductor hence penalty imposed was cancelled [S. 139A, 273B]

The assessee quoted invalid permanent account numbers for 196 deductees. The error was due to wrong quoting of permanent account numbers by the deductees to the assessee. The assessee rectified the mistake by furnishing the correct permanent account numbers as soon as it came to its notice. The revised permanent account numbers and the revised statement were filed. The Income-tax officer levied the penalty of Rs. 19,60,000/- at Rs. 10,000/- per default under section 272B of the Income-tax Act, 1961. The Commissioner(Appeals) deleted the penalty on the ground that there was sufficient compliance with the provisions of section 139A. The Tribunal came to the conclusion that there was sufficient cause on the part of the assessee and as such no penalty was leviable. On appeal by revenue, dismissing the appeal, the Court held that there was nothing to show that the findings recorded by the Commissioner(Appeals) and the Tribunal were erroneous in any manner. (A.Y. 2009-10)

CIT(TDS) v. Superintendent of Police (2012) 349 ITR 550 / (2013) 214 Taxman 101 (Mag.) (P&H)(HC)

S. 273A : Penalty - Commissioner - Power to reduce or waiver - Common order different A.Y. waiver can be passed by the Commissioner

According to section 273A(3), an assessee can get relief only once, whether application relates to one or more A.Y. However, where no order of relief to reduce or waive penalty has yet been passed by

Commissioner and merely an application is made before him for waiver of interest and penalty for different assessment years, assessee is entitled to claim benefit of waiver under section 273A for all A.Y. by having his application considered by Commissioner by a common order. (A.Y. 1987-88)
Mohinder Singh v. CIT (2012) 211 Taxman 196 (Mag.) / (2013) 353 ITR 278 (P&H)(HC)

S. 276B : Offences and prosecutions - Failure to pay to the credit tax deducted at source - Directors - Liability of company - Company as juristic company is liable to be prosecuted, though the directors of company was acquitted on technical grounds [S. 2(35), 278B]
The Assessing Officer launched the prosecution to the Directors of assessee-company as "principal Officers" for failure to deduct and deposit the tax at source from the interest paid to different companies. After the trail the respondents had been convicted under section 276B. One of the director has expired during the trail, hence proceedings against him, stood abated. Another director was acquitted on the technical ground that non-compliance of section 2(35) of the Act. As no notice was issued to him as principal officer the proceedings held to be bad in law. The Addl. Sessions Judge held that since the notices to individual directors has held to be defective the company cannot be convicted as the company being legal entity managed by the its officers. On appeal by revenue the Court, set aside the order and held that a company can be prosecuted for the offence punishable under section 276B notwithstanding the fact that its director had been acquitted for non compliance of notice under section 2(35). The Court held that juristic person cannot be order to be imprisonment however other consequences would ensure, i.e. payment of fine etc. Accordingly the order was set aside and order of conviction and sentence passed by the ACMM-02 (North) Delhi was restored.
ITO v. Delhi Iron Works (P) Ltd. (2012) 67 DTR 380 (Delhi)(HC)

S. 276C : Offences and prosecutions - Willful attempt to evade tax - False verification - Penalty set aside by Tribunal prosecution does not survive [S. 271(1)(c), 277, 278]
The Court held that when the concealment penalty is set aside by the Tribunal prosecution does not survive.
ITO v. Nandlal and Co. (2012) 341 ITR 646 / 68 DTR 247 (Bom.)(HC)
ITO v. Veer Radios (2012) 341 ITR 646 (Bom.)(HC)
ITO v. Vishram (2012) 341 ITR 646 (Bom.)(HC)

S. 276C : Offences and prosecutions - Wilful attempt to evade tax, etc. - Finding of lower Courts that act of assessee was only a preparation was apparently ridiculous. Therefore, orders of lower Courts were liable to be set aside and matter required to be remanded back to Court of competent jurisdiction. Matter remanded. [Criminal Procedure, 1973, S. 227, 228, 397, 482]
Authorised Officer, on basis of some complaints by some approved trusts/institutions that some persons were collecting donations in their names without authority and worked scrupulously aiding donors in siphoning off donated money back to them in dubious ways after retaining a part of alleged donations as commission, conducted a search under section 132 upon assessee-company on 13-9-1983 and noticed that during previous year relevant to A.Y. 1984-85, assessee issued cheques in sums of Rs. 15 lakhs and Rs. 10 lakhs in favour of two approved trusts/institutions and subsequently got cheques encashed through bogus accounts. Further for A.Y. 1984-85, assessee filed return of income on 2-6-1984. Assessee computed profit without taking into account aforesaid amount of donations of Rs. 25 lakhs and it was shown in balance sheet as claims recoverable. Further assessee did not claim rebate in respect of said donations .Commissioner filed a complaint under section 276C against assessee. Both lower Courts discharged assessee on plea that act of assessee at most could be termed as preparation and not an attempt to commit offence. Since clauses (i) and (iv) of Explanation to section 276C were sufficient for continuation of prosecution against assessee, finding of lower Courts that act of assessee was only a preparation was apparently ridiculous. Therefore, orders of lower

Courts were liable to be set aside and matter required to be remanded back to Court of competent jurisdiction. Matter remanded. (A.Y. 1984-85)

Dy. CIT v. General Sales (P.) Ltd. (2012) 211 Taxman 199 (Mag.) / (2013) 351 ITR 410 (Delhi)(HC)

S. 279 : Offences and prosecutions - Sanction - Chief Commissioner - Compounding of offence - Deduction tat source - Commissioner was justified rejecting the Compounding application of the petitioner [S. 276B]

The Court held that where three complaints had already been filed against petitioner for offence under section 276B and in two of those, petitioner stood convicted by Court, competent authority was not bound to effect compounding in violation of mandatory prohibitions prescribed, therefore, offence could not be said to be compoundable at instant stage. The Court up held the rejection order of Commissioner for not compounding the offences. Writ petition of assessee was dismissed. (A.Y. 1982 83 to 1984-85)

Anil Batra v. CCIT (2012) 211 Taxman 203 (Mag.) / (2011) 337 ITR 251 (Delhi)(HC)

S. 279 : Offences and prosecutions - Sanction - Chief Commissioner / Commissioner Compounding - Chief - Court will not compel the Commissioner to compound the offence or interfere unless there is factual or legal malafide

Power of compounding is discretionary power of a statutory authority which can be interfered with only on ground of factual or legal mala fides or perversity, where petitioner was convicted, power can be exercised to compound offence, but this by itself, cannot be a ground for issue of mandamus to compound offence. Writ petition was dismissed. (A.Y. 1983-84)

Punjab Rice Mills v. CBDT (2012) 211 Taxman 203 (Mag.) / (2011) 337 ITR 251 (P&H)(HC)

S. 281 : Certain transfers to be void - Priority of dues to Government - Secured creditor - Income-tax department by way of attachment of assets cannot claim for priority over secured creditor for realization of Income-tax due [S. 13, 35, Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (54 of 2002)]

Property of borrower Company mortgaged to secured creditor (Bank). Charge created without notice to Bank of pending income-tax recovery proceedings against company. The Income tax department informed the petitioner stating that substantial tax due for the A.Y. 1993-94 to 1996-97. This fact was informed the official liquidator and outstanding due and property has been attached by the Income tax department, therefore the claim of Income tax department on the assets of the assessee company should be exhausted before the sale of assets of the company. The Court held that transfer or charge would not be void. Income-tax department by way of attachment, of assets covered by section 13(2) cannot claim for priority over secured creditor for realization of Income-tax dues. It will be open for the secured creditor for realization of income tax dues. It will be open for secured creditor to exercise his right under SARFAESI Act and Rules made there under and Income-tax department cannot in any manner hamper or restrain secured creditor in proceedings further under SARFAESI Act. Accordingly the attachment of property by Income-tax department was held to be illegal. The petition was allowed.

Asset Reconstruction Co. (India) Ltd. v. CIT AIR 2012 (NOC) 196 (Guj.)(HC)

S. 281 : Certain transfers to be void - Recovery of tax - Pendency of income tax proceedings - Transfer can be held void only if transferee had notice of pendency of income tax proceedings

The assessee took loans from a financial institution and created a charge on the property. The Financial institutions as a secured creditor took physical and actual procession of the secured assets under section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. It issued public notice of sale of assets. The Writ petition was filed by the

Income-tax department and Custom department stating that the assessee being defaulter had not paid huge outstanding income tax demand with interest and penalty, the secured assets already being attached by department, therefore such property of assessee could not have been attached nor possession of the property have been taken by the financial institution to be secured creditor, hence in view of section 281(1) the transfer was void. The Custom department also alleged that the assessee had admitted its huge liability. The Court dismissed the petition stating that the Tax Recovery Officer had not served any notice of pendency of any income tax proceedings on the financial institutions on or before execution of the equitable mortgage by the assessee in favour of financial institutions. Under section 142 of the Customs Act, 1962, no charge was created in favour of the Customs Department, much less a first charge or priority of claim over the secured creditors. The Court held that the Financial Insitutition was entitled to proration and bonafide transfer of the property having made for valuable consideration from the assessee without serving the notice under clause (i) of the proviso to sub section (1) of section 281 of the Act, though the transfer was hit by the main provision of the Act. Accordingly the writ petition of revenue was dismissed. (A.Y. 1996-97 to 2001-02)

Tax Recovery Officer v. Industrial Finance Corporation of India and another (2012) 346 ITR 11 (Guj.)(HC)

S. 281B : Provisional Attachment - Recovery - Remain in operation till assessment order is passed and demand is raised [S. 220(1)]

Provisional assessment order passed under section 281B of the Act would remain in operation only up till the assessment order is passed and demand is actually raised. (A.Y. 2008-09)

Motorola Solutions India (P) Ltd. v. CIT (2013) 212 Taxman 35 / (2012) 80 DTR 129 / 254 CTR 569 (P&H)(HC)

S. 282 : Service of notice- Search and seizure - Block assessment - Service of notice is held valid - Block assessment - Validity [S. 132, 143(2), 158BC]

Notice dated 17th October, 1997 was served by hand and has been received and bears signature / initials but the name of the recipient is not stated / mentioned. By notice under section 143(2) dated 24th October, 1997, the Assessing Officer had required the assessee to furnish details as per questionnaire attached. The assessee by letter dated 17th November, 1997 filed various details. There was no allegation that the appellant was not served with the notice under section 158B dated 17th October 1997. The Court held that section 282 provides that notice may be served on a person either by post or as if summons were issued by a Court under the CPC Order V of the CPC prescribes the mode, procedure and the manner of service of notices. The object and purpose of service of notice / summons is to inform and initiate the addressee about the proceedings and the date of hearing. If the notice is served or received by the party concerned and this is established, then the manner and mode of service is not relevant. On the facts it was established that notice under section 158BC was served on a person who had represented the assessee and only on that basis reply to notice under section 143(2) was filed, assessee cannot claim non-service of notice under section 158BC and cannot challenge the assessment as invalid.

Venad Properties (P) Ltd. v. CIT (2012) 340 ITR 463 / 247 CTR 527 / 65 DTR 258 / (2013) 212 Taxman 20 (Mag.)(Delhi)(HC)

S. 282 : Service of notice - Speed Post is included in generic word 'Post' or 'Registered Post' - When notice sent by "Speed-post" does not return as undelivered, finding that it is deemed to have been delivered to assessee presumption is justified [S. 143(2),292BB,General Clauses Act, 1897, S. 27]

For the relevant A.Y., assessee was issued notice under section 143(2) on 24/25-10-2007 by speed post but nobody appeared for compliance. Thereafter, in response to notice issued on 8-8-2008 under section 142(1), one person without noting attendance appeared and filed photocopy of returns,

computation of Income, profit and loss account and Balance Sheet but on 13-8-2008, the assessee filed reply for dropping of case since notice under section 143(2) was not served within statutory period. The Assessing Officer, however, held that notice was duly served and passed the assessment order on 17-12-2008 and also ordered for initiation of penalty proceedings under sections 271(1)(b) and 271(1)(c). Commissioner(Appeals) allowed the appeal of assessee filed against the order dated 17-12-2008 only on the ground that notice under section 143(2) was not served within the stipulated period. He, however, in view of favourable decision on question of law, did not choose to decide other issues with respect to the addition made by the Assessing Officer. Thereafter, revenue preferred appeal only on one ground obviously, for the reason that the Commissioner(Appeals) allowed the appeal of the assessee only on one issue relating to the mandatory service of notice under section 143(2) The Tribunal, by a detailed order, held that notice under section 143(2) was duly served. The assessee preferred an appeal before the High Court held that the notice should be issued either by post or it may be served as is served under the provisions of Code of Civil Procedure. In this case, a notice under section 143(2) was alleged to has been sent by post, which includes sending notice by Ordinary Post, Post under Certificate, Registered Post, Registered A/D or by Speed Post and this fact is not in dispute that notice was sent by 'Speed Post' and, therefore, notice was in accordance with law under section 282(1). Appeal of assessee was dismissed. (A.Y. 2007-08)

Milan Poddar v. CIT (2012) 211 Taxman 403/(2013) 90 DTR 80/ 260 CTR 170 (Jharkhand)(HC)

S. 288 : Appearance by Authorised representative - Appellate Tribunal - Members of Ex-ITAT Members - As interim measure - Ex-ITAT Members permitted to practice before Benches where they were not posted - Advocates Act, 1961 - Section 30 [S. 254]

Rule 13E of the Income-tax Appellate Tribunal Members (Recruitment and Conditions of Service) Rules, 1963 notified on June 3, 2009 imposes a ban on the practice by retired members before the Income-tax Appellate Tribunal. The Petitioner, a retired member of the Tribunal, filed a writ petition to challenge the said Rule as being ultra vires the provisions of section 288 of the Act and section 30 of Advocates Act 1961. Held by the High Court granting interim relief:

Though, prima facie, the Rule appears to be a correct notification supposedly issued in public interest in line with the rules and practice clamping ban on the legal practice by the retired judges of High Court in the Courts where they remain posted as permanent judge and the Tribunals and Courts subordinate to High Court, however, it appears to be offensive in two respects; namely, that the retired members have been completely barred from practice before the Tribunal, and secondly, that the aforesaid Rule 13E has been interpreted to apply retrospectively in the judgment rendered in the case of Concept Creations v. ACIT (2009) 120 ITD 19 (Delhi)(Special Bench) by the Income-tax Appellate Tribunal, Delhi, beyond its pale of competence as it has the jurisdiction to decide only the matters relating to tax appeals as contained in the Income-tax Act vide Sections 253 and 254 thereof.

Hence, issue notice to opposite party No. 3 to show cause as to under what jurisdiction and authority, the Tribunal has interpreted Rule 13E as aforesaid in the judgment passed in the case of Concept Creations(supra) to the disadvantage of the retired members by imposing a complete ban on the practice before the Tribunal.

The petitioner may serve this notice dasti as well.

Till the next date of hearing, operation of the impugned Rule 13E as well as the judgment in the case of Concept Creations shall remain stayed in so far as they impose a complete ban on the practice by retired members before the Tribunal.

Thus, it would be open for the retired members to practice before the Benches of Tribunal where they had not remained posted and held Courts temporarily or on regular basis. (A.Y. 2006-07)

Dinesh Chandra Agarwal v. UOI (2012) 206 Taxman 29 (All.)(HC)

S. 292B : Return of income not to be invalid on certain grounds - Notice - Only one irregularity in notice - Minor omission of some words, does not invalidate notice [S. 143]

Merely compliance to notice may not validate a notice which is totally illegal, however, where there is only an irregularity in notice which is otherwise in substance in conformity with intent and purpose of act, notice cannot be deemed to be invalid. Minor omission of some words, does not invalidate notice in view of section 292B. (A.Y. 2002-03)

ITO v. Mukut Finvest & Properties (P.) Ltd. (2012) 138 ITD 166 / (2013) 153 TTJ 309 (Delhi)(Trib.)

S. 292CC : Authorisation and assessment in case of search or requisition - Search and seizure - Authorisation in joint names - In view of section 292CC with retrospective effect from 1st April, 1976, authorization in joint names was held to be valid and matter was set aside to Commissioner(Appeals) to decide the appeal on merits [S. 132, 132A]

The Court held that the effect of insertion of section 292CC with retrospective effect from 1st April, 1976 is that (1) it is not necessary for the authorities to issue an authorization under section 132 or requisition under section 132A separately in the name of search person; (2) if an authorization / requisition has been issued in the names of more than one person, it shall not be construed that it was issued in the name of Assessing Officer or BOI, consisting under section 132A in the names of more than one person, the assessment or reassessment can be made separately in the name of search of the person mentioned in the authorization/requisition. As the provisions of section 292CC have come into force retrospectively i.e. from 1st April, 1976, it shall be deemed that the aforesaid provision was on the statute book i.e. The Income-tax Act, 1961 since 1st April, 1976 and the consequence of issue of a warrant of authorization under section 132 if issued in joint names of more than one person has to be adjudged in the light of the provisions of section 292CC.In the present case the warrant of authorization under section 132 has been issued on 10th Nov., 2006 in the joint names of three persons. In view of section 292CC with retrospective effect from 1st April, 1976, authorization in joint names was held to be valid, and matter was set aide to Commissioner(Appeals) to decide the appeal on merits. Both the orders passed by the Commissioner(Appeals) and the Tribunal are set aside and the matter was remanded to the Commissioner(Appeals) to decide the appeal on merits. (A.Y. 2001-02 to 2006-07)

CIT v. Devesh Singh (2012) 252 CTR 356 / 76 DTR 403 / 209 Taxman 267 (All.)(FB)(HC)
CIT v. Yogendra Singh (2012) 252 CTR 356 / 76 DTR 403 / 209 Taxman 267 (All.)(FB)(HC)

WEALTH-TAX ACT, 1957

S. 2 : Definitions

S. 2(ea) : Asset - Building - Let out of factory building and plant - Wealth tax cannot be levied as it remained as commercial asset

The assessee was carrying on business of manufacturing for two years, however the same was leased thereafter and earned the lease rentals. The Wealth tax Officer levied the wealth tax, which was confirmed in appeal. On appeal to the Tribunal the Tribunal held that even though the assessee is receiving lease rent from lessee, the property i.e. building, plant and machinery, etc., remained commercial assets exploited for the purpose of carrying on manufacturing business, therefore, such assets did not attract levy of Wealth-tax. (A.Y. 1997-98, 1998-99)

Vyline Glass Works Ltd. v. ACWT (2012) 147 TTJ 642 / 74 DTR 149 / 51 SOT 169 (Chennai)(Trib.)

S. 2(ea) : Asset - Commercial establishment or complex - Leasing of premises - Leasing of premises cannot be considered as commercial establishment hence liable to wealth tax

Where assessee was not in business of letting out of its office premises and intention of letting out same was not to exploit business assets in relation to its business, said premises would not fall in

category of commercial establishment or complex as per provisions of section 2(ea)(i)(5) and therefore, above premises was assessable to wealth-tax. (A.Y. 2006-07)
Naturell (India) (P.) Ltd. v. ACWT (2012) 137 ITD 136 (Mum.)(Trib.)

S. 2(ea) : Asset - Urban Land - Construction not permissible - Held for industrial purpose
Vide notification dated 12th Nov., 1992 under the MRTP Act, 1966, the land in question was reserved to the extent of 50 per cent for park and the remaining 50 per cent of the land to be deleted and included in C-I zone for specific purpose of development of hotel subject to the conditions that the parties should develop and maintain the park and shall keep them for general public during restricted hours. Conditions as provided in the notification are not in the nature of prohibition of development and construction of the land, rather the notification permits the development of the land subject to fulfilment of certain conditions as prescribed in the notification. Therefore, said notification, would not render the land in question under the exception as enumerated under cl. (b) of Expln. 1 of section 2(ea). (A.Y. 1996-97 to 1998-99)
Mars Hotels & Resorts (P) Ltd. v. Dy. CIT (2012) 77 DTR 265 / 136 ITD 344 / 149 TTJ 577 (Mum.)(Trib.)

S. 2(m) : Net wealth - Debt owed - Mortgage of property - Money borrowed for securing release of mortgage with bank is deductible
Money borrowed from the directors for securing release of mortgage which bank had over the assessee's property be treated as a debt incurred to the property, and is deductible as debt owned in the determination of net wealth. The debt incurred "in relation to the asset" in the definition of "net wealth" should enjoy a wide meaning to cover all debts incurred for acquiring, securing and retaining the property free of charge. (A.Y. 1995-96 to 2001-02)
CWT v. Associated Industries (P) Ltd. (2012) 250 CTR 398 / 72 DTR 33 (Ker.)(HC)

S. 3 : Charge of tax - Net wealth - Value of silver bars confisticated
In the light of the provisions of sub-section (3) of section 7 of the SAFEMA, upon the passing of the order under section 7 on 8th June, 1979, the subject assets stood forfeited to the Central Govt. Free from all encumbrances. Such position continued to exist till the order of the competent authority came to be asset aside by the Tribunal for forfeited property on 24th June, 1992. As such, the assessee ceased to have any legal interest in the subject assets during the period when the aid order of forfeiture was in operation. However, till then, the same stood vested in the Central Govt. Under the circumstances, when the subject assets did not legally belong to the assessee during the period under consideration, the same could not have been included while computing his net wealth. (A.Y. 1984-85, 1985-86, 1988-89 & 1989-90)
WTO v. Lallubhai Jagibhai Patel (2012) 78 DTR 9 (Guj.)(HC)

S. 5(1)(i) : Exemptions - Charitable trust - Kalyan Mandapam - Wealth tax cannot be levied [Income-tax Act - S. 11]
Income of assessee charitable trust from "kalian Mandapam" having accepted as property held under trust and allowed exemption under section 11, exemption under wealth tax cannot be denied. (A.Y. 1986-87 to 1988-89, 1990-91)
DIT (Exemption) v. Samyuktha Gowda Sarswatha Sabha (2011) 339 ITR 456 / (2012) 66 DTR 211 / 247 CTR 593 (Mad.)(HC)

S. 5(1)(vi) : Exemptions - Asset - Plot of Land - Land wrongly shown taxable on return - Held that exemption cannot be ignored, as provided by statute
In the instant case, the assessee wrongly shown a plot of land admeasuring 336 sq. meters as taxable. As per the provisions of section 5(1)(vi) and wealth Tax Act, land admeasuring an area of 500 sq.

meters or less is not chargeable to wealth tax as per provisions of section 5(1)(vi) in return of wealth. It was held that even if assessee had not made any claim for exemption in return of wealth, exemption under section 5(1)(vi) could not be ignored, which is provided by provisions of the Act. (A.Y. 2007-08)

Udit Narain Agrawal v. Dy. CWT (2012) 138 ITD 51 / (2013) 83 DTR 340 / 152 TTJ 540 (Agra)(Trib.)

S. 7 : Valuation of assets - Immoveable property - Urban Land (Ceiling & Regulation) Act, 1976 - Property subject to ULCA restrictions cannot be valued at market value [S. 10 Urban Land (Ceiling &Regulation) Act, 1976]

The assessee had a plot of open land which was declared to be surplus under the Urban Land [Ceiling & Regulation] Act, 1976. The assessee claimed that as the land was under ULCA and not marketable, its value for wealth-tax purposes had to be taken at the rate of compensation that it was entitled to be awarded under the ULCA. However, the Assessing Officer, CIT(A) and Tribunal held that as section 7 of the W.T. Act required the land to be valued on the basis of "if sold in open market", property had to be valued on that basis and there was no question of reducing the value of the land on the ground of restrictions and prohibitions. On a reference to the High Court, the issue was referred to the Full Bench. Held by the Full Bench reversing the lower authorities:

The words 'if sold in open market' in section 7 assumes that there is an open market and the property can be sold in such a market. However, if there is a restriction on transfer of the property, the value of the property has to be reduced. On facts, as the land in question was declared surplus land under the ULCA, that had a depressing effect on the value of the asset and the valuation had to be made on the basis of assumption that the purchaser would be able to enjoy the property as the holder, but with restrictions and prohibitions contained in the ULCA. It is not open to the Revenue to assess the property on the basis of the market value, which normally could have fetched without any restriction or prohibition, but it ought to value the land on the basis of the restrictions and prohibitions contained in the ULCA. (A.Y. 1984-85)

AIMS Oxygen Pvt. Ltd. v. WTO (2012) 345 ITR 456 / 73 DTR 313 / 251 CTR 19 / 209 Taxman 49 (FB)(Guj.)(HC)

S. 7 : Valuation of assets – Quoted equity shares - Lock in period-Promotors quota. [Schedule III, Rule 9, 11, 21]

The shares were given to the assessee on promoters quota, they being family members of the promoter; the shares were held at the value of Rs. 10 per share. It is an admitted fact that the shares of the company are quoted shares. Even though market value as a concept would hold good even in respect of shares suffering restriction on their transferability, there is need for assigning a depreciated value to such market value. In respect of shares with a lock in period held out of the promotes quota, necessarily one has to arrive at the depreciated value of these shares. It is an open secret that in the absence of any such guideline, the depreciation may range from 0 to 100 and it is always a question of debate. Apparently, on account of all these, the CWT justifiably adopted Rule 11 of Part C of the Sch. III, which is with reference to unquoted equity shares. By adopting the principle as given under Rule 11, one is neither treating the shares as unquoted shares, nor is he ignoring the fact that the company shares are quoted shares. Though the assessee is not in a position to show what could be the depreciated value of the restriction on the transfer, even invoking Rule 21, as had been done by the Revenue, Rule 11 could only be a plausible method to arrive at the depreciated value of a quoted share, which suffers a lock in period, by reason of it being allotted as a promoters quota.

CWT v. Thirupathy Kumar Khemka & Ors. (2012) 77 DTR 475/(2013) 259 CTR 260 (Mad.)(HC)

S. 7 : Valuation of assets - Residential premises - Rule 3 of Schedule III - Benefit of third proviso is available as the option is with assessee

Assessee owned a property. He had valued said property on basis of capitalization of net maintainable rent as per third proviso to Rule 3 of Schedule III of Act. The Assessing Officer having noticed that assessee had not occupied property in question for residential purpose for period of 12 months ending on 31-3-2001 valued property as per second proviso to Rule 3 of Schedule III. It was held that the language of third and fourth provisos to Rule 3 of Schedule III makes it clear that there may be more than one house belonging to assessee and exclusively used by assessee for his own residential purpose and in that case assessee may not stay in all house, but still benefit of third proviso is available to assessee at his option to one of such house and staying in house is not a mandatory condition. Since property in question was residential house which had not been let out or used for purpose other than residential, conditions as enumerated in third proviso to Rule 3 of Schedule III were satisfied by assessee. (A.Y. 2001-02)

Ramesh D. Hariani v. WTO (2012) 137 ITD 128 / 149 TTJ 494 / 76 DTR 297 (Mum.)(Trib.)

S. 7 : Valuation of assets - Large land

The contention of the assessee is that since the land in question is larger area of 12 acres; therefore, while taking the stamp duty rate for determining the market value of the land, 40 per cent of deduction should be allowed. There is force in the contention of the assessee on this point because when the area of land in question is 12 acres and the rate as per the stamp duty authorities are taken as per square metre; therefore, the rate of per square metre cannot be directly adopted for a larger area of land of 12 acres. Accordingly, the deduction of 40 per cent is allowed while computing the fair market value of the land in question on account of large track of the land. Further the development of the land in question was allowed to the extent of 50 per cent subject to the conditions that the assessee should develop a park on the 50 per cent of the land which shall be opened for the public. It is to be noted that the net wealth has been computed on the land and the value of the land is directly connected with the potentiality of the land for development of hotel. The infirmity attached to the land in question has a direct effect on the value of the land in comparison to the land free from any such infirmity. Therefore, such an infirmity would certainly deflate the value (market value) of the land in comparison to the value of other normal land. In that view of the matter, the assessee has incurred the expenditure for removing all the defects/hurdles attached to the property in question prior to its development. This expenditure incurred by the assessee in developing the public park as a precondition to clear the way for development of land. Further the valuation date of the land in question is prior to development of the hotel at the land in question. Accordingly, the expenditure, which is incurred for exploiting the potential development of the land, is an allowable deduction for computation of fair market value while determining the net wealth. (A.Y. 1996-97 to 1998-99)

Mars Hotels & Resorts (P) Ltd. v. Dy. CIT (2012) 136 ITD 344 / 149 TTJ 577 / 77 DTR 265 (Mum.)(Trib.)

S. 17 : Reassessment - Reason to believe - No WT returns were filed by assessee - Assessee cannot challenge notice issued under section 17

Assessee cannot challenge notice issued under section 17 on the ground of change of opinion where no WT returns were filed by assessee. (A.Y. 1997-98, 1998-99)

Vyline Glass Works Ltd. v. ACWT (2012) 51 SOT 169 / 147 TTJ 642 / 74 DTR 149 (Chennai)(Trib.)

S. 17 : Reassessment - Information - Tangible material - Information in income tax proceedings constitute a tangible material for reassessment [S. 143(3)]

Information and material found during course of assessment proceedings under section 143(3) of Income-tax Act, 1961 constitute a tangible material for forming a belief that net wealth of assessee assessable to tax has escaped assessment. (A.Y. 2006-07)
Naturell (India) (P.) Ltd. v. ACWT (2012) 137 ITD 136 (Mum.)(Trib.)

S. 21AA : Association of persons - Association of persons registered under Society Registration Act, 1860 is not liable to wealth tax [S. 3]
The assessee, an association persons which is registered under the Societies Registration Act, 1860, claimed that it is not liable to wealth tax. The Assessing Officer held that the assessee is liable to wealth tax. The Commissioner(Appeals) upheld the order of Assessing Officer. In appeal before the Tribunal, the tribunal held that the members of the Association did not have any share in the income or asses of the association either on the date of its formation or any time thereafter. The Tribunal held that section 21AA would be applicable subject to the rider that its members should have any share in the income or assets or both of the association on the date of its formation or any time thereafter. Since the second condition was not satisfied, the assessee could not be considered as falling under section 21AA, hence not liable to wealth tax. On appeal by revenue, the High Court upheld the view of Tribunal and held that the assessee association of persons is not liable to wealth tax. (A.Y. 1988-89, 1989-90)
DIT v. Aparna Ashram (2012) 205 Taxman 362 / Vol. 42 Tax LR May 395 (Delhi)(HC)

S. 34A : Refund - Interest - Self assessment tax - Assessee is entitled to interest on refund of excess payment of self-assessment tax
Assessee paid more amount by way of self assessment tax. After giving effect to the order of Appellate Authorities the assessee was entitled for refund. The Assessing Officer denied the interest on refund on the aground that the tax was paid by assessee as self assessment tax and not in pursuance of notice under section 30. On appeal to the High Court, the Court held that assessee having filed a revised return declaring correct net wealth which was ignored by the Assessing Officer and was finally accepted after appeal. Therefore the assessee is entitled to interest on refund as provided under section 34A(4B)(a) on the excess payment of self assessment tax; accordingly claim of interest could not be denied on the ground that such interest is payable only if payment of tax is effected pursuant to a demand notice issued under section 30. (A.Y. 1991-92)
Nasser Zackeria & Ors. v. CWT (2012) 249 CTR 303 / 69 DTR 413 / 206 Taxman 139 (Ker.)(HC)

Wealth Tax - Finance Act, 1983 - S. 40(3)(vib) - Exemption - Leasing - Property leased as part of business is entitled to exemption - Part of property used by managing director as residential accommodation is entitled to exemption
One of the business of assessee is leasing and in the course of business it had leased out the premises to a factory manufacturing inks, as the property is commercially exploited it was nit liable to be included in the net wealth. The part of property was used by managing director as residential accommodation is also entitled to exemption. Condition of holding not less than 1 per cent of equity share of assessee as prescribed in section 40(3)(vib) is applicable only in respect of an employee and not a director, managing director or secretary. (A.Y. 1989-90 to 1992-93)
CIT v. Kumudum Printers P. Ltd. (2012) 341 ITR 514 / (2013) 83 DTR 273 (Mad.)(HC)

INTEREST- TAX ACT, 1974

2. Definitions :

S. 2(5A) : Finance company - Credit institution - Leasing transactions of assessee constituted only 29 percent of its business activity hence not liable to charge interest tax [S. 2(5B)]

The assessee is a subsidiary of a schedule bank. It is engaged in providing financial services. Its main business activities related to income from leasing transactions, merchant banking, brokerage, interest on security, interest on investment, dividend on investment, profit on sale of investment and interest on loan.

The assessee contended that it is neither "credit institution" nor "financial company" hence provisions of Interest-tax Act is not applicable. The claim of assessee was negative by the Assessing Officer and Commissioner(Appeals). On appeal the Tribunal has accepted the claim of assessee. On appeal by revenue to High Court, the High Court up held the claim of assessee and held that leasing transaction vis-à-vis loan transactions of assessee constituted only 29 percent of its business activity therefore the assessee would neither fit in to the definition of "credit institution" as per section 2(5A) nor financial company as per section 2(5B) hence not liable to charge tax. (A.Y. 1998-99)

CIT v. Canbank Financial Services Ltd. (2012) 208 Taxman 444 / 76 DTR 137 (Karn.)(HC)

S. 10(a) : Assessment - Reassessment - Full and true disclosure - Change of opinion - Reassessment beyond four years held to be valid

Assessee is a non banking finance company, which is liable to be charged for Interest-tax Act. The Assessing Officer reopened the assessment on the ground that interest which otherwise chargeable to tax under the Act for each of the assessment years had not been brought to tax by non-disclosure on the part of the assessee. In appeal Commissioner(Appeals) held that the reassessment is bad in law on the basis of change of opinion. On appeal by revenue to the Tribunal, up held the view of Commissioner(Appeals). On appeal to High Court, the Court held that the Assessing Officer has reopened the assessment on discovering that assessee had not offered chargeable interest attributable to hire purchase transactions to interest tax in its returns, it is a case of reopening under section 10(a) and not under section 10(b) and the concept of 'change of opinion' not being applicable to a situation where the reopening is made under clause (a) of section 10, it cannot be said that this is a case of change of opinion or that reopening of assessments was barred by limitation as the period of four years from the end of relevant A.Y. is not attracted. The Court held that the re-opening is valid and appeals of revenue was allowed. (A.Y. 1992-93 to 1996-97)

CIT v. Standard Chartered Finance Ltd. (2012) 68 DTR 249 (Karn.)(HC)

S. 13 : Penalty - Concealment - Non-inclusion of bill discounting charges in chargeable interest, Levy of penalty was held to be justified

Section 13 stipulates that penalty can be imposed when an assessee has furnished inaccurate particulars of interest or concealed particulars of chargeable interest. It does not use the word 'deliberately', 'wilful' or 'wilfully'. Though this section does not have any explanation as in the case of section 271(1)(c) of the Income-tax Act, 1961, this does not mean that penalty cannot be imposed where an assessee has furnished inaccurate particulars or concealed particulars of chargeable interest. It is well settled that establishment of mens rea is not the requirement or a condition precedent to impose penalty. Question of mens rea is important and relevant in criminal proceeding and not for the purpose of civil penalty under section 13. As per section 2(7), for the purpose of Interest-tax Act, bill discounting charges have to be treated and regarded as 'interest'. Term 'interest' as per section 2(7) as amended w.e.f. 1st Oct., 1991, is absolutely clear and unambiguous. Two divergent views on interpretation of section 2(7) are not possible Reliance placed by the assessee on Circular No. 647 of 1993 dated 22nd March, 1993 is entirely misconceived. Said circular was issued to explain the applicability of the provisions of section 194A of Income-tax Act, 1961, and not section 2(7) of Interest-tax Act. Thus, it cannot be accepted that there was a genuine difference of opinion on the question "whether or not bill discounting charges could be treated as interest". Declaration or statement in the return that the said amounts were not included for the purpose of tax may

show/establish absence of mens rea but, this by itself does not justify cancellation or quashing of penalty. Penalty under section 13 was therefore sustainable. (A.Y. 1996-97, 1997-98)
CIT v. Fortis Financial Services Ltd. (2012) 76 DTR 429 (Delhi)(HC)

KAR VIVAD SAMADHAN SCHEME, 1998
S. 90 : Settlement of tax arrear - Pendency of revenue's appeal - Once final determination is made, hearing of any pending appeal before the appellate forum for passing order on merit is not possible [S. 92]
The assessee opted for the benefit of Kar Vivad Samadhan Scheme. The Authority has passed the order final tax arrear. When the application was filed the assessee was not aware whether the department has filed an appeal before the Tribunal. On appeal before the Tribunal, the revenue contended that the benefit of Kar Vivad Samadhan Scheme is not available to the appellant in respect of the Departmental appeal. The Tribunal accepted the argument of revenue and held that the assessee is not eligible for benefit of Kar Vivad Scheme in respect of departmental appeal. On appeal to the High Court, the Court held that once determination is made under section 90 of Finance (No. 2) Act, 1998, towards full and final settlement of tax arrears, there is nothing to be treated as pending for final consideration before any authority, including an appeal at the instance of the Revenue before the Tribunal. Accordingly the order of Tribunal set aside and appeal was decided in favour of assessee. (A.Y. 1993-94)
S. Jagtrakshagan (Dr) v. Dy. CIT (2012) 73 DTR 214 (Mad.)(HC)

VOLUNTARY DISCLOSURE OF INCOME SCHEME, 1997
S. 64(2) : Finance Act, 1997 - Voluntary disclosure - Search and Seizure - Firm - Partners - Partners are not entitled to immunity [S. 132, 158BC]
Search and seizure action was conducted against firm and partners. Partners name were included in the warrant of authorization, therefore the partner is not entitled to immunity under VDS on the basis of the declaration of undisclosed income made by him under the VDS after the search proceedings.
Naresh Chand Baid v. ACIT (2012) 66 DTR 221 / 247 CTR 196 (Chattisgarh)(HC)

ALLIED LAWS:
Advocates Act, 1961 - Professional misconduct - Professional ethics and morality [S. 35 of the Advocates Act, 1961]
It is not only undesirable but highly unethical on part of appellant to have created title or at least having attempted to create title to him in respect of which litigation was pending in Court and he was representing one of parties in that litigation. The Court also observed that settlement with complainant would not mitigate or wipe out professional misconduct and must not prevent adequate punishment to appellant. The Court held that a person practicing law has an obligation to maintain probity and high standard of professional ethics and morality. On the facts the advocates certificate of practice was suspended for three months.
Dhanraj Singh Choudhry v. Nathulal Vishwakarma (2012) 204 Taxman 124 (SC)

Appeal - Condonation of delay - Appeal to Supreme Court - Special leave petition - Appeal by department - Delay by Department in filing appeal cannot be mechanically condoned
The Government filed an appeal to challenge the judgement of the High Court. There was a delay of 427 days in filing the appeal which was caused due to the normal bureaucratic procedure. The department cited a number of judgements and argued that in matters relating to the Government, a lenient view had to be taken as there was no want of bona fides. Held dismissing the appeal:
In the absence of plausible and acceptable explanation for the delay, the question to be posed is why the delay should be mechanically condoned merely because the Government is a party. Though in a matter of condonation of delay when there was no gross negligence or deliberate inaction or lack of

bonafide, a liberal concession has to be adopted to advance substantial justice, in the facts and circumstances, the Department cannot take advantage of various earlier decisions. The claim on account of impersonal machinery and inherited bureaucratic methodology of making several notes cannot be accepted in view of the modern technologies being used and available. The law of limitation undoubtedly binds everybody including the Government. It is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bonafide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red-tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few. As there was no proper explanation for the delay except mentioning of various dates and the Department has miserably failed to give any acceptable and cogent reasons sufficient to condone such a huge delay, the appeals have to be dismissed on the ground of delay.

Office of the Chief Post Master General and others v. Living Media India Ltd. (2012) 348 ITR 7 (SC)

Appellate Tribunal - Power of President - Members ACR - Judgment of High Court stating that, ITAT President has no power to write ITAT Members' ACR is stayed

In Uttam Bir Singh Bedi v. UOI, a Judicial Member of the Tribunal filed a Writ Petition to challenge his supersession to the post of Vice President by his junior. He claimed that the supersession was on account of adverse Annual Confidential Reports ("ACRs") written by the President of the Tribunal which had misguided the high level Selection Committee without the Petitioner being giving an opportunity to represent against the ACR. He claimed that the President of the ITAT had no authority to record the ACRs of the Members. This plea was accepted by the High Court and it was held as the Tribunal is a judicial body, the President, though exercising administrative control over the Benches, had no power to write the ACRs of the Members. It was also held that the Tribunal had judicial autonomy and the Government could not act like a reviewing authority on the ACRs. It was directed that as the ACRs were illegally recorded by the President and reviewed by the Government, the Selection Committee must reconsider the claim of the Petitioner on merits de hors the ACRs. This verdict was challenged by a Vice President of the Tribunal before the Supreme Court. Held by the Supreme Court at the interim stage:

Put up for final disposal on October 03, 2012. During the pendency of the special leave petition, the direction of the High Court in paragraph 24 of the impugned judgment shall remain stayed.(SLP.Civil no .6141 /2012 dt 30-03-2012)

N. Bharatvaja Shankar v. UBS Bedi (SC) www.itatonline.org

Appellate Tribunal - Concern expressed at "mutual acrimony" between Members of Chandigarh Bench

The Applicant, an Accountant Member of the Tribunal, was transferred from Chandigarh to Rajkot. He challenged the transfer on the ground that it was punitive and had arisen because of a complaint against him by a Judicial Member. It was alleged that the Sr. VP, who decided the complaint, had indicted him without a hearing and that the said VP was part of the Collegium which had recommended the transfer. In turn, the Judicial Member alleged that she had been subjected to harassment by the Applicant and other Members of the Chandigarh Bench. She claimed that she had heard a bunch of appeals with the Applicant and that though she had drafted the judgement, the Applicant did not sign it till he sat on another Bench and decided another bunch of appeals by taking a contrary view to the view taken by her. She claimed that the Applicant had "purposely" kept the draft judgement in abeyance in order to be able to take a different view in another Bench while the

Applicant alleged that there was something "extra judicial in her mind". Held by the CAT, dismissing the application:

(i) The documentation indicates an unsavoury and uneasy situation prevalent at the Chandigarh Bench of the ITAT and the litigating parties are found to be engaged in an unenviable endeavour to wash the proverbial dirty linen in public. The prevalence of the factual scenario, indicating almost complete want of trust and faith inter-se, ought to be foreign to each segment of dispensation of justice which (system), for optimum and unbiased delivery requires an ambience based upon balanced and conscientious approach. For reasons of propriety, we are not noticing any part of the mutual acrimony as between the personnel who are a part of the dispensation at the local Bench of ITAT. We express our deep sense of exasperation at the prevalent scenario and hope and trust that the sentiments expressed by the President of the ITAT in the course of his letter dated 4.1.2012 for ensuring bonhomie at the local Bench of the ITAT, would be pursued to its logical conclusion;

(ii) Transfer is an incident of public service. It is well settled that Courts / Tribunals ought to refrain from interfering in transfer matters unless there is an element of perversity or extreme arbitrariness / bias in the grant of the relevant order. The transfer order was passed on the recommendation of the collegium and though the Applicant found fault with the association of the VP who dealt with the complaint, no bias on part of the President or the other VP was alleged. Further, the claim that as the transfer was pursuant to a complaint, the competent authority ought to have granted a hearing is not acceptable. An employer is free to effect transfer on the basis of a complaint or adverse report without hearing the employee. The giving of a hearing may actually be counter-productive in such matters. Also, the Applicant was not free from blame because, having heard the bunch of appeals with the JM and having allotted the matters to her for dictation, it was not appropriate for him to retain the draft judgement till he sat on another Bench and took a view contrary to the one taken by the JM. If he was not agreeable with the view of the JM, he ought to have written an order of dissent. (Desire expressed that the competent authority may consider the feasibility of doing something to establish appropriate ambience at the Chandigarh Bench of the ITAT).(OA no 87.CH of 2012 dt 27-2-2012)

D. K. Srivastava v. UOI & Ors. (Central Administrative Tribunal) www.itatonline.org

Appellate Tribunal - Section 129(6) of Customs Act barring ex-Members from practice before CESTAT is valid

The appellant was appointed Member (Technical) of CEGAT on 1-11-1990 and demitted office on 7-3-1993. He enrolled as an advocate with the Bar Council of India on 18-4-1993. Section 129(6) of the Customs Act, 1962 introduced by F.A. 2003 debarred ex-Members from appearing, acting or pleading before the CEGAT/ CESTAT. Section 129(6) was challenged before the High Court on the ground that (i) it was ultra vires Article 19(6) of the Constitution of India & (ii) could not apply to persons who had demitted office before the insertion of the provision. The High Court (P.C. Jain v. UOI) rejected the plea on the ground that the restriction was to remove a perceived bias and was not unreasonable. On appeal to the Supreme Court, held dismissing the appeal:

(i) As regards the constitutional challenge, while the right to practice as an advocate is not only a statutory right under the Advocates Act but is also a fundamental right under Article 19(1)(g) of the Constitution, it is subject to reasonable restrictions. The restriction imposed by section 129(6) of the Customs Act is constitutional because (i) the restriction is partial to the extent of practice before CESTAT and does not bar practice before other judicial bodies & (ii) the restriction is intended to serve a larger public interest and to uplift the professional values and standards of advocacy in the country. It adds to public confidence in the administration of justice by the Tribunal;

(ii) The contention that the restriction is based on an illogical presumption of likelihood of bias is also not acceptable because when one has been a member of a Tribunal over a long period and other members have been his co-members, it is difficult to hold that there would be no possibility of bias or no real danger of bias. Even if this possibility was ruled out, it is still in the interest of the institution

that restrictions are enforced. Then alone will the mind of the litigant be free from a lurking doubt of likelihood of bias and this would enhance the image of the Tribunal;
(iii) The contention that section 129(6) cannot be given effect to retrospectively so as to adversely affect persons who were enrolled as advocates when the provision was not on the statute book is not acceptable because there is a distinction between a law being enforced retrospectively and a law that operates retroactively. The restriction in the present case is one where the right to practice before a limited forum is being taken away in present while leaving all other forums open for practice. Though the restriction has the effect of relating back to a date prior to the present, the law stricto sensu is not retrospective, but is retroactive. The restriction does not interfere with settled or vested rights.
N. K. Bajpai v. UOI (2012) (278) E.L.T 3 (SC)

Contempt - Officer not following the direction of High Court - The High Court held that the Custom Officer committed gross contempt accordingly punished with simple imprisonment of three months & fine of Rs. 2,000/- High court also observed that CBEC may consider prosecuting him
The assessee's truck loaded with betel nuts was seized by the customs authorities on the suspicion that the assessee was indulging in smuggling. The assessee filed a Writ Petition to challenge the seizure which was allowed by the High Court and the customs authorities were directed to unconditionally release the truck immediately. Despite the High Court's verdict, the customs authorities issued a show-cause notice threatening confiscation. The assessee filed a contempt petition against the department. The department defended its stand and at the same time tendered an unconditional apology. Held by the High Court:
Though the High Court's order was communicated to the department directing a release of the truck without any conditions, the department wrongly demanded 100% cash security and 100% Bond for the said release. The act of issuing show cause notice to avoid giving release is in direct confrontation with the judicial order of the Court. The plea raised with respect to investigation and confiscation is "absolutely frivolous and ridiculous" and has been raised to save from punishment of contempt. Also, the act of justifying the action and simultaneously tendering unqualified apology is a "double faced stance" which is against the settled principle of law. The Asst./Dy. Commissioner, Customs, being a senior officer, should have known his limits and by crossing those limits, he has committed gross contempt. He is accordingly punished with simple imprisonment of three months & fine of Rs. 2,000/-. Also, as the act may constitute "corrupt practice", the CBEC may consider prosecuting him.
Birendra Kumar Singh v. UOI (Patna)(HC) www.itatonline.org

Constitution of India - Article 226 - Avoidance of tax - Transfer pricing - Reference to TPO - Petitioner participated in the proceedings before TPO and has remedy to move before the DRP as well as appeal before the Tribunal hence writ petition was held to be not maintainable [S. 92CA]
The Assessing Officer relying upon the CBDT instruction selected for scrutiny and after seeking approval of CIT made reference to the TPO. The petitioner participated in the proceedings before TPO. The petitioner thereafter filed a writ petition questioning the validity of the approval granted by the Commissioner to the Assessing Officer and the order passed by the TPO. The Court dismissed the petition by observing that petitioner participated in the proceedings before TPO and has remedy to move before the DRP as well as appeal before the Tribunal hence writ petition was held to be not maintainable under Art. 226, of the Constitution of India.
Hindalco Industries Ltd. v. Addl. CIT (2012) 75 DTR 238 / 252 CTR 167 / 211 Taxman 315 (Bom.)(HC)

Companies Act, 1956 - Company - Scheme of amalgamation - Capital gains - Transfer - Amalgamation - Tax avoidance scheme - Scheme of arrangement is not a "tax avoidance

scheme"- Recovery of tax-Department has locus standi to raiseobjection to scheme. [.S. 281,S. 391, 392, 393, 394 - Companies Act, 1956]

Vodafone Essar Gujarat Ltd. ("transferor") filed a Petition under section 391 to 394 of the Companies Act, 1956 to transfer its 'Passive Infrastructure Assets' to Vodafone Essar Infrastructure Ltd. ("transferee") free of liabilities and encumbrances. The corresponding liabilities were not to be transferred. No consideration was payable by the transferee nor were any shares to be allotted to the members of the transferor. Post de-merger, the transferee was to be made a substantially owned company of a new company to be formed by all or some of the shareholders of the transferee. Thereafter, the transferee was to be amalgamated/ merged into Indus Towers Ltd. The application was opposed by the income-tax department on the ground that since no consideration was involved, the transaction was ultra vires. It was also claimed that the transaction did not fall within the ambit of sections 391 to 394 but was a simple transfer between two separate entities to evade legitimate taxes which would be payable if the transaction was effected as a simplicitor transfer. It was also claimed that the Scheme was solely for purposes of avoiding tax. The Company Judge came to the conclusion that the transferee was a paper company and that the sole object of the Scheme was to avoid tax on income in excess of Rs. 3,500 crore and also stamp duty and VAT to the tune to Rs. 600 crores. He accordingly refused to sanction the arrangement. On appeal by the Company, Held reversing the Company Judge:

(i) The Scheme cannot be said to have no purpose or object and that it is a mere device/subterfuge with the sole intention to evade taxes. While it is true that the Scheme may result into tax avoidance, it cannot be said that the only object of the Scheme is tax avoidance.

(ii) The Revenue's argument that the transfer is void for want of consideration is not acceptable because it is not a party to the transaction. Even a consideration of one rupee can be said to be a valid consideration and it is not necessary that consideration is always a monetary consideration. In a reconstruction there is a give and take and mutual/reciprocal promises and obligations, which can be said to be consideration for each other. Even the most trifle benefit can be consideration so as to avoid the impact of section 25 of the Contract Act.

Vodafone Essar Gujarat Ltd. v. Dept. of Income-tax (2012) 76 DTR 241 / (2013) 353 ITR 222/216 Taxman 187 (Mag.) (Guj.)(HC)

Interpretation of taxing statute - Tax avoidance and tax planning

The Hon'ble Court in Vodafone International Holdings B.V. v. UOI has once again the approved that tax palnning is permissible and not tax evasion. At para. 116 observed as under:- "A five Judges Bench judgment of this Court in Mathuram Agrwal v. State of Madhya Pradesh (1999) 8 SCC 667 after referring to the judgment of in CIT v. B. M. Kharwar (1969) 1 SCC 651 (supra) as well as the opinion expressed by Lord Roskill on Duke of westminister stated that the subject is not to be taxed by inference or analogy, but only by the plain words of a statute applicable to the facts and circumstances of each case.

117. Revenue can not tax a subject without a statute to support and in the course we also acknowledge that every tax payer is entitled to arrange his affiras so that his taxes shall be as low as possible and that he is not bound to choose that pattern which will replenish the treasury. Revenue's stand that the ratio laid down in Macdowell is contrary to what has been laid down in Azadi Bachao Andolan, in our view, is unsustainable and therefore, calls for no reconsideration by a larger Branch (Bench)

Vodafone International Holdings B.V. v. UOI (2012) 341 ITR 1 / 204 Taxman 408 / 247 CTR 1 / 66 DTR 265 / 6 SCC 613 / Vol. 42 TLR April 305 (SC)

Interpretation - Doctrine of merger - Appeal - Dismissal of appeal on ground of limitation

The Court held that if for any reason an appeal is dismissed on the ground of limitation and not on merits, that order would not merge with the orders passed by the first appellate authority.
Raja Mechanical Co. (P) Ltd. v. CCE (2012) 345 ITR 356 (SC)

Interpretation of statute - Income-tax Act, 1961 - National Housing Bank Act, 1987 - Overriding effect
The NHB Act, 1987 was enacted to promote housing finance institutions both at local and regional levels to provide financial and other support to such institutions. There is no provision under the said Act which says that NHB Act will have overriding effect of Income-tax Act, 1961. Since the Assessment orders are passed under the Income-tax Act, the provisions of Income-tax Act is applicable and NHB Act, 1987 does not override the Income-tax Act, 1961.
Orissa Rural Housing Development Corporation Ltd. v. ACIT (2012) 66 DTR 73 / 247 CTR 137 / 204 Taxman 673 / 343 ITR 316 / Vol. 42 Tax L. R. 219 (Orissa)(HC)

Interpretation - Doctrine of merger - Review petition - Special leave petition
The petitioner had preferred appeal against order passed in writ petition. When appeal has been preferred against an order and dismissed, review petition cannot be allowed against the same order. Decision of lower court merges in to decision of appellate Court and latter's decision which subsists, remains operative and is capable of enforcement in eyes of law. Court would have no jurisdiction to entertain review petition as petitioner had exhausted option of preferring appeal, hence review petition was not maintainable. Doctrine of merger is not attracted when question whether leave to appeal should be granted or not is considered and decided. It is attracted when leave to appeal is granted, and order from which appeal arose and order granting leave get merged. When special leave to appeal is declined, there is no appeal and question of merger does not arise at all. It is only when leave to appeal is granted before Supreme Court, jurisdiction of High Court to review is lost.
Anup Kumar Roy & Ors. v. State of Tripura & Ors. AIR 2012 Gauhati 163 (HC)

Interpretation of statute - Precedent - Per incuriam - Ignorance of earlier decision
A decision which is rendered in ignorance of an earlier decision of a co-ordinate Bench of equal strength "which covered the case before it" does not have precedent value. The Tribunal followed the ratio of Punjab Land Development & Reclamation Corpn. Ltd. v. Presiding Officer, Labour Court (1990) 3 SCC 682 and CIT v. B. R. Constructions (1993) 202 ITR 222 (AP)(FB). (A.Y. 1998-99)
ACIT v. Pramod H. Lele (2012) 66 DTR 134 / 143 TTJ 721 / (2011) 47 SOT 363 (Mum.)(Trib.)

Interpretation - Precedent - Authority for Advance Rulings - Authority is not barred from expressing opinion different from view expressed in another earlier Ruling
The Authority should be slow in disagreeing with a proposition of law unrelated to facts, enunciated in an earlier ruling. But, when the Authority is convinced that a view already expressed may not be correct, it should not deter the Authority from expressing itself.
Castleton Investment Ltd. (2012) 348 ITR 537 / 252 CTR 131 / 211 Taxman 282 (AAR)

Interpretation of taxing statutes - Words used in provision - Principles of Noscitur A Sociis and Ejusdem Generis
General words in a statute must receive general construction. This is, however, subject to the exception that if the subject matter of the statute or the context in which the words are used, so requires a restrictive meaning is permissible to the words are used, so requires a restrictive meaning is permissible to the words to know the intention of the legislature. When a restrictive meaning is given to general words, the two rules often applied are noscitur a sociis and ejusdem generis. Noscitur a sociis literally means that the meaning of the word is to be judged by the company it keeps. When two or more words which are susceptible of analogous meaning are coupled together, they are

understood to be used in their cognate sense. The expression ejusdem generis - "of the same kind or nature" signifies a principle of construction whereby words in a statute which are otherwise wide but are associated in the text with more limited words are, by implication given a restricted operation and are limited to matters of the same class of genus as preceding them. (A.Y. 1985-86, 1986-87, 1989-90)

CIT v. O. R. Distilleries Ltd. (2012) 349 ITR 215/87 DTR 268/(2013) 259 CTR 473 (AP)(HC)

Interpretation - Precedent - High Court - Different views of High Court - Decision favourable to assessee to be followed

When two different views of different jurisdictional High Courts are available, the decision favourable to the assessee is to be followed. (A.Y. 2005-06)

ACIT v. Charon Tech. P. Ltd. (2012) 20 ITR 487 (Chennai)(Trib.)

Delegated Legislation - Delegation of power to fix rate of tax - Fee - Element of quid pro quo - License fee under the Mysore Race Courses Licensing Act, 1952

Delegation of power to fix rate of tax is permissible so long as legislative policy is clearly laid down. There is no requirement of such guidance unless impost is tax.

In case of license fees imposed for regulatory purpose quid pro quo is not necessary for the services rendered. However, such license fee must be reasonable and not excessive. The license fee under the Mysore Race Courses Licensing Act, 1952 was held to be regulatory in nature; therefore, the government need not render some defined or specific services in return as long as the fee satisfied the limitation of being reasonable.

Delhi Race Club Ltd. v. Union of India (2012) 347 ITR 593 (SC)

Power of taxation - Tax of essential characteristics - Power of Eminent Domain distinguished from Police Power and Taxation Power - [Constitution of India - Arts. 300A, 30(1A), 31(A1) second proviso & Art. 31(2) since omitted]

Power of taxation does not necessarily involve a taking of specific property for public purposes, though analogous to eminent domain as regards the purposes to which the contribution of the taxpayer is to be applied. Tax is imposed under statutory power without taxpayer's consent and payment is enforced by law.

K. T. Plantation (P.) Ltd. v. State of Kerala (2011) 9 SCC 1

Interpretation of Statue - Explanation - Purpose

If the language of the Explanation appended to the section depicts a purpose and a construction consistent with the purpose can reasonably be place upon it, that construction should be preferred against any other construction. (A.Y. 1992-93 to 1994-95)

Prayag Udyog (P) Ltd. v. UOI & Ors. (2012) 348 ITR 217 / 80 DTR 25 (All.)(HC)

Right of information - Members of CESTAT - Corruption charges - Tribunal Member's Corruption Charges Information can be disclosed under RTI

Certain complaints qua corruption were made against Ms. Jyoti Balasundaram, Member, CESTAT. After examining this complaint, the President of CESTAT made certain adverse entries in the ACR of the said Member. On the basis of the said ACR, the Department of Revenue, Ministry of Finance, opened a file with the subject "follow up action on the integrity in the ACR for the year 2000-01 in respect of Ms. Jyoti Balasundaram, Member (Tech.), CESTAT." Ultimately, this file was closed without taking any proper action. The appellant filed a RTI application seeking inspection of the file & copies of the Note Sheets and correspondence. This was rejected by the CIC on the ground that the issue relating to integrity was a part of the ACR & ACR grades could not be disclosed to third-parties

except under exceptional circumstances. The Single Judge held that the information sought was "third party information" and so the authorities had to consider whether the third party's "privacy" defence could be overruled in the public interest or not. On second appeal, Held:
Under section 8(1)(j) of the RTI Act, information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual cannot be disclosed unless the authority is satisfied that the larger public interest justifies the disclosure of such information. Under section 11(1), where the CPIO etc. intends to disclose the information which relates to or has been supplied by a third party and has been treated as confidential by that third party, the CPIO is required to give written notice to the third party and invite him to make submissions why the information should not be disclosed. This mandatory procedure has to be followed and the Single Judge rightly directed the CIC to determine whether disclosure of the Tribunal Member's ACR was in the larger public interest (Arvind Kejriwal v. CPIO AIR 2010 Delhi 216 followed; Centre for Earth Sciences Studies v. Anson Sebastian, 2010 (2) KLT 233 not followed)(LPA no 22 of 2012 dt 20-04-2012)
R. K. Jain v. UOI (Delhi)(HC) www.itatonline.org

Right to Information Act, 2005
S. 8(1) : Right to information - Exemption from disclosure - Return of income - Personal information - Income-tax details can be disclosed under RTI only if in "larger public interest" - Information not to be disclosed
It was held by the Apex Court that the details disclosed by a person in his income tax returns are "personal information" which stands exempted from disclosure under clause (j) of Section 8(1) of the RTI Act, unless it involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the Appellate Authority is satisfied that the larger public interest justifies the disclosure of such information. On facts, as the Petitioner has not made a bona fide public interest in seeking information, the disclosure of such information would cause unwarranted invasion of privacy of the individual under section 8(1)(j) of the RTI Act.
Girish Ramchandra Deshpande v. CIC (2012) 211 Taxman 46 / (2013) 351 ITR 472 (2013) 1 SCC 212 (SC)

Central Excise Act, 1944 - Appeal - Dismissed - Limitation - Interpretation - Merger - Doctrine of merger
If for any reason an appeal is dismissed on the ground of limitation an not on the merits, that order would not merge with the orders passed by the first appellate authority.
Raja Mechnical Co. (P.) Ltd. v. CCE (2012) 345 ITR 356 (SC)

SERVICE- TAX
Service-tax - Works contract - Benefit of composition under section 3 of Works Contracts [Composition Scheme for payment of service tax - Rules 2007]
As per Rule 3(3) of the said Rules, the assessee who wants to avail of the benefits under Rule 3 must exercise it option before payment of service tax in respect of the works contract and the option so exercised is to be applied to the entire works contract. Assessee is not permitted to change the option till the said works contact is completed. In the instant case, admittedly, the assessee had already paid service tax on the basis of classification of taxable services, namely, erection, commissioning or installation service, commercial or industrial construction service or construction of complex service, which was in force prior to 1st July, 2007. Thus, it cannot be said that the assessee had exercised a particular option as to the mode of payment of tax after 1st July, 2007, with regard to the reclassified works contract. Assessee who had paid service tax as per the provisions and classification existing prior to 1st June, 2007, and those who opted for payment of tax under the provisions of the said Rule 3

and paid tax before exercising the option belong to different classes and, therefore, it cannot be said that Circular No. 98/1/2008-ST, dt. 4th Jan., 2008 or the provisions of Rule 3(3) are discriminatory. Impugned circular only provides guidelines as to how the provisions of Rule 3(3) are to be interpreted and it is not contrary to the Finance Act, 1994, or the statutory rules made there under. Even if the impugned circular is set aside, the provisions of Rule 3(3) would stand and that would not benefit the assessee.

Nagarjuna Construction Co. Ltd. v. Government of India & Anr. (2012) 80 DTR 116 / 254 CTR 457 (SC)

Service-tax - Taxable service - Service by consulting engineer - S. 65(105)(g) - Finance Act, 1994 - Rule 8A of Wealth Tax rules

A person who is not an engineer is also qualified to render services as a valuer as evident from the qualifications prescribed for valuers in Rule 8A(2) of the WT Rules, 1957 and therefore, services rendered by a valuer, whether an engineer or any other person, are not in relation to advice, consultancy or technical assistance in any one or more disciplines of engineering and accordingly, qualified engineers who act as valuers do not fall within the ambit of term "consulting engineer" as defined in the Finance Act, 1994, to the extent of valuation services rendered by them and such services are not exigible to service tax.

Institution of Valuers & Anr. v. UOI & Anr. (2012) 76 DTR 315 (Guj.)(HC)

S. 65 : Service-tax - Chargeability - General Insurance business - Public interest - Liable to service tax in respect of insurance activity of financing of vehicles - Levy is not ultra vires [Finance Act, 1994 - S. 69]

Perusal of Circular No. 89/7/2006-ST, dated 18th Dec., 2006 shows that what is exempted in para 2 is the activities performed by sovereign / public authorities under the provision of law, which are in the nature of statutory obligations which are to be fulfilled in accordance with law. The fee collected by them for performing such activities is in the nature of compulsory levy as per the provisions of the relevant statute and it is deposited into the Govt. treasury. Such activity is purely in public interest and it is undertaken as mandatory and statutory function. It is in those cases, service tax is not leviable. Insurance activity carried on by the assessee in respect of vehicles owned by the Government departments and commercial concerns and vehicles financed by the Government falls within para 3 of Circular referred above and the same is exigible to service tax, levy is not ultra-vires, arbitrary or unreasonable.

Karnataka Government Insurance Dept. v. Astt. Commissioner of Central Excise & Ors. (2012) 253 CTR 603 / 78 DTR 282 (Karn.)(HC)

S. 65 : Service-tax - Taxable service - Storage and warehousing service - Terminal charges for export cargo and passenger baggage - Insurance coverage to employees is not liable to service-tax - Other coverage of general insurance is liable to service-tax [Finance Act, 1994]

The exemption clause provided for exemption from service tax on export cargo and passenger baggage under section 65(23) should enjoy a liberal construction. What is specifically excluded from levy should not be brought to tax under another charging entry and if the same is permitted, the same will frustrate the exemption clause. All fiscal statutes provide for tax/duty exemptions to encourage exports and 65(23) also should be understood as part of the same scheme. The only question to be considered is whether retention upto 48 yours of the air cargo and passenger baggage for X-raying, for completion of all customs formalities and the time taken by the Airlines to lift the cargo could be treated as storage and warehousing for the purpose of levy of tax under section 65(102).

Storage and warehousing obviously is storing the goods for a duration of time providing safe custody of goods. Nobody sends the cargo or passenger baggage to assessee's terminal building for storage because goods are sent there only for shipment by air. It so happens that there is a time lag between the arrival of the goods in assessees terminal and the actual dispatch of goods by air. The short

duration of time taken for unloading and transport to the plane cannot be said to be time of storage or warehousing of goods. Activity of the State Government department in providing life insurance coverage to the employees of the State Government as part of its statutory obligation for giving effect to Rule 22 of part 1 of Kerala Service Rules is not taxable service so as to attract service-tax liability, however, activities regarding any other service / insurance coverage provided as part of general insurance to commercial institutions / individuals or even to a Government company are liable to service-tax.

Kerala State Industrial Enterprises Ltd. v. CIT (2012) 253 CTR 586 / 78 DTR 275 (Ker.)(HC)

S. 65 : Service-tax - Taxable service - Insurance business - Life insurance coverage to State Govt. employees and general insurance coverage for assets of the Government [S. 44(f) of the LIC Act, 1956]

Section 44(f) of the LIC Act, 1956 is very much clear and categoric to the effect that it excludes any scheme in existence on the appointed day or any scheme framed after the appointed day with approval of the Central Govt. in consideration of certain compulsory reduction made by the Governemnt from the salary of its employees as part of the conditions of service, assuring payment of money on the death of the employee or on the happening of any contingency dependent on his life. It is also relevant to note that by virtue of Rule 22A of part I of KSR, which rules have been formulated by the State Govt. is exercise of the power under Art. 309 of the Constitution of India, it is obligatory on the part of any State Government employee to have applied for and obtained coverage in respect of life by subscribing to a policy, in the official branch of the State Life Insurance and shall continue to subscribe the same till he ceased from the 'service'. The said provision itself makes it clear that there is a reciprocal statutory duty upon the State Insurance Department to provide policy to such State Government employees and this statutory obligation cannot be stated as a 'taxable service' provided to any individual or establishment or class of such persons.

Activity of the State Govt. Department in providing 'life insurance coverage' to the employees of the State Government as part of its statutory obligation for giving effect to Rule 22A of part I of Kerala Service Rules is not a taxable service so as to attract service tax liability; however, activities regarding any other service / insurance coverage provided as part of general insurance business to commercial institutions / individuals or even to a Government company are liable to service tax.

Kerala State Insurance Department v. UOI (2012) 253 CTR 593 / 78 DTR 286 (Ker.)(HC)

S. 65 : Taxable Service - clearing and forwarding agent - Consignment agent selling goods to customers under its own invoice

Though the definition of C&F agent is quite wide, essentially what is a taxable service is a service rendered by a C&F agent to a client in relation to clearing and forwarding operation. In the instant case, assessee has been appointed as a consignment agent by BALCO. None of the tasks detailed in para 2.2. of Trade Notice No. 87 of 1997, dt. 14th July, 1997, has been entrusted to the assessee. It was receiving goods for outright sale to the customers that it would get. Though price therefo was pre-decided by the principal, and the assessee could not charge any higher rate, sale was made by the assessee under its own invoice. For such purpose, assessee was receiving certain discount. It is assessee who is liable to pay sales tax and other taxes. Renewal of agency depended on the performance of the assessee in fulfilling its minimum consignment commitment and regular payments. Thus assessee did not act as a C&F agent. Merely because the assessee has been referred to as a consignment agent in the agreement in question cannot by itself be sufficient to treat it as a C&F agent as defined in section 65(25) as it did not provide any service to the principal in relation to clearing and forwarding of goods. Therefore, assessee cannot be said to be a C&F agent of BALCO.

CCE v. Trade Tek Corporation (2012) 77 DTR 193 (Guj.)(HC)

S. 76 : Penalty

Penalty under section 76 and 78 of the Finance Act, 1994 is not automatic; not only the ingredients of sections 76 and 78 should exist, but also there should be absence of reasonable cause for the said failure, sections 76 and 78 are mutually exclusive, if penalty is payable under section 78 amd 76 is not attracted; authority has the discretion regarding the quantity of the penalty to be imposed; however, the penalty to be imposed cannot be less than the minimum or more than the maximum prescribed under the statute; minimum penalty to be imposed was Rs. 100/- and not Rs. 100/- per day till the amendment w.e.f. 18th April, 2006.

CST v. Motor World & Ors. (2012) 79 DTR 151 (Karn.)(HC)

S. 84 : Revision - Powers of Commissioner to enhance penalty

When the statutory provisions prescribe a penalty at a particular rate taking away discretion on the part of the assessing authority and the assessing authority imposes penalty lesser than what is prescribed, probably a case for exercise of revisional power is made out. However, if the penalty imposed is not less than the minimum prescribed and an element of discretion is vested in the authority to impose penalty between the minimum and maximum limits, the revisional authority cannot enhance the penalty in his revisional jurisdiction.

CST v. Motor World & Ors. (2012) 79 DTR 151 (Karn.)(HC)

Service-tax Rules - Cenvat Credit - Penalty

Assessee, a cellular telephone service provider, which was not paying service tax on roaming charges having wilfully suppressed the fact of availment of Cenvat credit in respect of exempted service in excess of the prescribed limit of 35 per cent laid down in Rule 3(5) of service tax credit Rules, 2002, it is liable for penalty under sections 76 and 78 r/w/r. 6 of Service-tax Rules, 1994.

Vodafone Digilink Ltd. v. CCE (2012) 78 DTR 128 (Raj.)(HC)

Transfer of Property Act, 1882, Sections 5, 53A & 54 - Indian Stamp Act, 1899, Section 27 - Registration Act, 1908, Section 17 - Transfer of Property - Immovable Property

Immovable property can be legally and lawfully transferred or conveyed only by a registered deed of conveyance. General power of attorney / sales agreements / will transfers do not convey title and do not amount to transfer, nor can they be recognised as valid modes of transfer of immoveable property. They cannot be recognised as deeds of title except to the limited extent of section 53A of the Transfer of Property Act.

These observations are not intended to in any way affect the validity of sale agreements and power of attorney executed in genuine transactions. A person may enter into a development agreement with a land developer or builder for developing the land either by forming plots or by constructing apartment buildings and in that behalf execute an agreement of sale and grant a power of attorney empowering the developer to execute agreements of sale or conveyances in regard to individual plots of land or undivided shares in the land relating to apartments in favour of prospective purchasers.

Suraj Lamp and Industries Pvt. Ltd. v. State of Haryana & Anr. (2012) 340 ITR 1 (2011) 202 Taxman 607 (SC)

Judicial enquiry - Out sourcing of Judgment - Judge alleged to have "outsourced" judgements can be dismissed without opportunity of hearing or enquiry

The appellant was appointed sub-ordinate Judge in the Garhwa Civil Court. The Inspecting Judge inspected the records of the Civil Court and submitted a confidential report to the Chief Justice of the Jharkhand High Court that the appellant did not prepare judgments on his own but got it prepared by somebody else before delivering the judgments. The Chief Justice referred the matter to the Full Court. The Full Court resolved that the appellant be recommended for removal from service without

any enquiry as it was felt that it was not practicable in the interest of the institution to hold an inquiry since it may lead to the question of validity of several judgments rendered by him. Pursuant to that resolution, the Governor exercised power under proviso (b) to Article 311(2) of the Constitution and removed the appellant from service. This was unsuccessfully challenged before the High Court. In appeal before the Supreme Court, it was argued that an enquiry for the purpose of removal of a judicial officer could not be dispensed with. It was also claimed that there was no evidence to show that the appellant was guilty of any misconduct as alleged. Held dismissing the appeal:
(i) Under the "doctrine of pleasure" recognized under Article 310, all civil posts under the Government are held at the pleasure of the Government and are terminable at its will. Under Articles 310 and 311, public servants are given protection from being dismissed, removed or reduced in rank without holding a proper inquiry or giving a hearing. Exceptions to Article 311 have been provided that the said Article shall not apply to such employees who have been punished for conviction in a criminal case, where inquiry is not practicable to be held for reasons to be recorded in writing or where the President or the Governor as the case may be is satisfied that such an inquiry is not to be held in the interest of the security of the State. The power to dispense with an enquiry is an absolute power of the disciplinary authority who after following the procedure laid down therein can resort to such extra ordinary power provided it follows the pre-conditions laid down therein meaningfully and effectively;
(ii) On facts, the allegation against the Judge was that he did not prepare judgments on his own but got it prepared through somebody else. The view of the High Court that it is not possible to hold an enquiry and that holding of such enquiry should be dispensed with in view of the fact that if an enquiry is held the same may lead to the question of validity of several judgments rendered by the Judge is a legal and valid ground for not holding an enquiry. There was also no necessity for giving the Judge any opportunity of hearing before removal from service.(Civil Appeal no 2420of 2011 dt 10-03-2011)
Ajit Kumar v. State of Jharkhand (SC) www.itatonline.org

Legal Practice - Foreign Lawyers cannot practice law in India but are entitled to visit India for short periods to advice on foreign law & conduct international commercial arbitration
A Writ Petition was filed claiming that Foreign Law Firms and foreign lawyers were practicing the profession of law in India in contravention of the Advocates Act and that they should be restricted from having any legal practice either on the litigation side or in the field of non-litigation and commercial transactions within the territory of India. Held by the High Court:
(i) Foreign law firms or foreign lawyers cannot practice the profession of law in India either on the litigation or non-litigation side, unless they fulfill the requirement of the Advocates Act, 1961 and the Bar Council of India Rules. As rightly held in Lawyers Collective v. Bar Council 112 BLR 32 establishing liaison office in India by the foreign law firm and rendering liaisoning activities is not permissible. However, given that the foreign law firms have to give legal advise to their clients in India regarding foreign law or their own system of law and on diverse international legal issues, there can be no bar in their visiting India for a temporary period on a "fly in and fly out" basis, for such purpose. Also, having regard to the aim and object of the International Commercial Arbitration introduced in the Arbitration and Conciliation Act, 1996, foreign lawyers cannot be debarred to come to India and conduct arbitration proceedings in respect of disputes arising out of a contract relating to international commercial arbitration (Vodafone International Holdings B.V. referred).
(ii) The BPO Companies providing a wide range of customised and integrated services and functions to its customers like word-processing, secretarial support, transcription services, proof-reading services, travel desk support services, etc. do not come within the purview of the Advocates Act, 1961 or the Bar Council of India Rules. However, in the event of any complaint made against these B.P.O. Companies violating the provisions of the Act, the Bar Council of India may take appropriate action against such erring companies.

A. K. Balaji v. GOI (2012) 3 Com LJ 262 / AIR 2012 Mad 124 (Mad.)(HC)
Editorial:- Refer Bar Council of India v. A. K.Balaji (2012) 3 Com L J. 302 (SC)

Professional misconduct - Chartered Accountant - Chartered Accountant issuing wrong section 80HHC certificate is guilty of "gross professional misconduct"
The CIT, Delhi, filed a complaint before the ICAI that the Respondent-CA had issued an audit report in Form No. 10CCAC certifying that the assessee had exports and that it was eligible for deduction under section 80HHC of Rs. 18.32 lakhs. However, during the assessment, the claim was found to be false and the assessee admitted that. The assessee's accounts showed that sale proceeds had not been realized within the prescribed period of 6 months. After enquiry, the ICAI held the CA to be guilty of professional misconduct under clause (7) of Part-I of the Second Schedule read with section 22 & 21 of the Chartered Accountants Act, 1949. It recommended that the CA's name be removed from the Register of Members for a period of three years and filed a reference seeking confirmation of that. In his defence, the CA argued that he had practiced for 21 years without a single incident of professional misconduct or negligence and that he could not put up his defence properly because he had suffered paralytic attack and the assessee had taken away the file and that a lenient view should be taken. Held by the High Court:
(i) The Accountants' profession occupies a place of pride amongst various professions of the world and makes observance of professional duties and propriety more imperative. When conduct of a member of the profession is contrary to honesty, or opposed to good morals, or is unethical, it is misconduct-warranting consequences indicated in the Statute. A breach of confidence is a stigma not only on the individual concerned, but is also likely to have effect on credibility of the profession as a whole.
(ii) The CA's explanation that the assessee had taken away the file and that he suffered a paralytic stroke does not inspire any confidence because the relevant documents and information were supplied to him. The assessee accepted the fact that the section 80HHC claim was not maintainable during the assessment proceedings. Once it is established that no payment was received against the export, the certificate issued by the CA was false. It is a bogey raised by the CA that he has verified all the documents and only then issued the certificate. On the quantum of punishment, on the one hand, the CA pleads his sickness, has an otherwise unblemished practice of 21 years and the incident is old. On the other hand, the misconduct is of serious nature because submitting a false/bogus certificate to the client to enable him to make false claim of deduction under the Income-tax Act, is of serious offence. That the CA made an attempt to dupe the tax authorities and help the assessee to avoid the tax to that extent such a conduct has to be taken seriously. He accordingly cannot be let off merely by giving him reprimand. Some penalty needs to be imposed so that it acts as deterrent and such professional misconduct are not committed. Weighing the circumstances, the ends of justice would be subserved by removing his name from the Register of Members for a period of six months.
Council of ICAI v. Ajay Kumar Gupta (2012) 206 Taxman 117 (Delhi)(HC)

Foreign Judgment - Information cannot be disclosed u/A 28 of DTAA in absence of strong connection between requested information & India's tax laws
The Indian tax authority seized documents from an Indian national which were believed to indicate the existence of undeclared income deposited in a company's bank accounts in Singapore. Pursuant to Article 28(1) of the India-Singapore DTAA, the Indian tax authority sent a request for information to its Singapore counterpart (the Comptroller of Income-tax). In support of the request, the Indian tax authority relied on unsigned transfer instructions allegedly issued by the Indian national as evidence that the Indian national remitted monies to the Singapore Company's bank accounts. The Comptroller filed an application in the High Court under section 105J of the Singapore Income-tax Act for an order requiring the bank to produce the company's bank records. HELD dismissing the application:

(i) Article 28(1) of the DTAA provides that "the Contracting States shall exchange such information as is forseeeably relevant for carrying out the provisions of the DTAA or to the administration or enforcement of the domestic laws concerning taxes… imposed on behalf of the Contracting States …" Section 105J(3) of the ITA imposes two other conditions, namely that, (a) the making of the order is justified in the circumstances of the case; and (b) it is not contrary to the public interest for a copy of the document to be produced or that access to the information be given. These three conditions must be satisfied before the High Court will grant an order under section 105J(2) of the ITA for access to the information requested or for a copy of the document containing the information requested to be given.

(ii) The first requirement of "**foreseeable relevance**" requires the Comptroller (on behalf of the requesting state) to show some clear and specific evidence that there is a connection between the information requested and the enforcement of the requesting state's tax laws**.** Clear and specific evidence is necessary to prevent unwarranted disclosure of information that could not otherwise be sought from any party including the requested state. Spurious or frivolous requests for information are not acceded to and nor are "**fishing expeditions**" allowed. These procedures are not meant to frustrate or delay the information exchange process but are intended to provide a fair and independent assessment of the validity of requests.

(iii) On facts, the Indian tax authorities had relied on an unsigned transfer instruction as evidence that the Indian national remitted monies to the Singapore bank account and claimed that this was evidence of the connection between the Singapore company and the Indian national for the purposes of the investigations. The transfer instruction was a letter to Bank S to transfer monies to an account purportedly held by the Singapore Company with a bank in Dubai. There was no evidence that monies had been transferred to or from the account. There was also no evidence of any transaction between the Singapore Company and the Indian national**.** Accordingly, the Request and the supporting was not sufficiently clear and specific to say that the information requested would be foreseeably relevant to the enforcement of India's tax laws and the ongoing investigations on the Indian national. Even if a tenuous connection between the Indian national and the Singapore Company could have been shown such that the requirement of foreseeable relevance was satisfied, consideration as to whether the application was justified is a process that envisages more evidence than presently adduced. This should include evidence of the use of the accounts for the purposes complained of in India(.(2012) SGHC 112 dt 23-05-2012))

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